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Dear Mr Marcenko

ATO consultation on TD 2026/D2 and TR 2026/D1

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) on the consultation on draft Taxation Determination TD 2026/D2: Income tax: capital gains tax consequences of using a smart contract to wrap and unwrap crypto assets, and draft Taxation Ruling TR 2026/D1: Income tax: receipt and disposal of crypto assets by an airdrop (together, the **Draft Guidance**).

In preparing this submission, we consulted with our members with experience in crypto assets to develop a considered response.

We acknowledge the ATO's objective of providing timely, practical guidance on the tax treatment of common crypto asset transactions, including wrapping arrangements and airdrops, in an area that has to date relied on general web-based guidance rather than binding public rulings.

However, we consider that, in their current form, the Draft Guidance documents contribute to uncertainty because they adopt positions on the fundamental character of crypto assets, including the role of the private key and the treatment of balances held at smart contract addresses, that have not been reconciled with the submissions the Commissioner advanced as intervener in [Poulton v Conrad](#) (case No.H1/2026) (**Poulton**), a proceeding in which judgment remains reserved before the High Court.

Summary of key concerns

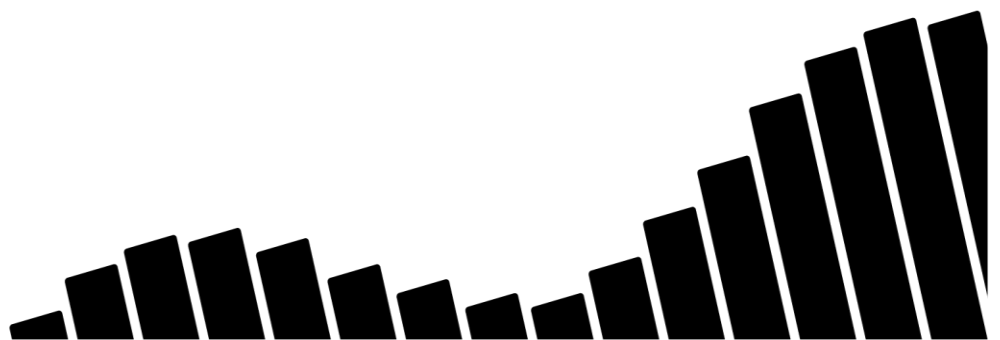
Our key concerns with the Draft Guidance may be summarised as follows:

- **Finalisation ahead of Poulton:** the Draft Guidance adopts positions on the character of crypto assets that have not been reconciled with the Commissioner's submissions in the pending High Court proceeding, and should not be finalised until judgment is delivered.

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- **Unreconciled treatment of control and abandonment:** TD 2026/D2 treats the private key as part of the CGT asset itself and treats a surviving blockchain record as no longer representing a CGT asset, positions that are difficult to reconcile with each other, and with the Commissioner's submissions in *Poultton*.
- **Transfer characterised as abandonment:** TD 2026/D2 treats materially equivalent ledger mechanics as a transfer in one context, and as an abandonment in another, without a clear reconciling criterion.
- **Unresolved physical property theory:** the Draft Guidance does not clarify whether the Commissioner maintains the physical and corporeal unspent transaction output (UTXO) theory advanced in *Poultton*, or how that theory applies to balances held at smart contract addresses.
- **Section 108-5 analysis not undertaken separately for each asset type:** the Draft Guidance does not separately construe section 108-5 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) for UTXO systems, account-based assets, contract-minted tokens and protocol rights.
- **Awareness and control not addressed for airdrops:** TR 2026/D1 treats unsolicited tokens as received property without considering whether the recipient knows about them or can control them. Whereas, in *Poultton* the Commissioner argued that possession requires awareness of the asset and an intention to exclude others from it.
- **Timing of publication:** both drafts were issued six days after the *Poultton* hearing and are proposed to apply retrospectively, without addressing the different view of the asset advanced in Court.

We consider that the Draft Guidance would benefit from further refinement, and in particular from deferral pending judgment in *Poultton*, to ensure that the ATO's administrative guidance is consistent with the High Court's decision and with the position the Commissioner has put to the High Court.

