27 January 2024

Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

It is not to be thought of that the Flood
Of British freedom, which, to the open sea
Of the world's praise, from dark antiquity
Hath flowed, "with pomp of waters, unwithstood,"
Roused though it be full often to a mood
Which spurns the check of salutary bands,
That this most famous Stream in bogs and sands
Should perish;

Wordsworth

Fundamentally, the Bill is another sad and all too frequent case of the gradual perishing of the famous stream of our ancient liberties in the bogs and trackless sands of obscure Schedules of what in 1953 was a simple *Taxation Administration Act*.

I wish to make this submission to the members of the Committee as to the proposed "reform" of the promoter penalty laws as I have reason to believe the "reform" may be partly aimed at punishing me for giving advice that the ATO seems to neither like nor understand (the two seem to go together). It was advice given to a legal client on the normal solicitor/client basis but the ATO seem to hate lawyers who don't kowtow to them, rather than appreciating that we have differing duties and that giving advice to a client on how he might arrange his affairs to protect assets, provide for himself and his family and do so with the least amount of tax being lawfully due to the Crown is a normal part of a lawyer's business. I served the Crown loyally and honestly as its servant; I serve my clients no less so.

Perhaps the ATO would be happy if Parliament simply completely abdicated and passed a "reforming" law as follows:

> *"It shall be a criminal offence punishable by transportation to Botany Bay (or Macquarie Island these days?) for any lawyer or other person to give advice on the operation of a taxation law without the prior written approval of the Commissioner of Taxation."*

Leaving such musings apart, I do note that no Treasury officer appears to have lost his job as a result of the PwC debacle.

That does not surprise me looking back on my experience as Senior Adviser in Prime Minister and Cabinet years ago writing Cabinet briefing notes on Treasury tax submissions. Treasury does not suffer from introspection and ever ask itself why its previous tax legislation proposals did not work.

One thing I have noticed over 40 years, whether in the Commonwealth Public Service, or as private secretary to a Senator, or as a lawyer, is that bureaucratic failure seems to be its own reward. Failed legislation or administration is rewarded by wider legislated powers and more staff - no one ever asks whether perhaps the problem was in the original legislation.

The Bill's widening promoter penalty provisions

Paragraph 1.4 of the Explanatory Memorandum states –

> *The amendments seek to boost the effectiveness of the operation of the promoter penalty provisions <u>without inhibiting the capacity of entities to provide independent and objective tax advice, including advice regarding tax planning.</u> The amendments improve the ability of the Commissioner to target promoters of tax exploitation schemes…*

This is hardly honest. The amendments are designed to do precisely that.

The way this is done is to remove the requirement that a promoter receive "consideration" promoting a tax exploitation scheme and loosening it to receiving a "benefit". Paragraph 1.14 and 1.15 of the Explanatory Memorandum state-

> *One element of the meaning of 'promoter' that the Commissioner is required to establish if the promoter penalty laws are to apply where an entity, or an associate of an entity, is a promoter of a tax exploitation scheme, is that the entity or associate <u>has received (directly or indirectly) consideration in respect of marketing a scheme or encouraging growth or interest in a scheme</u>. This*

concept of receiving 'consideration', inferring receipt of payment or financial reward, in respect of such marketing or encouragement of schemes has been difficult to establish. While 'indirect consideration' includes in-kind payments and payments to third-party associates, the inference has been that the reward is quantifiable.

*This element has restricted the Commissioner's ability to effectively apply the promoter penalty laws in some cases due to the practical challenges in obtaining sufficient evidence that shows that the promoter or an associate of the promoter has received consideration in respect of marketing, or encouraging growth or interest in, the tax exploitation scheme. Shifting to the broader concept of '**benefit' removes the requirement that the reward is quantifiable** (sic – emphasis added).*

