Submission –*Treasury Laws Amendment (Tax Accountability and Fairness) Bill* 2023

9 February 2024

Senate Standing Committees on Economics
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RE: *Treasury Laws Amendment (Tax Accountability and Fairness) Bill* 2023

Tax Astute Training (established in 2010) is a national professional taxation training provider which provides practical and interactive technical tax and related training and CPD/CLE hours to tax professionals who are both self-employed and/or the owners and employees of large and small accounting, legal, financial planning and corporate employers. Our broad client base includes professional tax practitioners throughout every State of Australia and ranges from large corporates, law firms and international accounting firms and listed companies through to medium-sized and sole practitioner businesses in regional areas. Our role includes analysing and explaining the practical implications of all new Federal legislative developments of relevance to our client base, Treasury and ATO announcements, public rulings and similar and relevant taxation case law. We also aim to respond to our clients' practical queries and feedback on such developments.

We have researched in detail and presented numerous training sessions to (and received feedback from) our tax professional clients regarding the proposed new Promoter Penalty Rule (***PPR***) applicable from 1 July 2024 (***new PPR***) under the *Treasury Laws Amendment (Tax Accountability and Fairness) Bill* 2023 (***PPR Bill***). Given Tax Astute Training's role in ensuring its clients are at all times up to date with all relevant technical and practical taxation developments, both we and our client base clearly support any provisions designed to ensure that real wrongdoing by other tax professionals can be minimised and eradicated wherever possible.

Our submission includes the following issues:

1. Reasons why greater certainty and safeguards are required within the text of the PPR Bill

We recognise that the existing PPR are likely to require some expansion in order to ensure that they can effectively address instances of actual wrongdoing by what is likely to be a limited group of tax practitioners. We also note and accept at the outset the following **ATO comments** (emphasis added):

- In Practice Statement PS LA 2021/1 under the '*Proper application of promoter penalty laws'* heading…
  'The application of the promoter penalty laws is a ***serious matter****. Their* ***potential application should not be raised lightly****.'*

- on its '*Promoter penalty laws*' home page:

  'The promoter penalty laws ***aren't intended to obstruct tax advisers and intermediaries from merely providing advice*** *to their clients'.*

  In addition, we note the similar statement at paragraph 1.4 of the PPR Bill's Explanatory Memorandum (**EM**) emphasis added:
  '*The amendments seek to boost the effectiveness of the operation of the promoter penalty provisions* ***without inhibiting the capacity of entities to provide independent and objective tax advice, including adviser regarding tax***'

We have no doubt that the above comments reflect the genuine view of both the ATO and Treasury and that they are well intentioned in their planned approach towards enforcing both the existing and new PPR. We also recognise the reversed onus of proof requirements for the ATO to prove their PPR case may assist. Nonetheless, where Explanatory Memorandum (**EM**) or ATO comments ultimately express a different view to the text of a Bill/Act of Parliament, the text of the Bill/Act will prevail in any future judicial decision to the extent they conflict. In our view, the current very broad drafting of the PPR Bill means that future judicial decisions regarding the (***new PPR***) may well be constrained to follow the broad approach taken by the legislative provisions, contrary to their intended effect per the above well intentioned ATO and Treasury comments.

Tax Astute Training's submission therefore primarily relates to the paramount effect of the Bill's text, with a view to suggesting amendments which might align that legislative text with the Treasury and ATO intentions stated above. It is noted that an approach which enlists ATO Guidance regarding any deficiencies or 'gaps' in the text of a Bill has been taken regarding various recent Bills (e.g. the s 207-159 ITAA 1997 franking credit integrity rule in the *Treasury Laws Amendment (2023 Measures No. 1) Act* 2023 and the recent Senate Committee Report regarding the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency Bill 2023*). We understand that there can be occasions where such ATO Guidance (or, in some cases, use of its Remedial Power) may provide an efficient solution. We would, however, respectfully suggest that:

- the magnitude of the penalty and reputational damage risks potentially arising for tax professionals of all varieties and sizes from the expanded new PPR (as currently drafted) – see page xx; and
- likely associated practical effects (such as potentially untenable Professional Indemnity (**PI**) Insurance premiums due to the substantially increased risks above),

makes it critical for legislated protections, potentially including appropriate '*bright line'*, easily understood and applied practical exceptions, are essential regarding this particular Bill (see also page 15 below).