Our detailed response and recommendations to improve the Draft Guidance are contained in **Appendix A**.

We would welcome the opportunity to engage further with the ATO on these issues, including through consultation or roundtable discussions, to support the development of clear, practical and principled guidance in this area. If you would like to discuss any of the above, please contact our Associate, Sumitha Krishnan, on (02) 8223 0019.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

Yours faithfully,

Julie Abdalla

Head of Tax & Legal

Tim Sandow

President

APPENDIX A

We have set out below our detailed comments and observations on the Draft Guidance for your consideration.

Deferral pending *Poulton v Conrad*

We consider that the Commissioner should not finalise TD 2026/D2 or TR 2026/D1 until the High Court has delivered its judgment in *Poulton*. *Poulton* is presently the leading final appellate consideration of the proprietary status of Bitcoin, including whether it is tangible or intangible property, and capable of possession. Judgment is reserved.¹

The Commissioner intervened in *Poulton* because the outcome may affect the tax treatment of crypto assets. In our view, the positions adopted in the Draft Guidance have not yet been reconciled with the submissions the Commissioner advanced in that proceeding.

In our view, finalising the Draft Guidance now would risk issuing administrative guidance on questions the legal foundation of which may be affected by the forthcoming judgment. The principal inconsistencies we have identified concern what the asset is, the role of the private key, control and possession, transfer and abandonment, and whether a smart contract can supply property without a counterparty.

We also note, by way of comparison, that the Commissioner's alternative physical property submission in *Poulton* characterised the UTXO as a corporeal thing constituted by code, or, at further levels of reduction, ones and zeros, or electrons. The Draft Guidance adopts a different view of the asset, as discussed below. We consider that this difference should be reconciled before the Draft Guidance is finalised.

Recommendation

The ATO should not finalise the Draft Guidance until the High Court has delivered its judgment in *Poulton*, the implications of that judgment have been considered, and a separate section 108-5 analysis has been undertaken. The ATO should then consult again on revised guidance, taking into account those findings.

Control and abandonment

We consider that TD 2026/D2 adopts a different position from the Commissioner's case in *Poulton* about what the asset is, and how it is controlled.

The private key

The Commissioner's oral outline in *Poulton* identified the relevant thing as the token balance recorded against a unique digital address.² Gordon J asked whether that address included the private key.

¹ *Poulton v Conrad* [2026] HCATrans 044, 100 (Gageler CJ).

² Commissioner of Taxation, [Outline of Oral Submissions \(Intervening\)](#), *Poulton v Conrad* (H1/2026, 13 August 2026) [3].

Counsel for the Commissioner answered:

‘Not the private?’ ... ‘No. ... it is ... a string of code, or if you reduce it further it is ones and zeros, or reduce it further again, it is electrons, but it is something. That is the thing that is in play, and the thing is controlled by all of those other facets: the private key, Trezor wallets, all of those sorts of things.’³

TD 2026/D2 states at paragraph 28 that ‘the private key is a fundamental component of the CGT asset itself’. In the Court submission, the key was a means of controlling the thing, not part of the thing itself. The abandonment analysis in TD 2026/D2 depends on the different proposition that the key is a component of the asset. We ask the Commissioner to clarify which position is maintained, or how the two positions have been reconciled.

The surviving balance

TD 2026/D2 states at paragraph 33 that although a crypto asset remains recorded on the blockchain, it no longer represents a CGT asset once it has been abandoned. In *Poulton*, the Commissioner argued that the recorded digital thing was the asset. In the Draft Guidance, that thing remains recorded but no longer represents a CGT asset. We are of the view that these two views remain unreconciled.

Only one owner

The Commissioner argued in *Poulton* that Bitcoin ‘may only be transferred by its owner once’ and that ‘[o]wnership by one person prevents ownership by another’.⁴ Wrapping nevertheless produces a locked balance which the Draft Guidance says nobody owns, alongside a wrapped token of identical value which somebody owns. We consider that this result has not been reconciled with the Commissioner’s own argument that an asset of this kind can have only one owner.