Paragraph 1.42 seq of the Explanatory Memorandum state-

Schedule 1 to the Bill clarifies that for the purposes of the definition of 'promoter', marketing a scheme and encouraging growth or interest in a scheme are two distinct concepts, either one of which can be demonstrated for an entity to be a promoter of a tax exploitation scheme. Schedule 1 to the Bill also broadens the meaning of 'promoter' to include entities that have received a benefit, rather than 'consideration', in respect of the marketing or growth of interest in a scheme.
[Schedule 1, items 30 and 31, paragraphs 290-60(1)(a) and (b) of Schedule 1 to the TAA 1953]

This change allows the Commissioner to apply for an order that an entity has contravened the promoter penalty laws where the promoter has received a benefit from promoting a scheme that is not necessarily received directly from a client, such as increasing their client base. This amendment allows the Commissioner to apply for an order in situations where the promoter of a scheme has received benefits that are less obvious, intangible or disguised.

*While the concept of a 'promoter' can include both advisers within a professional services firm and in-house advisers, the broadening of the meaning of 'promoter' does not seek to undermine the requirement that the promoter encourage the growth of, or interest in, a tax exploitation scheme. In addition, **the exclusion for merely providing advice is unaffected**. (emphasis added)*

This is not correct and seems quite disingenuous. I have already been attacked under existing legislation for providing advice and drafting legal documents to implement that advice for a client. I am happy to give evidence to the Committee as to the details on a confidential basis.

In short, the reality will be that if a lawyer is paid to give advice on tax planning which the Commissioner does not like, that lawyer can be attacked as being a promoter of a tax exploitation scheme on the basis he has received a "benefit" – namely the fee received from the client for that advice. Even advice to one client can be described as a "tax exploitation scheme" if the Commissioner does not like it and if a lawyer gives the same or similar advice to more than one client that lawyer can be attacked even more easily *a fortiori*.

The attack will be backed by terror.

Paragraph 1.11 of the Explanatory Memorandum sates –

> *Under subsection 290-50(4), the maximum civil penalty that the Federal Court of Australia may impose is the greater of 5,000 penalty units (currently $1.57 million) for individuals .... or twice the consideration received or receivable by the entity (and associates of the entity) in respect of the scheme.*

Thus a lawyer who gives tax planning advice and receives a fee of $20,000 from the client can be threatened with a fine of $1.57 million if the Commissioner of Taxation does not like the advice.

I do not see that this sort of potential threat is consistent with the constitutional traditions of what supposed to be a free country with inherited common law liberties of the subject.

Retrospectivity

Extraordinarily, the Explanatory Memorandum unashamedly boasts that the power of such threats is to be made retrospective!

Paragraph 1.27 states baldly -

> *The extended timeframe available to the Commissioner applies in relation to conduct engaged in before, on or after the commencement of the amendments. This means the ATO is in a better position to take action against promoters that are in breach of the provisions before commencement of the amendments, for example in cases where the ATO becomes aware of the promotion of a scheme during a taxpayer audit, a considerable time after the conduct occurred, or where claims of professional privilege delay the conduct of an investigation.*

This is backed by Example 1.1

Example 1.1 – Existing breach

> *On 30 June 2024, the ATO is in the process of gathering evidence in relation to conduct of a tax practitioner who last promoted a tax exploitation scheme 5 years ago. The 6-year time period applies so that the ATO can make an application to the Federal Court for the imposition of a civil penalty on the tax practitioner.*

Conclusion

Years ago I recall in Treasury seeing a letter from Mr W J O'Reilly, the then Commissioner of Taxation, stating that his officers had great powers but they should be used carefully and that, if they were abused, Parliament would remove those powers.

That time has come.

I have found myself personally been abused by the insulting conduct of the ATO which, failing to comprehend precisely correct answers given in relation to their inquiries, deliberately chose not to ask further questions but to "go covert" (as if they were secret intelligence service), and went through my bank accounts behind my back without so much as a "by your leave".

They discovered that I received a payment from a country they do not like (Vanuatu) and jumped to the conclusion that I must have been receiving "kickbacks" from a tax scheme promoter or some such in relation to the advice given to the individual client.