2. The practical effect of the proposed PPR Changes for most tax professionals

The majority of tax professionals (including, but not limited to, accountants, lawyers, financial planners, large corporate in-house and other advisers) currently successfully navigate and manage a variety of risk management issues when providing tax and related advice. Some examples of these current risks include:

- penalty and interest risks for errors, late lodgements and similar;
- anti-avoidance/integrity risks (e.g. the potential application of Part IVA *ITAA* 1936); and
- reputational and Professional Indemnity (**PI**) Insurance premium and coverage risks which might arise from errors regarding the above.

These and other commonly encountered advisory risks will, in most cases, serve as a check and balance against substandard advice being provided by a practitioner. It is recognised that, as in any other profession or trade, there may be a very small minority '*bad apples*' whose non-compliant behaviour needs to be addressed. However, our observations regarding the practical implications arising under each of the current and proposed PPR suggest that the vast majority of tax professionals would become subject unreasonable additional compliance and commercial risks and costs under the PPR Bill as currently drafted – see further details below.

2.1 Practical effects of the current PPR pre-1 July 2024.

The currently legislated PPR (‘***current PPR’***) is only a current risk for a tax professional (per existing s 290-5 Schedule (***Sch***) 1 Taxation Administration Act 1953 (***TAA* 1953**) where there is ‘*promotion*’ (e.g. encouragement to ≥ 1 client/entity) of either:

- a tax avoidance/evasion scheme; or
- a scheme based on conformity with a Product Ruling which is materially different to the Product Ruling.

Given that the vast majority of Tax Professionals:

- are successfully managing their tax avoidance/evasion advisory risk (in turn managing most practitioners’ risks under the existing PPR); and
- are, in the majority of cases, not advising on Product Rulings (given that this is a specialist area),

then the above threshold requirements in s 290-5 *ITAA* 1997 (for application of the existing PPR) currently apply relatively rarely in practice. In turn, this means that the additional existing and more complex PPR penalty risks and definitions of ‘*tax exploitation scheme*’ and ‘*promoter*’ in ss 290-55, 290-60 and 290-65 Sch 1 *TAA* 1953 respectively do not usually need to be currently reviewed and dealt with by the majority of tax professionals.

2.2 Practical effects of the New PPR from 1 July 2024.

By contrast to the current practical PPR effects, the proposed new PPR from 1 July 2024 could additionally apply where a ‘scheme’ is ‘promoted/encouraged’ based on conformity with any of the long list of Rulings below, in circumstances where the scheme is in fact ‘*materially different*’ from the relevant ruling. Further comments regarding the meaning of and implications arising from ‘*materially different*’ status are provided at page 8 below. The ‘*materially different*’ requirement is undoubtedly one which can involve ‘*grey area*’ issues which are dependent on the specific circumstances involved.

As a consequence, tax planning type advice or suggestions made by a tax professional to any entity regarding any of the following Rulings which involved a favourable taxation outcome could potentially give rise to a risk under the new PPR (subject to additional PPR threshold requirements various PPR exceptions noted at pages xx and xx below) merely because the advice was 'materially different' to the Ruling, notwithstanding that no tax avoidance/evasion activity was present:

- Public Rulings which can a cover a broad range of items (see this link https://www.ato.gov.au/single-page-applications/legaldatabase#Law/table-of-contents?locid=RULING_CURRENT to access the full ATO list of current Public Rulings) including, but by no means limited to:
  - Tax and GST Determinations (TD and GSTD);
  - Class Rulings;
  - Self-managed Super Fund Rulings (despite their generally non-binding nature);
  - Wine Equalisation Tax, Excise and Fuel Tax Rulings;
  - Law Companion Rulings (LCR);
- Product Rulings; and
- Private Rulings which are specifically applied for regarding the application of particular tax provisions to a specified taxpayer's scheme.

