2013 FINANCIAL SERVICES TAXATION CONFERENCE

Promoter Penalty Laws Developments and Issues

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1 INTRODUCTION

Nine years after the announcement of the Government's intention to introduce measures to deter the promotion of tax avoidance and evasion schemes, the first decision of the Federal Court under the Promoter Penalty laws is expected in 2013. This will be the first significant development in the law since its introduction in 2006.

Given this, this paper does not propose to go through the rules in detail, but instead focuses on aspects of the laws relevant to advisers and financial institutions (and other intermediaries).

In this paper, the relevant provisions of Division 290 and Division 284 of Schedule 1 to the *Tax Administration Act 1953* (the **TAA**) are referred to as the Promoter Penalty provisions. These are set out in full in Annexure A. All legislative references are to the provisions of the TAA or the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* (together the **Tax Act**), as appropriate, unless otherwise stated.

2 A BRIEF HISTORY

The proliferation of mass-marketed schemes in the late 1990s was the catalyst for the Government's announcement in 2003 of its intention to introduce a promoter penalty regime.[1]

At that time, the proposed provisions were aimed at protecting investors from being "unwittingly enticed to enter into schemes which avoid or evade tax" by imposing sanctions on "unscrupulous scheme promoters" that would both deter the development of such schemes and improve the fairness of the system that previously penalised only the scheme participants.[2]

By the time of its introduction in 2006, the focus of the regime had broadened beyond such mass-marketed arrangements. The object of the Promoter Penalty provisions is clearly stated:

> "to deter promotion of tax avoidance schemes and tax evasion schemes"

and

> "to deter the implementation of schemes that have been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling".[3]

In defining the types of arrangements to which the provisions apply, the legislation is not limited to mass marketed schemes, and is not directed only at protection of investors. The intention of the

[1] The announcement followed the Senate Economic Reference Committee "Inquiry into Mass marketed Tax Effective Schemes and Investor Protection", the matter having been referred to the committee following complaints by a large number of taxpayers regarding the application of Part IVA, penalties and interest by the Australian Taxation Office (ATO) to a number of mass marketed schemes.

[2] Refer Press Release No C117/03, Minister for Revenue and Assistant Treasurer, Senator Helen Coonan, 5 December 2003.

[3] Section 290-5

legislation is to catch all promoters of tax exploitation schemes, including wholesale arrangements and "boutique" schemes designed only for one client:

> "The Government's policy objective to deter all forms of scheme promotion could not be effectively achieved by restricting the regime to mass marketed schemes."[4]

3 THE PROMOTER PENALTY PROVISIONS

3.1 Prohibited Conduct

The Promoter Penalty provisions prohibit an entity from engaging in conduct that results in:

a. that entity being a "promoter" of a "tax exploitation scheme";

b. another entity being a "promoter" of a "tax exploitation scheme"; or

c. a scheme that has been promoted on the basis of conformity with a product ruling being implemented in a way that is materially different from that described in the product ruling.[5]

3.2 Remedies

Upon an application by the Commissioner, the Federal Court may order the entity to pay a civil penalty[6] or grant an injunction restraining the entity from engaging in the prohibited conduct.[7]

In any application in relation to paragraphs (a) and (b) above (the "first limb"), the Commissioner must prove, on the balance of probabilities, each of the elements of the definition of "promoter" and "tax exploitation scheme".

In relation to paragraph (c) above (the "second limb"), the Commissioner must prove a causal connection between the entity's conduct and the fact that the implemented scheme was materially different to that ruled upon.[8] However, the Commissioner need not make any adjustment in relation to the participants in the scheme in order to be successful in any application under this limb.[9]

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[4] Explanatory Memorandum to *Tax Laws Amendment (2006) Measures No 1) Bill 2006* (the **Promoter Penalty EM**) paragraph 3.142

[5] Section 290-50

[6] Subdivision 290-B

[7] Subdivision 290-C

[8] PSLA 2008/95

[9] PSLA 2008/8 paragraph 83

3.3 Enforceable Voluntary Undertakings

In addition to granting the Federal Court power to order civil penalties and grant injunctions, the Promoter Penalty provisions also provide for the Commissioner to accept a written enforceable voluntary undertaking (**EVU**) from an entity where to do so would deter promotion of a tax avoidance and evasion scheme or deter implementation of a scheme otherwise than in accordance with an applicable product ruling.[10]

This is seemingly broader than the circumstances in which the Federal Court may make an order for a penalty or grant an injunction. The provision on its face does not require as a pre-requisite that the relevant entity is a promoter as defined or that there be a relevant arrangement that is a tax exploitation scheme. An EVU offer may be accepted in any circumstance where to do so would deter an entity from engaging in prohibited conduct.

Whilst EVUs are voluntary, and the ATO may not require an entity enter into an EVU, ATO staff may suggest that an entity make an EVU offer, and in such circumstances the entity may in practice feel compelled to do so. In particular, this may be driven by a commercial decision as to the allocation of resources required to deal with an ongoing ATO investigation and by reputational risk concerns that the ATO investigation may become public.

Given this combination of factors, EVUs appear to provide the ATO with significant power to influence the conduct and behaviour of entities. In practice we would expect that the ATO would act in good faith in accordance with the Taxpayers' Charter,[11] and that an EVU would only be suggested in circumstances where the ATO has satisfied itself that, at a minimum, it has a reasonably arguable position that the entity's conduct relates to a tax exploitation scheme.

Whilst the acceptance of an EVU does not prohibit the Commissioner from taking further action in respect of the relevant entity by applying for a penalty order or injunction, the making of an offer, and the level of compliance with an accepted EVU, are factors that would be taken into account by the ATO and the Federal Court in respect of any Federal Court application.

The terms of an EVU remain confidential. An entity need not admit that they have engaged in prohibited conduct, and a disclaimer may be included in the EVU to the effect that the EVU does not constitute such an admission. However, an EVU will be unlikely to be accepted unless it includes meaningful undertakings as to cessation of conduct of concern to the ATO and prevention of future contraventions. It may also be expected that the entity compensate participants in the arrangement and forgo any compensation received in respect of the conduct.

A pro forma EVU is provided on the ATO website and a copy of this document is included in Annexure B.

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[10] Subdivision 290-D

[11] The Taxpayers' Charter provides that the ATO will act fairly and without bias, will exercise due care and diligence, will exercise its powers in a fair, professional and responsible manner, will act with honesty and integrity, and will make fair, equitable and consistent decisions.

4 DEVELOPMENTS

Since the introduction of the provisions in 2006, there has not been any further development of the Promoter Penalty law *per se*. The provisions remain current in substantially the same form in which they were enacted, [12] and to date there has been no Federal Court decision pursuant to the provisions.

Many questions of interpretation of the provisions therefore remain unanswered:

a. can the provisions ever apply to tax evasion schemes?

b. can the provisions apply to schemes that do not have a reasonable prospect of success?

c. is it possible for a scheme to have a reasonable prospect of success, sufficient for it to reasonably be expected to reduce a tax related liability of an entity, but for that benefit not to be reasonably arguably available?

d. what conduct will result in another entity being a promoter?

e. what is the scope of the adviser exception?

We understand that the Commissioner has initiated proceedings in 2 cases under the first limb and 1 under the second limb, and it is expected that further guidance on the application of the provisions will be received when the Federal Court makes its determinations in respect of at least the first 2 of those matters in 2013.

Nevertheless, the intervening period since their introduction has seen significant development in the law which impacts upon the application and administration of the provisions. In particular, the series of Part IVA decisions in 2009 to 2012[13] culminating in the announcement of the Government's intention to amend Part IVA and the subsequent release of Exposure Draft legislation,[14] all impact upon the application of the Promoter Penalty provisions.

Assuming a scheme benefit is available under the general provisions of the Act, the scheme will not be a tax exploitation scheme as defined if it is reasonably arguable that Part IVA does not apply. Throughout 2009 to 2012, the application of Part IVA was considered in a number of cases before the courts. Relevantly, those cases considered, in relation to the determination of the existence of a tax benefit:

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[12] The only amendment to the Promoter Penalty provisions is the amendment made by *Tax Laws Amendment (2010 Measures No. 1) Bill 2010*, to allow for the provisions to apply to promoters of forestry managed investment schemes in certain cases notwithstanding the fact that the tax outcome for participants is the same as that set out in the product ruling as a result of the application of section 82KZMGA(1A) of the Act and/or section 394-10(5A) of the TAA.