That led to what Adam Smith quite correctly described as a "vexatious inquisition" by a "naturally insolent race of men" with a voluminous demand for correspondence which took hours to extract.

(Actually, the small payment was for a paper commissioned by the Vanuatu Finance Centre in making tax policy submissions to a government taxation review in that country. The paper was on optimal tax policy and recommended that the country collect its revenues from its lands and not introduce an income tax (which it does not have). The paper is a public document which I am happy to supply to the Committee if desired and I note that if Australia with its urban rural and mineral land values cannot collect a decent enough rent to get rid of income tax, perhaps we should ask what is wrong with us.)

Meanwhile, is it too much to ask that Parliament ***not*** confer ever more power on an ATO bureaucracy which cannot be trusted to use it wisely rather than as an instrument of oppression against hapless taxpayers and their advisers?

Is it really wise public policy to prevent taxpayers from getting qualified legal advice?

Yours sincerely

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Outline of chapter

1.2 Schedule 1 to the Bill amends the TAA 1953 to increase the time the Commissioner has to bring an application for civil penalty proceedings to the Federal Court of Australia, increase the maximum penalty applicable, and expand the application of the promoter penalty laws.

Context of amendments

General

1.3 The promoter penalty provisions in Division 290 of Schedule 1 to the TAA 1953 (Promotion and implementation of schemes) were introduced in 2006 to deter the promotion of tax avoidance and tax evasion schemes, where the benefit to be claimed is not permitted under the law. These provisions also penalise entities that intentionally or unintentionally misrepresent arrangements as being endorsed by the ATO through product rulings.

1.4 The promoter penalty provisions were introduced following the mass-marketed tax avoidance and evasion schemes prevalent in the 1990s. Over time, the nature of tax promoter activity has evolved as tax exploitation schemes have become more bespoke and complex, often operating across jurisdictional boundaries.

1.5 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 advice regarding tax planning. The amendments improve the ability of the Commissioner to target promoters of tax exploitation schemes and schemes being misrepresented as having ATO endorsement, and the ability to seek the application of civil penalties.

1.6 The promotion of these schemes puts taxpayers who enter such schemes at risk of shortfall tax, penalties and interest. The amendments ensure the incentives for tax practitioners and other promoters to make unauthorised disclosures of confidential information, where that information is used to promote these schemes, are diminished.

1.7 Legislative references in this Chapter are to Schedule 1 to the TAA 1953 unless otherwise specified.

Time limitation to commence civil penalty proceedings

1.8 The promoter penalty laws provide a four-year period within which the Commissioner may make an application in relation to an entity on the basis of their involvement in the promotion of a tax exploitation scheme, unless the scheme involves tax evasion. The Commissioner may only take action against the entity within this period which commences from the time that the promoter last engaged in the promoter conduct.

1.9 The Commissioner frequently becomes aware of the promotion of schemes during client audits, which often occur well after the four-year limitation period commences. Having regard to the complexity of tax exploitation schemes, the Commissioner also requires significant time to gather evidence. This means the four-year limitation period often has expired before the ATO is in a position to make an application to the Court.

Unimplemented avoidance and evasion schemes

1.10 Unlike the provisions concerning the promotion of tax exploitation schemes, which explicitly state that the scheme need not be implemented for a penalty to be imposed, the provisions concerning the misrepresentation of schemes conforming to a product ruling do not expressly provide for unimplemented schemes.

1.11 Promotions of schemes involving tax evasion are not subject to the time limitation within which action may be taken against an entity. However, this exception has been applied only where the scheme has been implemented and tax evasion has occurred. This has meant that there is no meaningful operation in relation to schemes where taxpayers have not, or not yet, implemented the scheme and obtained a scheme benefit.

Penalties

1.12 Under subsection 290-50(4), the maximum civil penalty that the Federal Court of Australia may impose is the greater of 5,000 penalty units (currently $1.57 million) for individuals or 25,000 penalty units (currently $7.8 million) for a body corporate, or twice the consideration received or receivable by the entity (and associates of the entity) in respect of the scheme. These penalties have not kept pace with other developments in Australian law.