Due to the broad list of rulings which could potentially trigger the proposed new PPR, from 1 July 2024, then unless a professional adviser can be absolutely certain that the advice which they encouraged or promoted to $\geq$ 1 entity regarding any of the above Rulings precisely conforms with that Ruling then the new PPR could be potentially triggered. This outcome is often difficult to achieve with absolute certainty due to slight differences between actual fact patterns vs scenarios provided within a Ruling (particularly a Public Ruling) then the expanded definitions of '*Tax Exploitation Scheme'* and '*Promoter*' in ss 290-50 to 290-65 Sch 1 TAA 1953 inclusive (see page 7 below) and the complex exception rules would need to be reviewed and managed regarding most tax practitioner advice. This would be the case despite no anti-avoidance or evasion, nor any other wrongdoing being present in by far the majority of cases.

While we appreciate that this PPR risk will often be relatively low, given the magnitude of penalties involved (and further effects such as potential loss of Tax Agent status where the PPR applies) we query how this may impact PI insurance premiums payable by tax professionals and/or PI Insurance coverage in general (e.g. an increased PPR risk and significant and increased penalties (which could often cause insolvency if they applied) from 1 July 2024 will clearly have adverse implications for PI insurance premiums when reviewed by actuaries).

Tax Astute Training understands that an ability to apply the PPR to a broader range of non-compliant advice (provided by the very limited group of tax professionals who may be doing the wrong thing and are the intended targets of the PPR) may be required. However, if the range of threshold circumstances which might potentially trigger the PPR is to be substantially expanded (via the above proposed list of Rulings but also other expansions and changes to the PPR – see further details below) then in order to prevent untenable compliance and commercial risks and costs to the majority of tax professionals (who are not intended PPR targets) it will be essential to include appropriate '*bright line*' threshold and/or exception rules within the Bill which are easily applied, understood and practical in nature so that they may be accessed by the vast majority of tax practitioners, PI Insurance actuaries and more. It is suggested that such an approach to the new PPR legislation could achieve the balance sought by the EM comments in paragraph 1.4 (see page 2 above and also suggested exception issues at page 15 below).

Effectively, if the threshold requirements for application of the new PPR are to be substantially rewritten, then it becomes necessary to substantially rewrite the protective elements of the Bill (e.g. exception provisions) to ensure that they can appropriately respond to the expanded threshold requirements for application noted above.

We would suggest that the current exception provisions were designed for the more limited existing PPR (which is often currently inapplicable in practice for the reasons noted at page 4 above). Given the proposed significant expansion under the new PPR, we would suggest that the existing exceptions (which are additionally proposed to be restricted in some cases under the new PPR– see page 11 below) will no longer appropriately respond to the expanded reach of the proposed new PPR.

It is notable that both the existing and new PPR can apply:

- in relation to a single client/entity (i.e. the PPR are <u>not</u> limited to mass-marketed schemes); and
- '*before the fact*' (i.e. to plans/ideas which have not in fact been implemented – unlike Part IVA ITAA 1936 and most other anti-avoidance integrity which require the presence of an actual tax benefit – see also our comments and example regarding what we have identified as a potential '*PPR seminar/conference presentation risk*' in this regard at page 12).

2.3 Further threshold and exception practical implications arising under the proposed new PPR

As a consequence of, and in addition to, the above broad range of Ruling advice (which becomes potentially at risk under the new PPR) the following additional PPR issues would need to be reviewed, addressed and documented by tax practitioners to manage significant PPR compliance and commercial risks regarding most Ruling advice or other analysis provided (a very regular, if not daily, occurrence for many tax practitioners). Important practical implications and potential unintended PPR consequences may arise for tax professionals due to the following issues:

1. The already broad existing **definitions of '*promoter*'** and '***tax exploitation schemes***' (in ss 290-60 and 290-65 Sch 1 *TAA* 1953 respectively) which will require more frequent consideration under the new PPR and the expanded **definition of '*benefit*'** via ss 290-50(5)(a) and 290-60(1)(b) Sch 1 *TAA* 1953, under the new PPR replacing the current, already broad, definition of '*consideration*' (see page 7).
2. The broad reach of the *'materially different'* PPR trigger if it applies to every type of Ruling from 1 July 2024 (see page 8);
3. The expanded **new PPR penalty amounts** and their application 10; and
4. The contraction/reduction of some current **PPR exceptions** under the new PPR (see page 11).