[13] In particular refer *Commissioner of Taxation v Axa Asia Pacific Holdings* [2010] FCAFC 134; *Commissioner of Taxation v Futuris Corporation Limited* [2012] FCAFC 32; *Commissioner of Taxation v RCI Pty Ltd* [2011] FCAFC 104.

[14] Exposure Draft: *Tax Laws Amendment (2013 Measures No. 1) Bill 2013: General anti-avoidance rules*

a. the counterfactual relied on must be reasonable, and this may not be the case where participants in the transaction would be in a worse financial or economic position under the counterfactual, including as a result of the imposition of stamp duty or tax;[15] and

b. the reasonably expected alternative hypothesis may be for the taxpayer to "do nothing".[16]

On 1 March 2012 the Government announced its intention to amend Part IVA to clarify its operation in order to ensure its continued effectiveness.[17] On 16 November 2012, Exposure Draft legislation was released for public comment.[18] The intended effect of the proposed amendments is to give primacy to the determination of dominant purpose. Pursuant to the draft provisions, it is proposed that whether a tax benefit arises must be determined:

a. in conjunction with the dominant purpose test;

b. by considering only an economically equivalent alternative hypothesis; and

c. without regard to the taxation implications of the available hypothetical alternatives.

The proposed amendments are intended to counter any argument that no tax benefit arises in respect of a transaction where the taxpayer would otherwise have "done nothing".

These changes are intended to have effect in respect of arrangements that are entered into or commenced to be carried out from 16 November 2012.

A consequence of the proposed amendments is that where a deduction is allowable to a taxpayer under the ordinary provisions of the Tax Act, the Commissioner should not be able to argue that that deduction constitutes a tax benefit on the basis that, absent the scheme, the taxpayer would reasonably have been expected to "do nothing". In practice, in cases of promoted schemes, in many circumstances there is no other alternative transaction that the participant would reasonably be expected to have entered into. As a consequence, the proposed amendments to Part IVA may limit the potential for the application of the Promoter Penalty provisions to promoters of those schemes giving rise to otherwise allowable deductions.

[15] Refer *Commissioner of Taxation v Axa Asia Pacific Holdings* [2010] FCAFC 134; *Commissioner of Taxation v Futuris Corporation Limited* [2012] FCAFC 32

[16] See for example, *Commissioner of Taxation v RCI Pty Ltd* [2011] FCAFC 104

[17] Press Release 10/2012, Maintaining the Effectiveness of the General Anti Avoidance Rule, Assistant Treasurer Mark Arbib, 1 March 2012

[18] *Exposure Draft: Tax Laws Amendment (2013 Measures No. 1) Bill 2013: General anti-avoidance rules*

5 APPLICATION OF THE PROVISIONS TO ISSUERS / INTERMEDIARIES

5.1 Current areas of Focus

In the 2012-13 Compliance Program the ATO stated that higher risk advisory firms and financial institutions are a key area of focus for the ATO and, in particular, advisory firms and financial institutions (and key individuals within these firms) that have a history of involvement in the development and promotion of controversial or contestable arrangements.

Further, in addition to monitoring and taking action in relation to widely-marketed arrangements generally, the ATO stated that it had over 400 compliance activities planned for the financial year in respect of the conduct of entities in relation to arrangements promising certain tax or superannuation benefits not available under the law, including:

- wholesale and retail financial products including:
    i. products giving rise to claims for interest and borrowing cost deductions that may not be available at law;
    ii. deferred purchase agreements with certain features which exploit the capital/revenue distinction;
    iii. investments in certain swap arrangements through a unit trust structure; and
    iv. products designed to provide investors with the benefit of franking credits.
- employment arrangements;
- wholesale boutique and one-to-one arrangements including:
    i. international cross border schemes, including schemes for the generation of debt deductions for non-assessable non-exempt income, schemes for aggressive profit shifting, foreign partnership arrangements and tax secrecy jurisdiction evasion schemes;
    ii. capital gains tax avoidance schemes;
    iii. mortgage restructuring schemes, including split loans;
    iv. loss generation and utilisation schemes; and
    v. business structure schemes.[19]

[19] ATO Compliance Program 2012-13; Compliance Program - current areas of focus www.ato.gov.au/atp.

5.2 Protection from Promoter Penalties

5.2.1 Reasonably Arguable Position

A scheme will not be a tax exploitation scheme as defined if it is at least reasonably arguable that the scheme benefit is or would be available at law, taking into account anything that the Commissioner can do under a taxation law (including for example, applying Part IVA).[20]

For these purposes, a matter will be reasonably arguable:

> "if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect."[21]

This is an objective test and requires a determination as to whether the taxpayer's argument is sufficiently strong to support a reasonable expectation that the taxpayer could win in court.[22] For a matter to be reasonably arguable, it must be the case that the taxpayer's argument could be argued on rational grounds to be right:

> "The case must thus be one where reasonable minds could differ as to which view, that of the taxpayer or that ultimately adopted by the Commissioner was correct. There must, in other words, be room for a real and rational difference of opinion between the two views such that while the taxpayer's view is ultimately seen to be wrong, it is nevertheless 'about' as likely to be correct as the correct view."[23]

In *Cameron Brae Pty Ltd* v *Federal Commissioner of Taxation*[24] applied in *Allen v FCT,*[25] the Court applied an approach than was less strict than that set out above, finding that even though the correct view was "clear", the question was "open to debate in the sense of being arguable". In *Allen*, the AAT concluded that:

> "while a Court may come to a clear view on a question of statutory construction adverse to a taxpayer, that view is not decisive against the conclusion that the taxpayer's position was reasonably arguable."

These cases indicate that different circumstances may warrant the taking of slightly differing approaches: the former stricter approach in circumstances involving a contentious area of the law or where the principles of the law are settled, but there is a serious question as to their application to the

[20] Section 290-65(1)(b) and (2)
[21] Section 284-15(1)
[22] Revised Explanatory Memorandum to the *A New Tax System (Tax Administration) Bill (No. 2) 2000* paragraphs 1.22 and 1.23.
[23] *Walstern v Federal Commissioner of Taxation* (2003) 138 FCR 1 per Hill J
[24] 2007 ATC 4936
[25] *Allen & Anor (as Trustee for the Allen's Asphalt Staff Superannuation Fund) v FC of T* 2011 ATC 20-277

facts; and the latter approach in circumstances involving a question of statutory construction where there is no direct authority in existence.[26]

On the basis of these authorities, for the Commissioner to make an application under the Promoter Penalty provisions, the Commissioner must prove, on the balance of probabilities, that a relevant participant in the scheme would not have a reasonable expectation of a court determining that the relevant scheme benefit was available under the ordinary provisions of the Tax Act or that Part IVA does not apply. Put another way, the Commissioner would be successful where he is able to show that the position of the relevant taxpayer is "indefensible", or that it is "fairly unlikely" that a court would agree that the benefit was available and Part IVA does not apply.[27]

This is an extremely high benchmark and its proof would require the Commissioner to adduce evidence of the objective arguments and authorities supporting the case for allowance of the benefit, as well as evidence that such arguments and authorities would not be expected to be accepted by a court.

Recent history suggests that a taxpayer will be found not to have a reasonably arguable position in only the most straight forward of cases:

- In *Sent v Commissioner of Taxation*[28] $11.6m was contributed by an employer to a trust for the purchase of shares for the benefit of Mr Sent in consideration of his waiving of bonus entitlements. The Court found that the $11.6m constituted ordinary income. In that instance, a penalty for recklessness was imposed, however in the course of the judgement Murphy J commented on whether Mr Sent's position was reasonably arguable:

  > "Mr Sent's position that none of the $11,600,000 Payment is assessable as income requires a real stretch, involving an unrealistic approach to the relevant transaction which is outside the general understanding among practical business people as to derivation of income. I do not consider that there is room for the conclusion that his position is about as likely to be correct on the authorities as the finding made, or open to debate."[29]

- In *Pridecraft Pty Ltd v Federal Commissioner of Taxation,*[30] the Full Federal Court applied Part IVA on the basis that a key element of the relevant scheme was found to be

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[26] *Lawrence v Commissioner of Taxation* [2008] FCA 1497 provides another example of where the taxpayer was found to have a reasonably arguable position in relation to a question of statutory interpretation. There the Court found that the taxpayer's arguments had a rational basis notwithstanding that the court found them to be misplaced. The arguments were finely balanced and the Court stated it would not be critical of the taxpayer's advisers for taking a view about the construction of the provision which, according to the Court, fell just the wrong side of the line. The issue of penalties was not discussed on appeal *Lawrence v Commissioner of Taxation* [2009] FCAFC 29

[27] As set out in paragraph 1.23 of the Revised Explanatory Memorandum to the *A New Tax System (Tax Administration) Bill (No. 2) 2000,* the reasonably arguable standard would not be satisfied in these circumstances.