1.13 When the promoter penalty provisions in Division 290 were introduced in 2006, the intention was to align the maximum penalty with that in the *Trade Practices Act 1974*. Since then, the maximum civil penalty under the promoter penalty laws has remained unchanged (in penalty units). By contrast, the maximum civil penalty has significantly increased, in penalty units, in comparable legislation, including both the *Competition and Consumer Act 2010* (which replaced the *Trade Practices Act 1974*) and the *Corporations Act 2001*.

Meaning of promoter

1.14 One element of the meaning of 'promoter' that the Commissioner is required to establish if the promoter penalty laws are to apply where an entity, or an associate of an entity, is a promoter of a tax exploitation scheme, is that the entity or associate has received (directly or indirectly) consideration in respect of marketing a scheme or encouraging growth or interest in a scheme. This concept of receiving 'consideration', inferring receipt of payment or financial reward, in respect of such marketing or encouragement of schemes has been difficult to establish. While 'indirect consideration' includes in-kind payments and payments to third-party associates, the inference has been that the reward is quantifiable.

1.15 This element has restricted the Commissioner's ability to effectively apply the promoter penalty laws in some cases due to the practical challenges in obtaining sufficient evidence that shows that the promoter or an associate of the promoter has received consideration in respect of marketing, or encouraging growth or interest in, the tax exploitation scheme. Shifting to the broader concept of 'benefit' removes the requirement that the reward is quantifiable.

Meaning of tax exploitation scheme

1.16 Currently, a tax exploitation scheme may not include a scheme the entity has entered into or carried out that falls within the requirements of the MAAL or the DPT provisions or, if the scheme is not yet implemented, it would be reasonable to conclude that those requirements would be satisfied.

1.17 A tax exploitation scheme is a scheme entered into, or carried out, for the sole or dominant purpose of obtaining a scheme benefit. The MAAL and DPT provisions apply to a scheme if a person who entered into or carried out the scheme, or any part of the scheme, did so for a principal purpose of, or for more than one principal purpose that includes a purpose of obtaining a tax benefit, or both obtaining a tax benefit and reducing a tax liability under a foreign law.

1.18 This restricts the Commissioner's ability to target tax practitioners and other promoters that promote schemes to multinational enterprises to avoid the attribution of profits to the Australian arm of the enterprise and erode the corporate tax base.

ATO rulings

1.19 There is no specific prohibition on promoters using a category of ATO ruling, other than a product ruling, to mislead clients by asserting that their scheme has ATO endorsement while implementing the scheme in a materially different way from that described in the ruling.

1.20 This means that tax practitioners and other promoters cannot be penalised under the provision concerning the misrepresentation of schemes conforming to a ruling, for example, for promoting schemes to clients falsely representing that an arrangement has been endorsed by the ATO in a class ruling when in reality, the circumstances of the promoted scheme are materially different and the tax outcome described in the ruling is not available.

1.21 A 'public ruling' is a written ruling by the Commissioner on the way in which the Commissioner considers a relevant tax law applies, or would apply, to entities generally or to a class of entities, or in relation to a class of schemes or a particular scheme and includes product rulings. These rulings are published on the ATO website.

1.22 A 'private ruling' is a written ruling by the Commissioner on the way in which the Commissioner considers a relevant provision applies, or would apply, to a taxpayer in relation to a specified scheme. The ATO maintains a public register of private rulings which contains edited versions of most private rulings, with identifying information removed. However, key features of the specified scheme are often deleted from these edited versions to avoid the taxpayer from being identified.