2.3.1 The already broad definitions of '*tax exploitation scheme*' and '*promoter*' – ss 290-65 and 290-60 Sch 1 *TAA* 1953

The defined terms ''*tax exploitation scheme*' and '*promoter*' and are already broadly defined. However most tax practitioners are not currently required to conduct any detailed review or risk management regarding their effect (for the reasons noted at page xx above).

With the significant expansion to the type of advice which may be potentially affected by the proposed new PPR from 1 July 2024, however, these broad terms will become an important risk management issue for every tax professional, whether working in a large or small organisation as explained below

Tax Exploitation Scheme (***TES***) as defined in s 290-65 Sch 1 TAA 1953 will continue to involve an entity (emphasis added):

- entering, carrying out or **intending to carry out** a TES;
- with the **sole/dominant purpose of a scheme benefit (e.g. a tax reduction) for themselves or another entity;**
- Where it is **not reasonably arguable** that the **scheme benefit is available at law.**

While the **TES definition** itself will remain broadly similar under the new PPR, the significantly expanded types of daily tax professional advice potentially triggering the new s 290-5 Sch 1 *TAA* 1953 new PPR threshold requirements (see page 4) mean that the broad reach of the TES definition (and difficulties regarding whether or not a '*reasonably arguable'* position is present regarding any advice which disagrees with a position taken in an ATO Ruling) becomes a problematic technical issue requiring significant compliance costs and time (including the likelihood that a barrister's (or similar) legal opinion would become regularly necessary to establish a reasonably arguable position wherever there is a potential '*material difference'* to the relevant ATO Ruling – see page 8 for further '*materially different*' issues).

The definition of '**Promoter'** in s 290-60 Sch 1 *TAA* 1953 will be significantly expanded due to the proposed replacement of the term '*consideration'* with '*benefit'* (including less obvious, unquantifiable, intangible and disguised benefits) -see ss 290-50(5)(a) and 290- 60(1)(b) Sch 1 *TAA* 1953. While it is understood why this expansion is sought (i.e. to address existing difficulties with imposing the PPR if '*consideration'* cannot be proved to be present) once again the broad reach and complexity of this definition becomes problematic if it needs to be reviewed and applied to regular and common tax professional advice (e.g. any advice or suggestions made by a tax professional regarding a wide variety of ATO Rulings where there is some possibility that there might be a material difference to that Ruling). Once again it is suggested that '*bright line'* exceptions are included within the legislation's text to manage the compliance and commercial risks and costs otherwise arising from the otherwise increased potential application of this definition to a broad range of tax advice.

2.3.2 The broad reach of the '*materially different'* PPR trigger if it applies to every type of Ruling from 1 July 2024

Under the proposed new PPR, where advice (or even an idea which is not ultimately implemented) is encouraged/promoted to $\geq$ 1 client/entity where it is 'materially different' to any type of Ruling (see page xx above) then the s 290-5 Sch 1 TAA 1953 threshold requirement for the PPR to apply would be triggered, including in cases where no avoidance, evasion, wrongdoing is present. Currently, this outcome would only arise regarding a *'materially different'* approach to a Product Ruling – a relatively rare occurrence for the majority of tax professionals given the specialist nature of Product Ruling advice.

While there is limited current guidance regarding the meaning of 'materially different' it is broadly triggered where the actual tax outcome varies from the intended outcome in the relevant ruling. Currently, examples are largely limited to Product Rulings (which have some parallels to Private Rulings sought by a tax professional regarding a specific client). There are no current examples, however, regarding how the '*materially different*' test might apply to a Public Ruling. Given that Public Rulings are not specifically addressed to a particular entity's circumstances, there is arguably a higher risk that a material difference could arise (e.g. if there is a disagreement between the taxpayer and the ATO as to whether a particular element of the Public Ruling sufficiently aligns with the actual taxpayer facts involved).