[28] [2012] FC 382

[29] at paragraph 224. On appeal the finding on penalties for recklessness was affirmed and the Court did not discuss the application of the reasonably arguable test: refer *Sent v Commissioner of Taxation* [2012] FCAFC 187

[30] [2004] FCAFC 339

"inexplicable" except as a means of securing a deduction for the taxpayer.[31] Nevertheless the court determined that:

> "Given the undisputed evidence that the … Scheme as a whole was prompted by a desire to restructure Spotlight's Profit Share Bonus Scheme and had a genuine commercial objective, I think it fair to say that there was room for a rational argument that, viewed objectively, Spotlight's dominant purpose in entering the Part IVA Scheme was not to obtain a tax benefit."[32]

- In *Allen v FCT*[33] the taxpayer argued that a contribution to a superannuation fund by way of trust distribution did not constitute "special income" of the superfund for the purpose of section 273, arguing that the undefined term "income" as used in that section meant income according to ordinary concepts and not "assessable income" a defined term. In finding that the amount was special income the Court stated:

> "In this case, as in *Cameron Brae*, the questions of statutory construction on which the case turns were free from authority squarely covering the point. And as our reasons on the substantive issues show, the taxpayers' position was debatable. There is another consideration which is relevant here.
>
> It should, we think, be borne in mind is that the legislature itself considered that the taxpayers' position was sufficiently arguable to warrant the replacement of s 273(7) of the ITAA 1936 by subdivision 295H of the ITAA 1997. That the legislature considered it prudent to shore up the Commissioner's position in this way gives the Commissioner's insistence that the outcome of the present case was clear beyond rational argument a somewhat pharisaical quality."[34]

Whether or not it is reasonably arguable that a scheme benefit is or would be available at law must be determined as at the time of the marketing or encouragement of the scheme.[35] It may not take into account later case law or other events that occur subsequent to the conduct.[36] Further, it is not a test that may be applied after exhaustion of appeal rights in relation to a scheme participant.[37]

Whilst this is clear from the statements in the Promoter Penalty EM, Example 3.4 of the Promoter Penalty EM and Example 3 provided in PSLA 2008/7 are not entirely consistent with these statements. In PSLA 2008/7 Example 3, the Federal Court determines that the Commissioner correctly applied Part IVA to the taxpayer in question, however:

> "it may be inferred from the reasons for the decision that it was finely balanced…The reasoning of the Court supports a view that it was reasonably arguable that the scheme benefit was available at the time of [the relevant] conduct….the scheme is therefore not a TES"

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[31] at paragraphs [90] and [92]
[32] at paragraph [110]
[33] *Allen & Anor (as Trustee for the Allen's Asphalt Staff Superannuation Fund) v FC of T* 2011 ATC 20-277
[34] at paragraphs 78 and 79
[35] paragraph 3.65 of the Promoter Penalty EM
[36] In the context of penalties for statements made to the Commissioner, see *Sent v Commissioner of Taxation*[2012] FC 382 this issue was not raised on appeal
[37] Promoter Penalty EM paragraph 3.65

It is possible therefore, at least in theory, that a penalty may be imposed on a promoter and a later determination made that a recipient of the scheme benefit did in fact have a reasonably arguable position. In such circumstances, the promoter has no rights to recovery of the penalty. In practice, the two applications may be required to be heard in a manner that would prevent the occurrence of any such anomaly.

Whilst an entity must have a reasonably arguable position at the time of the relevant promotional conduct, it is not necessary that the entity document that position at that time or even be aware of the basis upon which that the reasonably arguable position exists (although one would expect that an entity would only act in accordance with a belief that they have such a position). In the context of applying the shortfall penalty provisions, the Commissioner has stated that:

> "whilst the reasonably arguable position is determined at the time the statement is made, an entity has the opportunity to demonstrate their position when a shortfall amount…is identified, which may be a number of years later"[38]

Similarly, in PLSA 2008/7, the Commissioner states:

> "whether or not an entity had contemporaneous documentary support for the availability of the scheme benefit when they engaged in the prohibited conduct is not determinative of whether it is reasonably arguable that the scheme benefit was or would have been available at law."

Again it is noted that it is for the Commissioner to prove that it is not reasonably arguable that the scheme benefit is available, it is not, in an application before the court, a proposition that the entity accused of being a promoter must put and defend.

5.2.2 ATO Advice

In PSLA 2008/7, the ATO infers that it may provide advice in respect of aspects of the Promoter Penalty tests in a ruling or another form:

> "Staff must refer any advice requests (for example, private ruling, class ruling or product ruling applications) which involve questions that may relate to the application of the promoter penalty laws (such as whether an entity is a promoter, whether an arrangement is a TES or whether it is reasonably arguable that the scheme benefit obtained from a scheme is available at law for the purposes of the TES definition, etcetera) to ATPBSL[39] prior to providing the advice. ATPBSL will then provide guidance and support to the other area of the Tax Office regarding the potential application of the promoter penalty laws to the particular arrangement, whether it is appropriate to provide such advice and, if so, the wording of the relevant parts of the advice to be provided."[40]

The Commissioner is empowered to make a public or private ruling on the way in which the Commissioner considers a "relevant provision" applies to an entity or a class of entities in relation to a

[38] Miscellaneous Taxation Ruling MT 2008/2 Shortfall Penalties: administrative penalty for taking a position that is not reasonably arguable

[39] ATBPSL is the Aggressive Tax Planning business service line

[40] at paragraph 22

particular scheme.[41] For these purposes, a relevant provision is, *inter alia,* a provision "about" "tax", withholding tax or the administration and collection of those taxes.[42] For these purposes, "tax" means income tax imposed by the *Income Tax Act 1986,* or another Act, as assessed under the Tax Act and TAA.

The Commissioner considers that the use of the word "about" gives him the power to make rulings in a very broad range of circumstances:[43]

> "a provision under which the extent of liability or entitlement to the listed taxes, duties, levies and entitlements is worked out is a provision 'about' them, as are provisions that are sufficiently relevant, or a necessary pre-requisite, to working out the liability or entitlement."[44]

Consequently, the Commissioner may make a ruling in respect of the calculation or determination of a person's liability to tax, and any aspect thereof. Further, penalties for false and misleading statements, or late lodgement or payment, and the shortfall interest charge and general interest charge are considered to be provisions about the administration or collection of taxes and so may also be the subject of a ruling.[45]

The Promoter Penalty provisions are about the deterrence of the promotion of schemes for tax avoidance and tax evasion.[46] Notwithstanding the Commissioner's view on the breadth of the meaning of relevant provisions, the provision determining whether an entity is a "promoter" of a given tax exploitation scheme does not appear to be a provision that is "about" a liability to income tax.

Further, a potential promoter will not be able to obtain a private ruling that a scheme is not a tax exploitation scheme, as such a ruling would be a ruling on the availability of scheme benefits to a participant in the scheme and would not be a ruling on the way in which a tax law applies to the promoter.[47]

As a consequence, it would appear that an entity is not able to obtain written binding advice from the Commissioner in respect of the potential for the application of the Promoter Penalty provisions.