Control through a key

In *Poulton*, Counsel for the Commissioner put control in these terms:

‘what you can do is possess bitcoin through the indirect mechanism of the control the private key affords you. That is as much control as the nature of the thing allows.’⁵

The Commissioner’s filed submissions used the same key and lock analogy:

‘the holding of a physical key amounts to “actual possession” in law and “manual control” in fact of the contents of whatever lies behind the lock.’⁶

³ *Poulton v Conrad* [2026] HCATrans 044, 93 (Gordon J and T M Begbie KC).

⁴ Commissioner of Taxation, *Intervener’s Submissions*, *Poulton v Conrad* (H1/2026, 7 May 2026) [22], citing *Yeates (a pseudonym) v The King* [2025] VSCA 288; (2025) 79 VR 340, [71].

⁵ *Poulton v Conrad* [2026] HCATrans 044, 96 (T M Begbie KC).

⁶ Commissioner of Taxation, *Intervener’s Submissions*, *Poulton v Conrad* (H1/2026, 7 May 2026) [34], adopting F Pollock and R S Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) 11-13, 16, 20, 65.

TD 2026/D2 states in paragraph 26 that a balance at a wrapping contract address is not property because nobody exercises sufficient control over it. TD 2026/D2 in paragraph 9 nevertheless accepts that the wrapped Ether (**WETH**) holder has ‘the practical ability, under the contract’s programming, to obtain a new holding’ of Ether (**ETH**) by giving up WETH. On the Commissioner’s key and lock analogy, we consider that WETH works like a key to the locked reserve, because whoever holds it can use it to obtain the ETH. We also note that the Commissioner relied on the incoming statutory test under which only factual capacity matters, and took the view that it does not matter if another person can do the same thing.⁷ Although those provisions commence on 9 April 2027, the Commissioner raised them as evidence of a ‘symbiotic relationship’ between the common law and legislation. Applying that test, a wrapped token holder has the factual capacity to cause the release of an equivalent reserve balance. We ask the Commissioner to clarify why that capacity is not considered to be control over the reserve.

Recommendation

The ATO should identify the relevant CGT asset consistently, whether as a digital object, balance, keypair, bundle of holding rights, or proprietary relationship, and clarify whether the private key is treated as a component of the asset, or merely as a means of controlling it.

The ATO should also explain how its conclusion that no person controls a wrapping contract reserve is consistent with the wrapped token holder’s practical ability to obtain it.

Transfer and abandonment

The Commissioner described an ordinary Bitcoin transaction as a transfer. We consider that TD 2026/D2 describes materially equivalent ledger mechanics as abandonment, and that this inconsistency should be addressed before the Draft Guidance is finalised.

Ledger mechanics

The Commissioner’s filed submissions described the balance as ‘transferable only by a transaction that extinguishes the balance at the origin address and records it at the destination address’.⁸ The submissions continued:

‘The Bitcoin having thus been transferred, the original holder loses all control ... and the new holder ... has exclusive control through new public and private keys.’⁹

TD 2026/D2 states in paragraph 9 that when a crypto asset is sent to a wrapping contract address, ownership of that CGT asset ends by abandonment. We consider that the Draft Guidance gives no criterion by which a decrease at one address and an increase at another is treated as a transfer in *Poulton*, but as abandonment in the Draft Guidance.

⁷ Commissioner of Taxation, Intervener’s Submissions, *Poulton v Conrad* (H1/2026, 7 May 2026) [38]-[41], setting out Corporations Act 2001 (Cth) ss 86(2), 761GB(1)-(3), commencing 9 April 2027, and citing Explanatory Memorandum, Corporations Amendment (Digital Assets Framework) Bill 2026 (Cth) [1.51]-[1.56], [1.69].

⁸ Commissioner of Taxation, Intervener’s Submissions, *Poulton v Conrad* (H1/2026, 7 May 2026) [14].

⁹ *Ibid* [16].