Nonetheless, there are some examples of material difference examples (in a Product Ruling context) as follows:

- additional management fees being imposed (in comparison to the facts stated in the taxpayer's Product Ruling application); or
- not planting grapevines in the manner or at the time planned per the Product Ruling application,

such that the ATO's discretion to allow Div 35 *ITAA* 1997 non-commercial losses of individual investors to be deducted (as stated in the Product Ruling) would be materially different to the likely application of the Div 35 ITAA 1997 discretion based on the actual facts which transpired.

See Example 2 of TD 2010/7 and ATO commentary regarding the *Barrossa Vines* PPR decision on the existing ATO PPR home page for further details.

In our training presentations to our tax professional clients, we've identified the following likely examples where a potential PPR '*material difference*' might arise:

- For a **Private Ruling or Product Ruling** (applied for regarding a particular client/entity) – if circumstances change after the Private (or Product) Ruling is issued, where these circumstances may have altered the ATO's approach taken for tax purposes then this is a likely material difference example, triggering potential application of the PPR. The potential for a tax agent's client not disclosing a subsequent change to their tax agent (because the lay client does not realise the importance of the change for tax purposes) should be noted as a PPR risk which may possibly be beyond the control of the tax professional.

- For a **Public Ruling** – where actual circumstances are not viewed as sufficiently aligning with the ATO's examples and commentary, resulting in a different tax outcome to the portion of the Public Ruling being relied on by the tax professional. We note that this alignment of circumstances is already important for general penalty and interest risk management purposes, the magnitude of the PPR penalties which then become a potential risk are problematic, given how common this type of material difference could be.

2.3.3 The significant and increased PPR Penalty amounts from 1 July 2024

We understand the need for the PPR to be a significant deterrent against serious wrongdoing by a very limited group of tax professionals. However, given our comments above regarding the broad potential application of the new PPR from 1 July 2024 and the need, under the PPR Bill as currently drafted, for the majority of tax practitioners (and their PI insurers) to manage those risks regarding regular and common advice (which does not involve wrongdoing) the significant penalty amounts become problematic. For example, if a small accounting firm with, say, $1 Million or less aggregated turnover p.a. took a position which disagreed with any type of ATO Ruling then their maximum penalty risk under the new PPR would be $15.65 Million (50,000 Penalty Units) – see proposed s 290-50(4A)(a) Sch 1 *TAA* 1953 for this and also additional penalty amounts for larger organisations. Due to the likely '*business ending*' nature of this penalty risk (however small) and despite the absence of wrongdoing, additional barrister's opinions etc. to establish a reasonably arguable position defence would likely be required to definitively manage the risk. Arguably a '*bright line'* defence/exception which recognises the practitioner's ability to justify their advice (in place of the '*grey area*' reasonably arguable position defence) would be more appropriate – see page 15 for some suggested approaches in this regard. While it is recognised that Tax Professionals of all sizes and types already need to justify a reasonably arguable position for general tax penalty risk management purposes, the magnitude of the PPR penalties mean that self-assessment that a reasonably arguable position may be a less available option. Of course larger organisations would also suffer the same issues due to their even higher increased penalties in proposed new s 290-50(4) Sch 1 *TAA* 1953. We note also the proposed risk to loss of tax agent status suggested in separate legislation if the PPR applies.

2.3.4 The contraction of some existing PPR Exceptions

The existing PPR Exceptions are currently proposed to largely remain in their current form under the proposed new PPR provisions, although with the following contractions/restrictions to two existing PPR exceptions.

- Reasonable Mistake of Fact/Reasonable Precaution Exception/Defence; and
- the Act/Default of another entity beyond an entity's control may (or may not) be a defence.