A ruling may be given in respect of the availability or otherwise of a scheme benefit to a participant in the scheme.[48] This ruling would be applicable to, and binding on the Commissioner only in respect of, the relevant participant(s) and only in circumstances where the participant relies on the ruling by acting in accordance with it.[49] This will restrict the Commissioner from treating those entities to whom the ruling applies in a manner that is inconsistent with the ruling. However, it will not of itself prevent

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[41] Sections 358-5 and 359-5
[42] Section 357-55
[43] Refer TR 2006/10 Public Rulings, paragraph 14
[44] TR 2006/10 paragraph 15
[45] TR 2006/10 paragraph 16
[46] Section 290-5, Objects of the Division
[47] Section 359-5. See also the Promoter Penalty EM paragraph 3.33
[48] refer sections 358-5 and 359-5
[49] Section 357-60

the Commissioner from taking action against any alleged promoter under the Promoter Penalty provisions.

Further, any such ruling will not assist an alleged promoter in qualifying for the exception for reliance on advice in subsection 290-55(3). That subsection will prohibit the Commissioner from making an application in respect of the first limb where the scheme treats a tax law as applying in a manner consistent with advice provided by the Commissioner to the alleged promoter. Any private ruling provided to a scheme participant will not assist the alleged promoter in this respect.[50]

The Promoter Penalty EM provides that

> The exception for reliance on advice from the Commissioner covers promoters of schemes for whom it may not currently be possible to obtain a legally binding ruling. For example, a promoter may seek advice from the Commissioner about the way the tax law would apply to a proposed scheme that is to be entered into by a company that is not yet incorporated. In such a case a binding private ruling cannot be given to the non-existing company, but nevertheless administratively-binding advice can be given to the promoter.[51]

The exception is therefore seemingly restricted to the limited range of circumstances where the promoter has obtained administratively binding advice from the Commissioner. PSLA 2008/3 sets out the exhaustive list of topics in respect of which the Commissioner will issue administratively binding advice.[52] The range of topics is extremely narrow and each is quite specific. As a consequence, it is unlikely that the advice exception will be available to an alleged promoter in all but the narrowest of circumstances.

5.2.3 Rulings

In relation to available protections against Promoter Penalties, it therefore appears that the only guaranteed protection available to a potential promoter against an application under the first limb is a

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[50] Promoter Penalty EM paragraph 3.33

[51] Paragraph 3.34

[52] PSLA 2008/3 Attachment B sets out the exhaustive list of topics in respect of which the Commissioner will provide administratively binding advice:

* Advice on a superannuation or any other law administered by the Commissioner under which the extent of liability is worked out and is a law which does not have a legally binding rulings system (for example, superannuation guarantee charge and excess contributions tax).
* Advice on an arrangement where a company intends to launch a takeover of a target company and the first company wants advice (without getting consent from the target company) on the tax consequences for the target company.
* Advice on a proposed scheme that would be undertaken by a company, (including a corporate trustee) when it is incorporated or a trust when it is settled.
* Advice to a Commonwealth, state or territory government or one of their agencies about the tax consequences for a taxable purchaser under a proposed privatisation.
* Advice to a Commonwealth, state or territory government or one of their government authorities about a proposed transaction, for example, an industry restructure which has tax consequences for any new entity to be created as part of the restructure.
* Advice on a scheme where private or public infrastructure matters are raised and there are no entities presently in existence capable of requesting a private ruling.

product ruling, class ruling or a series of private binding rulings covering all participants. In these circumstances, the scheme will not satisfy the definition of a tax exploitation scheme.

As set out above, whether a scheme is a tax exploitation scheme must be determined as at the time of the relevant promotional conduct. Strictly speaking, it may be that it is reasonably arguable at that time that any scheme benefit is available, notwithstanding that the Commissioner has not yet issued a ruling, the later issue of the ruling acting as confirmation of that point. From a risk management perspective, obtaining a ruling prior to the commencement of any promotional conduct provides the greatest level of assurance.

However, from a practical perspective, the relative value of this assurance must be weighed against the commercial disadvantages, including the time and cost involved, in obtaining a ruling from the ATO. Whilst it is acknowledged that the ATO's processing of rulings in respect of established product and investment structures has improved significantly, the delays in processing rulings in respect of new or novel arrangements, and resources expended by a promoter in obtaining them, are real costs to business. This will have the greatest impact where the success of a product depends upon getting it to market within a short timeframe in order to capitalise on particular economic or market conditions. It will also have significant impact where being first to market with a new product gives the issuer commercial advantages over competitors: where the marketing of a product is delayed due to the delay in processing of rulings, issuers who have not engaged with the ATO will have an advantage over those who do.

It is noted that, where a promoter has applied for a product ruling, the marketing of the relevant product cannot be stopped by way of injunction until the Commissioner has either made the ruling or notified the promoter that he declines to make the ruling.[53] This prohibition applies only to prevent the Commissioner applying for an injunction in respect of the relevant conduct and will not prevent the Commissioner making an application for a penalty. However, the application for the ruling would be a relevant factor weighing against the imposition of any penalty to be taken into account by the ATO and the Federal Court in any application.

6 APPLICATION OF THE PROVISIONS TO TAX ADVISERS

Pursuant to the first limb of the Promoter Penalty provisions, a tax adviser may be liable for a civil penalty if:

a. the tax adviser is a promoter of a tax exploitation scheme; or

b. the tax adviser engages in conduct that results in another entity being a promoter of a tax exploitation scheme.

[53] Section 290-135

6.1 Tax Adviser as a Promoter

A tax adviser will be considered a "promoter" if:

a. the tax adviser markets, encourages the growth of, or encourages interest in, a tax exploitation scheme; and

b. the tax adviser or an associate receives (directly or indirectly) consideration in respect of the marketing or encouragement; and

c. it is reasonable to conclude that the tax adviser had a substantial role in the marketing or encouragement.

However, a tax adviser will not be a promoter as defined if the entity "merely" provides advice about a scheme.[54]

6.1.1 When does advice constitute marketing and encouragement?

The Promoter Penalty EM emphasises that the exclusion from the definition of a promoter is intended to protect those who provide "independent, objective advice", including where that advice constitutes tax planning and/or sets out alternative ways to structure a transaction.[55] This is often contrasted with the conduct of "entrepreneurial" activities.[56]

Example 3.1 provided in the Promoter Penalty EM provides a clear contrast between, on the one hand, 2 tax advisers who between them have devised a scheme, approached a client to advise him in respect of the arrangement, and received fees reflecting the client's tax savings, and on the other, an independent tax adviser whose only conduct is to advise her client of all of the tax implications of the scheme she is presented with, including the risks, in consideration of an ordinary fee.

The Promoter Penalty EM cautions advisers to familiarise themselves with the provisions to "ensure that they do not *cross the line* from advice to promotion".[57] However, the line is not one that is always so easily drawn.

In warning of the types of behaviour intended to be caught under the Promoter Penalty provisions, former Commissioner Michael D'Ascenzo referred to the description of the two roles provided by Brennan J in the context of a scheme for gift deductions in *Leary v. Federal Commissioner of Taxation:*[58]

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[54] Section 290-60(2)
[55] Promoter Penalty EM paragraphs 3.49 and 3.50
[56] *A new relationship with the tax profession,* Michael D'Ascenzo, Taxation Institute of Australia 21st National Convention, 6 April 2006
[57] Promoter Penalty EM paragraph 3.127
[58] 80 ATC 4438; refer M D'Ascenzo *A new relationship with the tax profession,* Taxation Institute of Australia 21st National Convention, 6 April 2006

> "The evidence in this case suggests that the scheme was promoted by members of the legal and accounting professions, who assumed the mantle of entrepreneurs. But it does not appear that any of the entrepreneurs in the present case assumed the functions of professional adviser to a client, nor does it appear that any professional adviser assumed the role of an entrepreneur. It has not been material to consider whether it is possible for the role of a professional adviser and the role of an entrepreneur properly to coincide or overlap, but the appearance of solicitors performing these respective roles in the present case leads me to invite attention to significant differences between the two functions. These differences do not arise out of any judicial view as to the lawfulness or morality of tax avoidance...They arise because the field of professional activity is co-extensive with a lawyer's professional duty. That duty is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of a client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer, as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of a contract, charges under the criminal law or any other of the varied fields of professional concern. It is a duty which arises out of the relationship of lawyer and client.
>
> But activities of an entrepreneur in the promotion of a scheme in which taxpayers will be encouraged to participate falls outside the field of professional activity; those activities are not pursued in discharge of some antecedent professional duty. Entrepreneurial activity does not attract the same privilege nor the same protection as professional activity; and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty." (emphasis added)

Leary has been considered in a number of subsequent cases requiring determination of whether certain activities were undertaken by a person in their capacity as a solicitor, or otherwise fall within the ordinary activities of a solicitor:

- *Solicitors' Liability Committee v Gray and Another*[59] involved a professional indemnity insurance claim by 2 solicitors involved in a scheme in which they purchased properties without instructions and then promoted and sold the properties to clients. The Court found the solicitors were acting as businessmen, as entrepreneurs rather than as legal professionals. Of particular importance was the fact that neither solicitor gave legal or tax advice in relation to the scheme, they were prepared to acquire the property in the name of their corporate vehicle, and nominated a fee equal to 10% of the property purchase price.
- *Noone v Mericka & Ors*[60] in relation to services provided by a solicitor in relation to the sale of clients' property, the Court stated that:

> "The activities of the defendants demonstrate an ongoing involvement in a business directed to the sale of clients" properties. These activities extend well beyond the mere provision of legal advice and legal services in connection with the sale of a particular client's property. The defendants are involved in or responsible for the ongoing and systematic marketing and advertising in connection with the sale of clients' properties. This is not the ordinary function of a lawyer."