Intention

TD 2026/D2 states in paragraph 32 that abandonment requires an owner to discard property 'with the intention of forgoing any future claim to it'. The footnote to that paragraph then states that the asset is still considered abandoned 'even if the user expects to later receive an equivalent quantity of tokens from the smart contract'. We consider that, read together, the Draft Guidance states a test requiring intention, and then removes the user's actual intention from that test.

We also note that the Explanatory Memorandum relied on by the Commissioner states that digital tokens are functionally equivalent to physical tokens in the ways they can be used and valued.¹⁰ In our view, the Draft Guidance does not explain how its abandonment analysis applies where a holder retains the practical means of retrieving an equivalent token.

National Provincial Bank Ltd v Ainsworth

Counsel for the Commissioner told the High Court that *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (**Ainsworth**) was 'well past its use-by date' and 'effectively a dead letter', and that any remaining utility was overtaken by 'the proper focus ... on control over access'.¹¹ Six days later, TD 2026/D2 relied on the *Ainsworth* characteristics, in a footnote to paragraph 58, to support its conclusion. We ask the Commissioner to clarify the different treatment of that authority.

Transactional power

The Commissioner's filed case defined the property as 'a specific transactional power over unique data entries on the ledger', relying on *D'Aloia v Persons Unknown*.¹² TD 2026/D2 relies on the same authority, in a footnote to paragraph 26, to conclude that a locked balance lacks transactional functionality and is not property. We are of the view that the Draft Guidance does not explain why the wrapped token holder's protocol enforced power to obtain the reserve is not itself transactional power over that reserve.

Counterparty

TD 2026/D2 describes unwrapping at paragraph 44 as 'a subsequent reciprocal dealing involving the mutual exchange of property with a wrapping contract'. At paragraph 45, it states that an asset from the contract 'is not derived from any counterparty' and that the contract executes 'without another entity participating in the exchange'. We consider that the mutual exchange described at paragraph 44 has not been reconciled with the absence of any counterparty or participating entity described at paragraph 45.

¹⁰ Ibid [41], citing Explanatory Memorandum, Corporations Amendment (Digital Assets Framework) Bill 2026 (Cth) [1.69].

¹¹ *Poulton v Conrad* [2026] HCATrans 044, 94 (T M Begbie KC).

¹² Commissioner of Taxation, Intervener's Submissions, *Poulton v Conrad* (H1/2026, 7 May 2026) [24], citing D Fox, 'Digital Assets as Transactional Power' (2022) 1 Journal of International Banking and Financial Law 3 and *D'Aloia v Persons Unknown* [2024] EWHC 2342 (Ch) [156].

Recommendation

The ATO should reconcile the abandonment conclusion in TD 2026/D2 with the Commissioner's transfer analysis in *Poulton*, set out a clear criterion distinguishing a transfer from an abandonment, and explain how that conclusion applies where a holder retains the means of retrieving an equivalent token. The ATO should also reconcile the mutual exchange described at paragraph 44 of TD 2026/D2 with the absence of a counterparty described at paragraph 45. If the conclusion cannot be reconciled, the ATO should withdraw it and consult further.

Physical property

The Commissioner put corporeality to the High Court as an available classification, not a necessary premise. Counsel said the submission was offered 'not because we insist upon this for our analysis that bitcoin is property' but as 'possible assistance and no more than that'.¹³ The filed outline likewise introduced *chose in possession* conditionally, and identified two alternatives: *chose in action* or, a third category¹⁴ Counsel added that, if the Court did not treat Bitcoin as a chose in possession or a chose in action, it might be attracted to the kind of third class developed in the United Kingdom.¹⁵

We consider that the Draft Guidance adopts a different view of the asset, which should be reconciled with the alternative advanced in *Poulton*.