1.23 An 'oral ruling' is an expression of the Commissioner's opinion of the way in which a relevant provision applies, or would apply, to an individual.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	***Current law***
The Commissioner may only apply to the Federal Court of Australia for an order that an entity has contravened the promoter penalty laws within **six years** from the time the conduct that is alleged to have contravened the laws was last engaged in.	The Commissioner may only apply to the Federal Court of Australia for an order that an entity has contravened the promoter penalty laws within **four years** from the time the conduct that is alleged to have contravened the laws was last engaged in.
Provides an exception from the time limitation periods for schemes that involve, or if implemented would involve, tax evasion.	Provides an exception to the time limitation periods for schemes involving tax evasion.
The maximum penalty under the promoter penalty laws is the greatest of: • 5,000 penalty units (for an entity other than a body corporate or SGE)	The maximum penalty under the promoter penalty laws is the greater of:

New law	*Current law*
or 50,000 penalty units (for a body corporate or SGE); • 3 times the benefits received or receivable (directly or indirectly) by the entity and associates of the entity in respect of the scheme; • for a body corporate, partner in a partnership that is an SGE or trustee of a trust that is an SGE, 10% of the aggregated turnover of the entity for the most recent income year to end before the entity engaged, or began to engage, in conduct that contravenes the promoter penalty laws, capped at 2.5 million penalty units.	• 5,000 penalty units (for an individual) or 25,000 penalty units (for a body corporate); and • twice the consideration received or receivable (directly or indirectly) by the entity and associates of the entity in respect of the scheme.
An entity can be considered a promoter of a tax exploitation scheme if the entity, or an associate of the entity, receives (directly or indirectly) a **benefit** in respect of the marketing or encouragement of that scheme.	An entity can only be considered a promoter of a tax exploitation scheme if the entity, or an associate of the entity, receives (directly or indirectly) **consideration** in respect of the marketing or encouragement of that scheme.
A scheme is a tax exploitation scheme, whether implemented or not, where the scheme satisfies, or it is reasonable to conclude that it is capable of satisfying, the MAAL or DPT provisions in sections 177DA or 177J of the ITAA 1936, respectively, and it is not reasonably arguable that the scheme benefit is or would be available at law.	A scheme can be considered a tax exploitation scheme, whether implemented or not, where it is reasonable to conclude the scheme has been carried out with the sole or dominant purpose of an entity obtaining a scheme benefit, and it is not reasonably arguable the scheme benefit is or would be available at law.
The promoter penalty laws apply in respect of conduct that results in: - a scheme, that is materially different from that outlined in a **public, private or oral** ruling, being promoted on the basis of conforming with the ruling (**irrespective of whether the scheme is implemented or not**); - a scheme, that has been promoted on the basis of conforming with a **public, private or oral** ruling, being implemented in a way that is materially different from that outlined in the ruling, regardless of whether the scheme is the subject of the ruling.	The promoter penalty laws apply in respect of conduct that results in a scheme, that has been promoted on the basis of conformity with a **product ruling,** being implemented in a materially different way from that outlined in the ruling.

New law	***Current law***

Detailed explanation of new law

Extending time limitation for ATO to commence civil proceedings

1.24 The current promoter penalty laws provide a four-year period within which the Commissioner may take action against an entity on the basis of their involvement in the promotion of a tax exploitation scheme. The Commissioner may only take action against the entity within this period, which commences from the time the entity last engaged in conduct that contravenes the promoter penalty provisions.

1.25 Schedule 1 to the Bill extends this timeframe to 6 years.
[Schedule 1, items 20 and 22, subsections 290-55(4) and (5) of Schedule 1 to the TAA 1953]

1.26 Allowing the Commissioner an extra two years to gather information and evidence assists the Commissioner to identify promoters and take appropriate action against them, ensuring promoters cannot avoid the consequences of their actions.

1.27 The extended timeframe available to the Commissioner applies in relation to conduct engaged in before, on or after the commencement of the amendments. ***This means the ATO is in a better position to take action against promoters that are in breach of the provisions before commencement of the amendments, for example in cases where the ATO becomes aware of the promotion of a scheme during a taxpayer audit, a considerable time after the conduct occurred, or where claims of professional privilege delay the conduct of an investigation.***
[Schedule 1, subitem 37(2)]

1.28 ***The amendments also clarify that the time limitations outlined above do not apply to a scheme that, if implemented, would involve tax evasion. Whether tax would be evaded if the scheme were implemented involves an objective conclusion on a reasonable basis.***
[Schedule 1, item 24, subsection 290-55(6) of Schedule 1 to the TAA 1953]

Example 1.2 – Existing breach

On 30 June 2024, the ATO is in the process of gathering evidence in relation to conduct of a tax practitioner who last promoted a tax exploitation scheme 5 years ago. The 6-year time period applies so that the ATO can make an application to the Federal Court for the imposition of a civil penalty on the tax practitioner.