[59] (1997) 147 ALR 154
[60] [2012] VSC 101

- In *Re Gray and ASIC*[61] The applicant was a solicitor providing both a documentation service and a trustee service to his clients. The AAT stated that:

> "the activities of the applicant in acting as a trustee under the [trust] coupled with charging and receiving fees paid for this service by clients over and above professional legal services provided in establishing the [trust] take this activity outside of the profession of a solicitor."

In each of these cases, the relevant party was found to have stepped outside their role as a professional adviser as a result of engaging in conduct and activities that were in addition to, or outside of, the ordinary activities and functions of a lawyer. That is, they engaged in conduct *other than* providing legal advice.

At the time of introduction of the Promoter Penalty provisions, former Commissioner Michael D'Ascenzo made comments indicating that advisers undertaking such additional activity are the targets of the legislation:

> "The promoter penalty legislation is aimed at eliminating unscrupulous operators who peddle unsustainable arrangements to the detriment of both taxpayers and ethical advisers."[62] (emphasis added)

However, the ATO has subsequently indicated that the provision of advice *of itself* may constitute an act of marketing or encouragement:

- if incomplete material information was given in order to influence the decision of an entity to participate in the scheme, this would indicate that the entity did more than merely provide advice;[63]
- where advice about the positive application of taxation laws to an arrangement is given to a client with advance knowledge that the advice will be shared with third parties, this may constitute marketing or encouragement of the relevant arrangement;[64]
- by putting forward an overly positive view of a position for an arrangement, an entity may move from 'merely' providing advice to marketing or encouraging that arrangement. A question will arise as to whether the service to the client is 'balanced and independent' advice or has moved to being entrepreneurial;[65] and
- where there is significant economic pressure to give "selling opinions" to obtain or retain clients, the entity may move from a truly independent advisory role into a more entrepreneurial mode.[66]

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[61] (2004) 86 ALD 230
[62] *A new relationship with the tax profession*, Taxation Institute of Australia 21st National Convention 6 April 2006
[63] PSLA 2008/7 paragraph 163
[64] *ATO Guide for Tax Intermediaries: Good governance and promoter penalty laws*
[65] *The Promoter Penalty Regime - how the ATO is applying it in practice*, Bruce Collins, Assistant Deputy Commissioner, NSW 5th Annual Tax Forum, 17 May 2012
[66] Ibid

This approach does not appear to be consistent with the ordinary meaning of the plain words of the section.

The Macquarie dictionary contains the following definitions:

> Mere: 1. being nothing more nor better than what is specified; pure and simple; 2. belonging or relating to a single individual or group, or sole.
>
> Merely: only as specified, and nothing more; simply
>
> Because: 1. for the reason that; due to the fact that. 2. because of, by reason of; on account of.

In applying these definitions to section 290-60(2), an entity will not be a promoter simply due to the fact that the entity provides advice on the scheme. That is, the entity must do more than provide advice.

The ATO's approach is consistent with the fact that each of the Promoter Penalty EM and PSLA 2008/7 put qualifications on the quality or type of advice that the exclusion will apply to, stating that:

> "The civil penalty regime is not intended to inhibit the provision of **independent and objective tax advice**, including advice regarding planning. Advisers who advise on tax planning arrangements….are not at risk of civil penalty to the extent that they have merely provided **independent, objective advice** to clients.[67] (emphasis added)
>
> Mere provision of **independent and objective** advice by an entity is not of itself conduct that results in the adviser or another entity being a promoter"[68] (emphasis added)

However, section 290-60(2) includes no such qualification. In accordance with the words of the provision, if an entity does no more than provide advice, that entity should not be a promoter. The provision is silent as to the type of advice, the quality of the advice and what the advice covers or excludes.

The ATO appears to interpret section 290-60 as providing that the giving of advice should not cause an entity to become a promoter, but the content of the advice may constitute an act of marketing or encouragement.

In practice this question of interpretation may not be an issue as an entity will either have undertaken other activity in connection with the scheme (in addition to the advice) that would constitute acts of marketing or encouragement, or will not satisfy the remaining requirements to be a promoter (for example, the substantial role element).

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[67] Promoter Penalty EM paragraph 3.50
[68] PLSLA 2008/7 paragraph 141

6.2 Receipt of fees in respect of marketing or encouragement:

To be a promoter an entity must receive consideration in respect of the conduct of marketing or encouragement.

Of concern in this respect is that, if the ATO is successful in an argument that the provision of an overly optimistic advice itself constitutes an act of marketing and encouragement, any fees received by the adviser would satisfy the consideration requirement, even where these are calculated at ordinary time based rates. That is, if the only act of marketing or encouragement is the provision of the advice, all of the fees for performing that service will be consideration for acts of marketing or encouragement.

This is clearly not the intention as can be seen from the Promoter Penalty EM which states:

> "Scheme promoters generally undertake promotional activities to earn higher financial rewards than would be available for providing independent and objective tax advice. Those scheme profits constitute consideration received from the marketing or encouragement of a tax exploitation scheme and help to establish that an entity is a promoter.
>
> Salary, wages and other professional fees that reflect the time and expertise spent advising clients about a scheme are unlikely to constitute consideration in the context of the promoter definition because the consideration must be linked to the promotional activity."

It also does not appear to be the way the ATO intends to apply the provision. In this respect the ATO has stated that its concerns relate to consideration calculated on the basis of tax savings or which is contingent upon the nature of the advice.[69] This would be expected to cover additional or bonus fees, over and above ordinary charge out rates, derived in connection with the success of the scheme or the distribution of it.

The ATO has stated that the fact that an adviser receives a contingent fee does not require a conclusion that the adviser has contravened the promoter penalty laws. However, the ATO has concerns that a contingent fee structure may result in a loss of independence and objectivity in the advice provided.

6.3 Substantial Role

Only an entity that plays a substantial role in the marketing or encouragement of a scheme will be considered a promoter. This would be determined by comparing the significance of the role of the entity in the marking and encouragement to the role of others. It is directed at getting to those entities that control the process by giving instructions or managing the activities.

To be successful in making an application for Promoter Penalties to be applied to an adviser, the ATO must therefore prove, on the balance of probabilities, that the adviser played a substantial role in the

[69] PSLA 2008/7 paragraph 133

marketing and encouragement of the arrangement, when compared with the role played by the client and others. In circumstances where the adviser has not originated the scheme, and has done no more than provide overly optimistic advice or an opinion for use by the client, this element may be difficult for the ATO to establish.

6.4 Conduct that causes another entity to be a promoter

The ATO has expressed a view that the provision by an adviser of an overly optimistic advice or a selling opinion may result in another entity being a promoter where the other elements of the law are present.[70]

Whilst not expressed in the legislation, the extension of the penalties to those whose conduct results in another entity being a promoter of a tax exploitation scheme was intended to prevent promoters from hiding behind the corporate veil. It was intended to ensure that the controlling minds of corporate or other vehicles were the entities liable to sanctions.[71] However, the words of the legislation are not so limiting.