The Commissioner's oral outline stated that Bitcoin 'does have a physical existence on the hard drives of numerous computers' and is 'physical and corporeal'.¹⁶ It accepted that this physical existence was 'highly diffuse, complex and minute', but said this was only 'a difference of physical degree'.¹⁷

Counsel for the Commissioner repeatedly identified the physical thing said to be the asset as follows:

'The ledger as a whole is not the bitcoin, but the ones and zeros on the ledger that comprise the UTXO are the bitcoin.'¹⁸

'[I]f you blew up every computer in the world, would there be any bitcoin? The answer is no.'¹⁹

¹³ *Poulton v Conrad* [2026] HCATrans 044, 97 (T M Begbie KC).

¹⁴ Commissioner of Taxation, Outline of Oral Submissions (Intervening), *Poulton v Conrad* (H1/2026, 13 August 2026) [11], [13].

¹⁵ *Poulton v Conrad* [2026] HCATrans 044, 97 (T M Begbie KC).

¹⁶ Commissioner of Taxation, Outline of Oral Submissions (Intervening), *Poulton v Conrad* (H1/2026, 13 August 2026) [11].

¹⁷ *Ibid* [12].

¹⁸ *Poulton v Conrad* [2026] HCATrans 044, 95 (T M Begbie KC).

¹⁹ *Ibid* 96 (T M Begbie KC).

‘It is intangible; we cannot see it, touch it and hold it in its ones and zeros form, but that does not make it incorporeal; it does not make it non-physical; it does not make it not a thing.’²⁰

We consider that the propositions in TD 2026/D2 discussed above (paragraphs 26, 28 and 33) have not been reconciled with the Court submission that the UTXO itself is a physical and corporeal thing, capable of indirect possession through a private key.

Recommendation

The ATO should clarify whether the Commissioner maintains the physical and corporeal UTXO theory advanced in *Poulton* and, if so, apply it consistently to balances held at smart contract addresses.

Section 108-5

We consider that *Poulton* cannot determine whether every crypto arrangement is property for every statutory purpose, and that the relevant statute and asserted asset must be separately identified.

The reserved issue

Edelman J observed that decisions about whether Bitcoin is property have arisen in different contexts, often under statutory definitions, and that the question in *Poulton* was possession.²¹ His Honour said there was no need to answer whether Bitcoin was property ‘for some, any or all purposes’.²² His Honour then suggested that if the possession gateway were satisfied, the wider property label added nothing.²³ Gageler CJ described the property right and the remedy as ‘two sides of the one coin’.²⁴

The tax statute

Counsel for the Commissioner told the Court that, as far as the Commissioner was aware, the High Court was the first apex court in the common law world to consider whether a Bitcoin holding should be admitted into the category of property.

Edelman J asked: ‘But not for the purposes of the *Income Tax Assessment Act*?’

Counsel for the Commissioner answered: ‘No’, adding only that the judgment would inform one limb of section 108-5(1).²⁵

Gordon J asked whether the outcome depended on what each Commonwealth statute said. Counsel answered: ‘It does.’²⁶ We note that the Commissioner accepted that *Poulton* does not itself determine the application of section 108-5.

²⁰ Ibid 97 (T M Begbie KC).

²¹ Ibid 69-70 (Edelman J).

²² Ibid 70 (Edelman J).

²³ Ibid.

²⁴ Ibid 70 (Gageler CJ).

²⁵ Ibid 88 (Edelman J and T M Begbie KC).

²⁶ Ibid 88 (Gordon J and T M Begbie KC).

We are of the view that the Commissioner must construe section 108-5 and identify the asserted asset separately for UTXO systems (such as Bitcoin), account-based native assets (such as Ether), contract minted tokens (tokens created by a smart contract), wrapped reserves (the assets held in a wrapping contract), and protocol rights (rights that arise under the rules of a blockchain protocol). In our view, a universal label cannot do that work.

Recommendation

The ATO should address UTXO systems, account-based assets, contract-minted tokens, and protocol rights separately when construing section 108-5, rather than applying a universal label to all crypto arrangements.

Airdrops

We consider that TR 2026/D1 contributes to further inconsistencies, both with the Commissioner's control case in *Poulton*, and with TD 2026/D2.