The Reasonable Mistake of Fact/Reasonable Precaution PPR Exception/Defence

Under existing s 290-55(1) Sch 1 *TAA* 1953 (and proposed new s 290-55(2)) the act or default of another entity may potentially be used as a defence by an entity which can prove that it has taken reasonable precautions/appropriate due diligence to avoid the conduct which breached the PPR.

While this deference/exception will remain available from 1 July 2024, the range of other entities which cannot be used for purposes of applying the defence from 1 July 2024 will be expanded from the existing exclusion for employees/agents would also exclude:

- directors of a company/body corporate; or
- various partners/trustees of SGE partnerships or trusts.

While it is understood why this change is proposed, given the broad reach of the new PPR as currently drafted, without easily applied 'bright line' exceptions it becomes particularly problematic to manage practice risks for a small suburban accounting firm operating through a private company structure, for example.

The Lack of Knowledge exception/defence from 1 July 2024

Under proposed s 290-55(7) Sch 1 *TAA* 1953 the existing lack of knowledge exception/defence will be narrowed such that, from 1 July 2024, a partner or trustee cannot claim lack of knowledge that their own conduct would cause a different entity to breach the PPR if that different entity is the relevant Partnership or Trust (or a fellow partner or trustee).

As a further comment regarding the lack of knowledge defence generally, we ask the Committee to carefully consider whether a tax professional, MBA/Masters of Tax lecturer in a higher education institution or tax training organisation generally (some of whom may not be Tax Agents) might encounter what we've termed '*PPR seminar risk*' under the new PPR. By way of example, if any of the above tax professionals suggested a technical approach to a particular Ruling (noting that every type of Ruling will be potentially subject to PPR issues from 1 July 2024) then where that approach might ultimately prove to be '*materially different*' to the ATO's approach (see page 8 for details) is there arguably a possible exposure to PPR penalty risk for the seminar presenter/lecturer etc. if the 40, 100 or other number of attendees took the idea back to their respective professional firms and discussed it further? Under the new PPR, it might be argued that if the presenter should have known about the material difference between their views and the Ruling and the fact that attendees might listen to and act on the views in the presentation then the lack of knowledge defence may be unavailable to that individual (or possibly the organisation they represented in some cases).

Currently this risk would only arise if the presenter suggested tax avoidance or evasion or a materially different approach to a product ruling – scenarios highly unlikely to occur at most conferences, seminars, lectures etc.

While we would like to hope that PPR action being taken against the lecturer or seminar presenter above would be unlikely in practice, the example is provided as an illustration of the broad technical reach of the PPR Bill in its current form. It is noted that the PPR can apply to a scheme which is not ultimately implemented and, unlike Part IVA *ITAA* 1936 there is no requirement for any actual '*tax benefit*' to arise.

Once again, while we understand why recent events have driven the desire to tighten various PPR exceptions. However, the extremely broad reach of the new PPR, as currently drafted, raises important practical compliance and business risk issues which should arguably be managed by the addition of '*bright line*' practical exceptions, to ensure PPR risks of substantial penalties, reputational damage and more (however small) remain limited to the intended targets of the PPR who are engaging in wrongdoing rather than becoming a significant dollar value and reputational risk to nearly every tax professional (including many tax professionals who are not required to be Registered Tax Agents due to their dealings with other tax professionals rather than members of the general public).

3. Specific issues for in-house tax personnel of large corporate and other businesses

In addition to training numerous different professional firms, Tax Astute Training's client base also includes in-house personnel from a variety of large corporate and other businesses who seek to ensure their tax knowledge and work is up to date, accurate and ethical.

The reason the relevant business has chosen to engage an in-house expert is usually due to an in-house capability assisting excellent tax compliance outcomes for the complex business circumstances involved as a high quality and bespoke, but also cost-effective and confidential, method for managing business costs.

As with any other Tax Professional, in-house tax counsel or manager-type roles require the individual(s) involved to hold required qualifications, manage compliance and other risks and ensure the management of their employer's tax function is carried out appropriately and ethically. It should be noted, however, that regardless of how well such in-house tax professionals might be paid, they are in a very different position to, for example, an equity partner of a large professional services firm (who is a business owner with a greater ability to make or veto business decisions). By contrast, an in-house tax professional (however senior) is ultimately an employee of a large organisation and answerable to the board. The in-house tax professional is generally not a board member, director or similar within the organisation they work for.