Further, it is intended that the prohibition will only be breached where an entity actively engages in conduct that results in another entity meeting each of the 3 requirements of the definition of promoter.[72] Again this is not explicit in the terms of the legislation: in theory it is possible for the behaviour of an entity to result in another being a promoter where, for example, the other entity would have satisfied 2 of the 3 requirements and the entity's conduct cause the other entity to satisfy the third.

A statutory construction question arises as to whether the adviser exclusion can protect an adviser from the application of the provisions: subsection 290-60(2) only operates to prevent an entity being considered a promoter, and does not on its face extend so far as to say that the mere provision of advice cannot result in another entity being a promoter, although the intention expressed in the Promoter Penalty EM is that this is its effect.[73]

In circumstances where the ATO successfully argues that such advice is activity extending beyond 'mere advice', the exclusion would not be available in any event. However, as referred to above, in order to make a successful application for sanctions to be applied to an adviser, the Commissioner would be required to prove that the adviser's conduct in providing the advice caused the other entity to meet the promoter definition. Assuming the interpretation given to the provision is that set out in the Promoter Penalty EM, this would require the adviser to cause the other entity to play a substantial role in the marketing of the arrangement for consideration.

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[70] *The Promoter Penalty Regime - how the ATO is applying it in practice*, Bruce Collins, Assistant Deputy Commissioner, NSW 5th Annual Tax Forum, 17 May 2012

[71] Promoter Penalty EM paragraph 3.21

[72] Promoter Penalty EM paragraph 3.20

[73] Promoter Penalty EM example 3.4 "…if Naomi were a promoter…Rona's conduct [in providing advice] would not render her liable under the second limb of section 290-50(1) because it is not a cause of Naomi being a promoter. **To conclude that the second limb is satisfied would subvert the adviser exception, which is not intended**." (emphasis added)

6.5 Privilege

One issue that the ATO and advisers may face in any potential investigation of an adviser under the Promoter Penalty provisions is the question of how an action may be progressed or defended where relevant communications are privileged.

For legal advisers, confidential communications between the adviser and their client will be the subject of legal professional privilege if made for the dominant purpose of obtaining legal advice. The privilege exists as a common law right, and belongs to, and may only be waived by, the client and not the adviser.[74] Neither may be compelled to disclose details of the communication.

For advisers who are accountants, the ATO generally provides an accountants concession pursuant to which the ATO will permit client confidentiality to be claimed over "non-source documents" in accordance with certain guidelines published by the ATO.[75] The guidelines apply to requests for access to documents made for any purpose of the Tax Act or any other Act administered by the Commissioner.

Advisers may therefore be in a position where they are unable to provide the ATO with sufficient information in relation to their instructions to satisfy the ATO that the adviser did no more than merely advise. However, by the same token and perhaps more relevantly, the ATO may confront circumstances where they are unable to prove that an adviser did more than merely advise, particularly in circumstances where the ATO is claiming that the advice itself constitutes marketing or encouragement of a scheme.

7 CONCLUSION

As set out above, to date, many questions of interpretation and application of the provisions remain unanswered. In fact, it may be the case that many of these are never the subject of Court proceedings and therefore continue to be areas of uncertainty for many years to come.

Nevertheless, the ATO's implementation and administration of measures supporting the Promoter Penalty provisions has undoubtedly been successful in increasing engagement between intermediaries and the ATO. It seems resolution of these issues may not be necessary for the Promoter Penalty provisions to have the intended deterrent effect.

[74] *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 81-2 per Kirby J; *Baker v Campbell* (1983) 153 CLR 52 at 85 per Murphy J

[75] A copy of the Guidelines can be found at http://www.ato.gov.au/content/51665.htm

ANNEXURE A
PROMOTER PENALTY PROVISIONS

Division 290—Promotion and implementation of schemes

Table of Subdivisions

Subdivision 290-A—Objects of this Division

Table of sections

290-5 Objects of this Division

The objects of this Division are:

(a) to deter the promotion of tax avoidance *schemes and tax evasion schemes; and

(b) to deter the implementation of schemes that have been promoted on the basis of conformity with a *product ruling in a way that is materially different from that described in the product ruling.

Subdivision 290-B—Civil penalties

Table of sections

290-50 Civil penalties

Promoter of tax exploitation scheme

(1) An entity must not engage in conduct that results in that or another entity being a *promoter of a *tax exploitation scheme.

Implementing scheme otherwise than in accordance with ruling

(2) An entity must not engage in conduct that results in a *scheme that has been promoted on the basis of conformity with a *product ruling being implemented in a way that is materially different from that described in the product ruling.

Note: A scheme will not have been implemented in a way that is materially different from that described in a product ruling if the tax outcome for participants in the scheme is the same as that described in the ruling.

(2A) For the purposes of subsection (2), disregard:

(a) subsection 82KZMGA(1A) of the *Income Tax Assessment Act 1936*; and
(b) subsection 394-10(5A) of the *Income Tax Assessment Act 1997*.

Note 1: Those 2 subsections relate to forestry managed investment schemes.

Note 2: The effect of this subsection is that a scheme will have been implemented in a way that is materially different from that described in a product ruling if the tax outcome for participants in the scheme is the same as that described in the ruling only because of the operation of the subsections mentioned in paragraphs (a) and (b).

Civil penalty

(3) If the Federal Court of Australia is satisfied, on application by the Commissioner, that an entity has contravened subsection (1) or (2), the Court may order the entity to pay a civil penalty to the Commonwealth.

Amount of penalty

(4) The maximum amount of the penalty is the greater of:
(a) 5,000 penalty units (for an individual) or 25,000 penalty units (for a body corporate); and
(b) twice the consideration received or receivable (directly or indirectly) by the entity and *associates of the entity in respect of the *scheme.

Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Principles relating to penalties

(5) In deciding what penalty is appropriate for a contravention of subsection (1) or (2) by an entity, the Federal Court of Australia may have regard to all matters it considers relevant, including:
(a) the amount of the consideration received or receivable (directly or indirectly) by the entity and *associates of the entity in respect of the *scheme; and
(b) the deterrent effect that any penalty may have; and
(c) the amount of loss or damage incurred by scheme participants; and
(d) the nature and extent of the contravention; and
(e) the circumstances in which the contravention took place, including the deliberateness of the entity's conduct and whether there was an honest and reasonable mistake of law; and
(f) the period over which the conduct extended; and
(g) whether the entity took any steps to avoid the contravention; and
(h) whether the entity has previously been found by the Court to have engaged in the same or similar conduct; and
(i) the degree of the entity's cooperation with the Commissioner.

Recovery of penalty

(6) The penalty is a civil debt payable to the Commonwealth, and the Commissioner may, on behalf of the Commonwealth, enforce an order for an entity to pay the penalty as if it were an order made in civil proceedings against the entity to recover a debt due by the entity. The debt arising from the order is taken to be a judgment debt.

290-55 Exceptions

Reasonable mistake or reasonable precautions

(1) The Federal Court of Australia must not order the entity to pay a civil penalty if the entity satisfies the Court:
(a) that the conduct in respect of which the proceedings were instituted was due to a reasonable mistake of fact; or
(b) that:

(i) the conduct in respect of which the proceedings were instituted was due to the act or default of another entity, to an accident or to some other cause beyond the entity's control; and

(ii) the entity took reasonable precautions and exercised due diligence to avoid the conduct.

(2) The other entity referred to in paragraph (1)(b) does not include someone who was an employee or agent of the entity when the alleged conduct occurred.

Reliance on advice from the Commissioner

(3) The Commissioner must not make an application under section 290-50 for conduct referred to in subsection 290-50(1) in relation to an entity's involvement in a *scheme if:

(a) the scheme is based on treating a *taxation law as applying in a particular way; and

(b) that way agrees with:

(i) advice given to the entity or the entity's agent by or on behalf of the Commissioner; or

(ii) a statement in a publication approved in writing by the Commissioner.

Time limitation

(4) The Commissioner must not make an application under section 290-50 in relation to an entity's involvement in a *tax exploitation scheme more than 4 years after the entity last engaged in conduct that resulted in the entity or another entity being a *promoter of the tax exploitation scheme.

(5) The Commissioner must not make an application under section 290-50 in relation to an entity's involvement in a *scheme that has been promoted on the basis of conformity with a *product ruling more than 4 years after the entity last engaged in conduct in relation to implementation of the scheme.

(6) However, the limitation in subsection (4) or (5) does not apply to a *scheme involving tax evasion.