Awareness and control

The Commissioner relied in *Poulton* on 'cognitive indicia' requiring 'an awareness of the asset's existence and form, and an active intention to exclude others from it'.²⁷ Example 5 of TR 2026/D1, at paragraphs 47 to 51, nevertheless treats unsolicited tokens as received property without asking whether the recipient knew of them when deposited, assented to them, could exclude others, or could transact with them.

We are of the view that malicious, frozen, non-transferable, inaccessible, and unmarketable tokens cannot all be treated as immediately owned and valuable merely because a ledger entry exists. We ask that TR 2026/D1 address awareness, control and, practical capacity, before imposing an income inclusion or a market value cost base.

The missing transaction

TR 2026/D1, at paragraph 14, applies section 21 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) to service airdrops. Section 21 gives a money value to non-cash consideration received in a transaction. TD 2026/D2, at paragraph 45, says that receiving an asset from a smart contract does not of itself produce ordinary income under section 6-5 of the ITAA 1997. A footnote to that paragraph explains that section 21 does not apply because the asset is not non-cash consideration received in a transaction with another person, citing *Grimwade v Federal Commissioner of Taxation* [1949] HCA 9; (1949) 78 CLR 199, 220 (Latham CJ and Webb J). Where autonomous code supplies the asset without another participant, we ask the Commissioner to identify the person, transaction and non-cash consideration on which section 21 is said to operate.

²⁷ Commissioner of Taxation, Intervener's Submissions, *Poulton v Conrad* (H1/2026, 7 May 2026) [33], citing S Green and J Randall, *The Tort of Conversion* (Hart Publishing, 2009) 110-111.

Timing

The Commissioner's filed case states that a transfer occurs through a submitted transaction, and that the transaction is thereafter verified through the mining process.²⁸ TR 2026/D1, in paragraph 82, fixes the issuer's CGT event when ownership changes. TD 2026/D2, in paragraph 9, fixes CGT event C2 when the asset is sent. The Draft Guidance does not state whether sending, verification and change of ownership occur at the same time. We consider that this omission matters for income years, valuation, probabilistic finality (the chance of a transaction being reversed falls as more blocks are added), and chain reorganisations (where a competing chain replaces recent blocks and reverses the transactions in them).

Prior ownership

TR 2026/D1, at paragraph 86, assumes that an issuer disposes of a newly created token when ownership passes to the recipient, and that the market value substitution rule in section 112-20 of the ITAA 1997 applies. TD 2026/D2, at paragraph 48, takes a different approach where a smart contract creates a wrapped token. It says that rule does not apply because the token is not acquired from another entity, as an autonomous smart contract is not a legal entity. CGT event A1 applies only where the issuer owned the asset it disposed of. We consider that, unless the issuer owned or controlled the token before the contract created it, TR 2026/D1 has not established the prior ownership required for CGT event A1.

Recommendation

The ATO should reconcile the cognitive indicia and factual control tests advanced in *Poulton* with the treatment of unsolicited airdrops and wrapped reserves, and reconcile the positions on section 21 of the ITAA 1936, counterparty, timing, and market value, across the Draft Guidance.

Timing of publication

The Commissioner's interests as intervener include the effect of the general law status of Bitcoin on section 108-5, trading stock, and the administration of public rulings under Division 358 of Schedule 1 to the *Taxation Administration Act 1953* (Cth). Those interests are set out in the Commissioner's submissions and Annexure A.²⁹ We note that the Draft Guidance was issued six days after the hearing, without addressing the different asset view of the asset advanced in Court.

We also note that the proposed date of effect of the Draft Guidance has significant consequences. TD 2026/D2, at paragraph 22, and TR 2026/D1, at paragraph 66, both propose to apply before and after they are finalised, subject to a limited exception in TR 2026/D1 for initial allocation airdrops. For the reasons set out above, we consider that applying any adverse final position retrospectively would be inappropriate.

Recommendation

The ATO should apply any adverse final position prospectively only.

²⁸ Commissioner of Taxation, Intervener's Submissions, *Poulton v Conrad* (H1/2026, 7 May 2026) [16].

²⁹ Ibid [3]-[6] and Annexure A.