In this context, we note with some concern the following EM examples which were provided in the PPR Bill:

a. EM Example 1.2 where, broadly an in-house tax professional was not subject to the PPR where they merely reviewed of an idea (which was the entity's idea) and checked that idea for consistency with the relevant ATO Ruling before it was implemented.

   It is noted that Example 1.2 produces a benign result. However, if the idea was consistent with the Ruling, then there would not have been a 'material difference' in any event (i.e. no PPR issue should have arisen in any event under this scenario even under the new PPR). It also raises unanswered questions regarding to determine whose idea it was in practice (i.e. how can it be proved where the idea originated from the entity vs the individual in-house adviser?).

b. Under the more concerning EM Example 1.3 an individual in-house adviser's personal idea, was encouraged (i.e. promoted to) their employer with a view to the in-house adviser receiving a bonus (i.e. a 'benefit' under the new PPR). To the extent that this action gave rise to a materially different approach to the relevant ruling (and other PPR triggers noted above) then EM Example 1.3 suggests a potential personal PPR penalty risk for the individual in-house adviser.

We note that in-house tax professionals are specifically engaged for their technical skills for purposes of facilitating the management of the business' tax function, allowing appropriate management of costs for large corporate and other businesses and to allow a bespoke and confidential in-house approach to the business' tax management. We suggest that without specific and appropriate exceptions and '*bright line*' rules being incorporated within the text of the PPR Bill that there are significant risks to the ability of many of large and small businesses operating within Australia (and their Australian and other stakeholders) to benefit from the currently timely, accurate, bespoke and cost-effective benefits provided by an in-house tax function if an unacceptable level of PPR risk needs to be managed every time a valid (but potentially materially different) approach is taken in relation to a complex tax Ruling to suit the particular complex circumstances of the business. If a second opinion to manage PPR risk becomes too frequent (which may be difficult to achieve in a timely manner if the relevant specialists become inundated with PPR '*rubber stamp'* second opinion work) then time sensitive genuine M&A activity, internal restructures etc. may be put at risk due to PPR risks without adequate practical '*bright line*' solutions. See further suggestions from page 15below.

We also note that an in-house adviser role as an employee (even a senior employee) will necessarily involve a power imbalance in comparison to the needs of the board and stakeholders that individual reports to. Under a '*grey area*' PPR scenario if the board of a large business (e.g. an ASX listed company or similar) is faced with a choice between arguing that:

- The PPR non-compliant idea originated from the organisation itself (maximum penalty of up to 2.5 million penalty units – currently $782.5 Million); or
- The PPR non-compliant idea originated from an individual tax counsel employee (see EM example 1.3 above) – maximum penalty of up to 5,000 penalty units - currently $1.565 Million),

then the economic reality of these two options, and the paramount need for the board to protect the interests of the company and its stakeholders, appears to offer a clear choice (to the significant detriment of the individual in-house tax adviser).

4. The use of Exception provisions to manage new PPR Risks

The existing PPR Exceptions which will remain in place under the new PPR from 1 July 2024 include:

a. The relevant advice/idea **NOT being a Tax Exploitation Scheme** (***TES***) under s 290-60(1)(b) Sch 1 TAA 1953 (see also new s 290-60(1A)(c) Sch 1 *TAA* 1953) on the basis that it is reasonably arguable at the promotion time. The original EM to the *Tax Laws Amendment (2006 Measures No. 1) Act 2006*) (***Original PPR EM***) suggested that a barrister's opinion coupled with a split judicial decision in the Federal Court (despite the taxpayer losing their case) would be an example of this exception applying. See also page 7 above.

b. **No 'Promoter' status** (per s 290-60(2) Sch 1 TAA 1953) due to merely providing independent objective advice (favourable or otherwise) on a potential PPR Scheme as opposed to being an 'architect' of the PPR scheme (see also Example 3.1 to the Original PPR EM).

c. **No '*Promoter*' status** due to s 290-60(1)(c) & (3) Sch 1 *TAA* 1953 due to not having a substantial role in the relevant scheme (e.g. a person following instructions as opposed to the person who devised the scheme/gave the instructions). See also para 3.48 of the Original PPR EM.

d. Implementation/Plans for Scheme **NOT '*Materially Different*'** to the relevant Ruling (ss 290-50(1A) and (2) Sch 1 *TAA* 1953) – see page xx above for further 'materially different' comments and their practical implications.