Exception where entity does not know result of conduct

(7) The Federal Court of Australia must not order an entity to pay a civil penalty in relation to the entity's engaging in conduct:

(a) that results in another entity being a *promoter of a *tax exploitation scheme; or

(b) that results in a *scheme that has been promoted on the basis of conformity with a *product ruling being implemented in a way that is materially different from that described in the product ruling;

if the entity satisfies the Court that the entity did not know, and could not reasonably be expected to have known, that the entity's conduct would produce that result.

Employees

(8) The Commissioner must not make an application under section 290-50 in relation to an individual's involvement in a *scheme as an employee if the Federal Court of Australia has ordered the individual's employer to pay a civil penalty under this Division in relation to the same scheme.

290-60 Meaning of *promoter*

(1) An entity is a ***promoter*** of a *tax exploitation scheme if:

(a) the entity markets the scheme or otherwise encourages the growth of the scheme or interest in it; and

(b) the entity or an *associate of the entity receives (directly or indirectly) consideration in respect of that marketing or encouragement; and

(c) having regard to all relevant matters, it is reasonable to conclude that the entity has had a substantial role in respect of that marketing or encouragement.

(2) However, an entity is not a ***promoter*** of a *tax exploitation scheme merely because the entity provides advice about the *scheme.

(3) An employee is not to be taken to have had a substantial role in respect of that marketing or encouragement merely because the employee distributes information or material prepared by another entity.

290-65 Meaning of *tax exploitation scheme*

(1) A *scheme is a ***tax exploitation scheme*** if, at the time of the conduct mentioned in subsection 290-50(1):

(a) one of these conditions is satisfied:

(i) if the scheme has been implemented—it is reasonable to conclude that an entity that (alone or with others) entered into or carried out the scheme did so with the sole or dominant purpose of that entity or another entity getting a *scheme benefit from the scheme;

(ii) if the scheme has not been implemented—it is reasonable to conclude that, if an entity (alone or with others) had entered into or carried out the scheme, it would have done so with the sole or dominant purpose of that entity or another entity getting a scheme benefit from the scheme; and

(b) one of these conditions is satisfied:

(i) if the scheme has been implemented—it is not *reasonably arguable that the scheme benefit is available at law;

(ii) if the scheme has not been implemented—it is not reasonably arguable that the scheme benefit would be available at law if the scheme were implemented.

Note: The condition in paragraph (b) would not be satisfied if the implementation of the scheme for all participants were in accordance with binding advice given by or on behalf of the Commissioner of Taxation (for example, if that implementation were in accordance with a public ruling under this Act, or all participants had private rulings under this Act and that implementation were in accordance with those rulings).

(2) In deciding whether it is *reasonably arguable that a *scheme benefit would be available at law, take into account any thing that the Commissioner can do under a *taxation law.

Example: The Commissioner may cancel a tax benefit obtained by a taxpayer in connection with a scheme under section 177F of the *Income Tax Assessment Act 1936*.

Subdivision 290-C—Injunctions

Table of sections

290-120 Conduct to which this Subdivision applies

This Subdivision applies to conduct of the kind referred to in subsection 290-50(1) or (2).

290-125 Injunctions

If an entity has engaged, is engaging or is proposing to engage in conduct to which this Subdivision applies or would apply, the Federal Court of Australia may, on the application of the Commissioner, grant an injunction:

(a) restraining the entity from engaging in the conduct; and

(b) if, in the Court's opinion, it is desirable to do so—requiring the entity to do something.

290-130 Interim injunctions

The Federal Court of Australia may, before considering an application for an injunction under section 290-125, grant an interim injunction restraining an entity from engaging in conduct to which this Subdivision applies.

290-135 Delay in making ruling

If:

(a) an entity applied in writing to the Commissioner for a *product ruling in relation to a *scheme; and

(b) the Commissioner has neither made the ruling nor told the entity in writing that the Commissioner has declined to make the ruling;

the Commissioner must not make an application under section 290-125 in relation to conduct or proposed conduct by an entity in relation to the scheme until the Commissioner makes the ruling or tells the entity in writing that the Commissioner has declined to make the ruling.

290-140 Discharge etc. of injunctions

The Federal Court of Australia may discharge or vary an injunction granted under this Subdivision.

290-145 Certain limits on granting injunctions not to apply

Restraining injunctions

(1) The power of the Federal Court of Australia under this Subdivision to grant an injunction restraining an entity from engaging in conduct of a particular kind may be exercised:

(a) if the Court is satisfied that the entity has engaged in conduct of that kind—whether or not it appears to the Court that the entity intends to engage again, or to continue to engage, in conduct of that kind; or

(b) if it appears to the Court that, if an injunction is not granted, it is likely that the entity will engage in conduct of that kind—whether or not the entity has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to anyone if the entity engages in conduct of that kind.

Performance injunctions

(2) The power of the Federal Court of Australia under this Subdivision to grant an injunction requiring an entity to do something may be exercised:

(a) if the Court is satisfied that the entity has refused or failed to do that thing—whether or not it appears to the Court that the entity intends to refuse or fail again, or to continue to refuse or fail, to do that thing; or

(b) if it appears to the Court that, if an injunction is not granted, it is likely that the entity will refuse or fail to do that thing—whether or not the entity has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to anyone if the entity refuses or fails to do that act or thing.

290-150 Other powers of the Federal Court unaffected

The powers conferred on the Federal Court of Australia under this Subdivision are in addition to, and not instead of, any other powers of the Court, however conferred.

Subdivision 290-D—Voluntary undertakings

Table of sections

290-200 Voluntary undertakings

(1) The Commissioner may accept a written undertaking given by an entity for the purposes of this section in connection with furthering the objects of this Division.

(2) The entity may withdraw or vary the undertaking at any time, but only with the consent of the Commissioner.

(3) If the Commissioner considers that the entity that gave the undertaking has breached any of its terms, the Commissioner may apply to the Federal Court of Australia for an order under subsection (4).

(4) If the Court is satisfied that the entity has breached a term of the undertaking, the Court may make one or both of the following orders:
   (a) an order directing the entity to comply with that term of the undertaking;
   (b) any other order that the Court considers appropriate.

284-15 When a matter is *reasonably arguable*

(1) A matter is ***reasonably arguable*** if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect.

(2) To the extent that a matter involves an assumption about the way in which the Commissioner will exercise a discretion, the matter is only ***reasonably arguable*** if, had the Commissioner exercised the discretion in the way assumed, a court would be about as likely as not to decide that the exercise of the discretion was in accordance with law.

(3) Without limiting subsection (1), these authorities are relevant:
   (a) a *taxation law;
   (b) material for the purposes of subsection 15AB(1) of the *Acts Interpretation Act 1901*;
   (c) a decision of a court (whether or not an Australian court), the *AAT or a Board of Review;
   (d) a *public ruling.

284-150 *Scheme benefits* and *scheme shortfall amounts*

(1) An entity gets a ***scheme benefit*** from a *scheme if:
   (a) a *tax-related liability of the entity for an accounting period is, or could reasonably be expected to be, less than it would be apart from the scheme or a part of the scheme; or
   (b) an amount that the Commissioner must pay or credit to the entity under a *taxation law for an accounting period is, or could reasonably be expected to be, more than it would be apart from the scheme or a part of the scheme.

(2) …

ANNEXURE B
PROFORMA ENFORCEABLE VOLUNTARY UNDERTAKING

ATTACHMENT 1

AUSTRALIAN TAXATION OFFICE

ENFORCEABLE VOLUNTARY UNDERTAKING GIVEN FOR THE PURPOSES OF DIVISION 290 OF SCHEDULE 1 TO THE TAXATION ADMINISTRATION ACT 1953

The commitments in this undertaking are offered to the Commissioner of Taxation by:

<person's full name/entity's name>
<address line 1>
of <address line 1>,
<address line 2>

Definitions

'the Commissioner' means	the Commissioner of Taxation of the Commonwealth of Australia
'associated entity' means	an entity that is an 'associate' of <person's/entity's name> as defined by section 318 of the *Income Tax Assessment Act 1936*
'the arrangement'	***Provide a brief (1-2 lines) description of the arrangement under consideration; include the name under which it was promoted if it has one.*** ***FOR EXAMPLE:*** the arrangement known as the <name of arrangement> and promoted by <person's/entity's name> involving participants providing services to end users through a labour hire firm and in return receiving distributions from discretionary trusts established as part of the arrangement, and associated actions
'a similar arrangement'	***Provide a brief description of the scope of similar arrangements to that under consideration; include the name of the relevant Taxpayer Alert if it exists.*** ***FOR EXAMPLE:*** means an arrangement described in <Taxpayer Alert TA 20XX/XX> and includes any arrangement that has a substantially similar taxation effect to the arrangement
'client' means	Any client of <person's/entity's name> or an associated entity.