We have also noted two further exceptions which will be subject to change from 1 July 2024 – see page 11 for details.

While the above exceptions can undoubtedly assist various potential PPR scenario (and should be retained under the new PPR) they primarily involve '*grey areas*'/unanswered questions. Examples of such questions, include, but are not limited to the following:

- If the example explained at **item a** above, would the outcome have been different if there had been a majority judgement against the taxpayer (vs the split judgement noted in the example)? In addition, would one barrister's opinion have been sufficient for this exception had the matter not gone to the Federal Court?

- Under **item c** above, how would a given individual's '*substantial role*' (or otherwise) be determined in practice?

We consider that given the broad potential application of the new PPR from 1 July 2024, the inability for most tax professionals to quickly and easily answer the '*grey area*' questions noted above and the '*grey area*' nature of the '*materially different*' rule (see page xx above) imposes an unreasonable compliance burden on the vast majority of compliant tax professionals who are not doing anything wrong and are not the intended targets of the new PPR. In addition, we have noted earlier the potential implications of these '*grey areas*' in relation to PI insurance actuary risk assessments, and the likely associated increases to associated PI insurance premiums throughout the tax profession.

While it will be for Treasury and Parliament (potentially in conjunction with the ATO) to consider what appropriate additional safeguards might be added to the new PPR Bill, some potential broad issues to considered might include:

a. Can some appropriate easily applied and practical '*bright line*' exceptions be added for the benefit of all tax professionals to ensure that most tax advice (including advice which may be materially different to an ATO ruling without any wrongdoing being involved) can be quickly and easily self-assessed as PPR compliant from 1 July 2024?

b. As a minimum, given Treasury and ATO data and knowledge regarding the most likely source PPR breaches and targets, is there an appropriate level of aggregated turnover below which the tax professional or firm should benefit from an expanded range of bright line exceptions?

c. Can particular attention be paid to issues affecting in-house tax counsel and similar roles within larger corporate and other businesses (see page 13 for more details) with a view to ensuring that appropriate '*bright line'* and other protections are incorporated for this type of employee adviser when doing the right thing?

d. Could a '*good compliance history*' PPR exception (for all scenarios which do NOT involve tax avoidance or evasion) be added to the PPR Bill (i.e. whether the relevant tax professional was an in-house adviser for a large business actively working constructively with the ATO under its top 500 or next 5,000 program towards achieving '*justified trust'* or similar status or a professional firm with a good compliance history with the ATO). Potentially a robust exception of this nature based upon identifiable ATO compliance status could protect most tax professionals and their PI insurance premiums from unnecessary and complex PPR compliance work when advising on Rulings in general.

Of course this is only a limited list of potential issues which might assist the formulation of additional bright line exceptions. There may of course be additional solutions which may also assist.

Concluding comments

Thank you for the opportunity to make this submission. As noted above, Tax Astute Training, and its entire client base, actively support a robust integrity regime to address actual wrongdoing by a very limited range of tax professionals. We also recognise the well-intentioned approach proposed by Treasury and the ATO. However, due to the significant compliance and commercial risks facing all tax professionals under the proposed PPR expansion (as currently drafted) and the fact that the text of the PPR Bill and its existing exceptions needs some adjustment to match the ATO and Treasury's intended approach under the significantly expanded new PPR regime, we hope that the above comments, examples and suggestions may assist in achieving the appropriate balance within the PPR Bill itself.

If you seek any clarification regarding the submission issues raised above, please do not hesitate to contact me using the contact details included in our online submission.

Yours sincerely,

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