Interpretation

1. In this document, unless the contrary intention appears:
   1.1. the singular includes the plural and vice versa.
   1.2. all legislative references are to Schedule 1 to the Taxation *Administration Act 1953*.

Outline the capacity in which the entity is making the undertaking (if relevant).
FOR EXAMPLE:

   1.3. a reference to <person's name> is to <person's full name> acting in any capacity; including in his/her personal capacity and as director, agent or trustee of any other entity.

Background

2. The Commissioner is responsible for administering the provisions of the *Taxation Administration Act 1953* and in particular, the provisions relating to the promotion and implementation of tax exploitation schemes in Division 290.

3. The objects of Division 290 are to deter:
   - the promotion of tax avoidance schemes and tax evasion schemes; and
   - the implementation of schemes that have been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling.

4. Provisions in Division 290 provide that the Commissioner may apply to the Federal Court for orders against the promoter of a tax exploitation scheme.

Outline the view of the arrangement that the Commissioner has communicated to you.
FOR EXAMPLE:

5. The Commissioner has reviewed the <scheme promoted by person's/entity's name> and holds the view that it is a tax avoidance or evasion scheme for the purpose of section 290-5, and is likely to be a tax exploitation scheme for the purpose of section 290-65.

Outline the relationships between the entity entering the undertaking and related entities that were involved in the arrangement under review.
FOR EXAMPLE:

6. <person's name> is the <officer> of <entity name>.

7. <person's name> is a <officer> of <entity 2 name>. <entity 2 name> is the corporate trustee of <entity 3 > Trust.

8. <person's/entity's name> is a partner in <partnership name>.

Outline the conduct of the entities in relation to the arrangement under review that concerns the Commissioner.
FOR EXAMPLE:

9. <person's/entity's name> communicated with clients and made referrals of clients willing to participate in the arrangement to the scheme promoter.

10. <person's/entity's name> was in receipt (directly or indirectly) of $XXXX in commissions from the scheme promoter.

11. There was no ruling sought by <person's/entity's name> or the clients from the Commissioner on the way in which the Commissioner considered relevant taxation provisions applied in relation to [the arrangement, the transactions, or the subject matter of the advice].

Outline the contact between the entities covered by this undertaking and the Commissioner and the entities' subsequent behaviour.
FOR EXAMPLE:

12. The Commissioner has informed <person's/entity's name> verbally and in writing that their conduct in connection with the arrangement may be prohibited conduct under Division 290.

13. <person's/entity's name> and associated entities have cooperated with Australian Taxation Office investigations and are offering to voluntarily modify their behaviour in response to the concerns expressed by the Commissioner and have given undertakings to that effect in relation to their future conduct.

14. On <date>, <person's/entity's name> made a written voluntary disclosure in relation to her/his and associated entities' participation in the arrangement and undertook to cease and desist from any further promotion of the arrangement.

15. <person's/entity's name> and associated entities have not claimed any <name of arrangement> <scheme benefits> in their lodged 20XX income tax return(s).

A disclaimer may be included.

FOR EXAMPLE:

16. The execution of this document by <person's/entity's name> does not constitute an admission that <person's/entity's name> or any associated entity has engaged in any conduct that may be prohibited under Division 290.

Undertakings

17. Pursuant to, and for the purposes of Division 290, <person's/entity's name> offers the following undertakings to the Commissioner of Taxation:

Outline the undertakings you are entering with the Commissioner.
FOR EXAMPLE:

17.1. <person's/entity's name> will not promote, market or otherwise encourage another entity to participate in, enter into or carry out the arrangement or any similar arrangement, or cause any other entity to do so.

17.2. Where <person's/entity's name> has caused information to be made publicly available that would encourage another entity to participate in, enter into or carry out the arrangement or any similar arrangement, he/she will make reasonable endeavours to ensure that the information is removed, amended, or retracted so that it will no longer have that effect.

17.3. Where <person's/entity's name> is or becomes aware that another entity has entered into the arrangement or any similar arrangement, he/she will advise and provide necessary support to the other entity to review their tax affairs in relation to the periods affected and where appropriate to:

17.3.1. make a voluntary disclosure to the ATO in relation to their participation in the arrangement

17.3.2. take steps to prevent any inappropriate tax consequences of their continued participation in the arrangement; for example, by amending a trust deed to change calculation of income clauses.

17.4. Where <person's/entity's name> is or becomes aware that another entity is contemplating entering into or carrying out the arrangement or any similar arrangement, he/she will make reasonable endeavours to ensure that the other entity does not enter into or carry out the scheme.

17.5. <person's/entity's name> will not make any attempts to obtain, or to cause any other entity (other than the Commissioner) to obtain, any payment, consideration or further agreement or transaction in relation to the arrangement or any similar arrangement.

Include this undertaking only if relevant to your circumstances.

17.6. <person's/entity's name> will reimburse clients any fee paid in relation to the specific promotional activity that is the subject of the Commissioner's concern to redress the affects of the entities' conduct.

Include this undertaking only if investigations and/or actions by the Commissioner against the arrangement or its promotion are ongoing.

17.7. <person's/entity's name> will provide assistance to the Commissioner in relation to enquiries and enforcement action taken concerning the arrangement and in particular will:

a) promptly respond to any request for information

b) promptly provide access to requested documents; and

c) make statements (written or oral) in evidence in relevant court proceedings.

17.8. <person's/entity's name> will implement internal governance controls to minimise the entities' potential exposure to the promoter penalty laws through involvement in tax exploitation schemes.

17.9. <person's/entity's name> will inform the Australian Taxation Office of any novel or potentially contentious tax-related arrangement that comes to his/her attention or with which he/she is considering becoming involved,

Acknowledgments

Include standard text outlining the entity's understanding of the effect of this document.
18. I, <person's full name>, acknowledge that:

18.1. I understand the undertakings given.

18.2. This undertaking may be withdrawn or varied only with the consent of the Commissioner of Taxation.

18.3. If any of the terms of this undertaking are contravened or not met, the Commissioner may: apply to the Federal Court for either or both of the following orders:
i. an order directing compliance with the terms of this undertaking
ii. any other order which the court considers appropriate.

18.4. Compliance with this undertaking does not depend upon the acts of any other entity.

18.5. This undertaking in no way constitutes a restraint upon the Commissioner's discretion, administration or powers.

18.6. The Commissioner's acceptance of this undertaking does not affect the Commissioner's powers to investigate a contravention arising from past or future conduct.

18.7. This undertaking has no operative force until accepted by the Commissioner.

Severability

19. If any provision of this undertaking is prohibited, invalid or unenforceable for any reason, in any jurisdiction, or held to be so by a court, that provision will, as to that jurisdiction, be ineffective to the extent of the prohibition, invalidity or unenforceability without invalidating the remaining provisions of this undertaking or affecting the validity or enforceability of that provision in any other jurisdiction, unless it materially alters the nature or material terms of this undertaking.

Execution

Outline the capacity in which the entity is making the undertaking
FOR EXAMPLE:
I declare that I am making this undertaking in my personal capacity and as director, agent or trustee of each entity with which I am currently associated.

_____	_____	_____
Signature	Print name	Date

In the presence of

_____	_____	_____
Witness	Print name	Date

THIS UNDERTAKING IS ACCEPTED BY THE COMMISSIONER OF TAXATION PURSUANT TO SECTION 290-200 OF SCHEDULE 1 TO THE *TAXATION ADMINISTRATION ACT 1953* BY A DELEGATE OF THE COMMISSIONER OF TAXATION AND AS SUCH BECOMES ENFORCEABLE BY THE COMMISSIONER OF TAXATION.

.....
Assistant Commissioner of Taxation

Name .....

This .....Day of .....