Penalties

1.29 Schedule 1 to the Bill strengthens the penalty provisions associated with a contravention of the promoter penalty laws. The amendments:

- increase the penalty that can be imposed on bodies corporate for breach of the promoter penalty laws from 25,000 penalty units to 50,000 penalty units;
- extend the civil penalties that can be applied to bodies corporate to SGEs;
- increase one of the maximum civil penalties that can be imposed from twice to three times the benefits received or receivable, directly or indirectly, by an entity or its associates in respect of the scheme;
- insert a new alternative maximum civil penalty for bodies corporate and SGEs being an amount equivalent to 10% of their aggregated turnover for the most recent income year ending before the relevant breach occurred, or began occurring, capped at 2.5 million penalty units.

[Schedule 1, item 16, subsection 290-50(4), (4A) and (4B) of Schedule 1 to the TAA 1953]

1.30 The amendments retain the maximum penalty of 5,000 penalty units that can be imposed on an entity other than a body corporate, a partner in a partnership that is an SGE or a trustee of a trust that is an SGE. However, the amendments provide an alternative penalty of three times the total value of all benefits received by the entity, and associates of the entity, in respect of the scheme. This means that the maximum penalty an individual may face is the greater of these two amounts.

1.31 The amendments allow the Federal Court to impose a penalty with reference to the ‘benefits’ rather than ‘consideration’ received by an entity. Where the benefits an entity receives in respect of a scheme are unquantifiable, a civil penalty that is not determined with reference to the scheme may still be imposed by the Federal Court.

1.32 Consistent with the existing law, the amendments do not limit the power of the Court to ensure the penalty amount is appropriate.

1.33 These amendments align the maximum civil penalties for promoters of tax schemes with the penalties in the *Corporations Act 2001* and ensure that maximum penalty amounts in the TAA 1953 are consistent with those contained in the *Corporations Act 2001, Australian Securities and Investments Commission Act 2001, National Consumer Credit Protection Act 2009* and *Insurance Contracts Act 1984*.

1.34 Extending the penalty provisions to SGEs is intended to include large partnerships and trusts and is consistent with the tax integrity and reporting measures imposed on SGEs. This ensures that large multidisciplinary firms are accountable regardless of their entity structure. It is also intended that bodies corporate that engage in conduct that contravenes the promoter penalty provisions in their capacity as trustee are captured by the provisions.

1.35 Broadly, the aggregated turnover of an entity is the ordinary turnover of the entity together with the turnover of any entities that are connected to or affiliated with it. The new alternative maximum penalty applicable to bodies corporate and SGEs ensures that the civil penalties able to be imposed by the Federal Court are material for these entities, which is designed to deter such entities from treating these civil penalties as a mere cost of doing business.

1.36 To give effect to these changes in relation to SGEs that are partnerships, any contravention of the civil penalty provisions by a partnership is taken to be a contravention by each of the partners. All partners in the partnership will be jointly and severally liable for a contravention by any partner acting in their capacity as a partner in the partnership.
[Schedule 1, item 35, section 444-30 of Schedule 1 to the TAA 1953]

1.37 Where a civil penalty is imposed in relation to a contravention by a trustee of a trust that has more than one trustee, the trustees are jointly and severally liable to pay the amount of the penalty.
[Schedule 1, item 36, section 444-120 of Schedule 1 to the TAA 1953]

1.38 An entity that is a partner in a partnership, or is a trustee of a trust, cannot rely on the exception of reasonable precautions and exercise of due diligence where the relevant conduct was the act or default of another entity if the other entity was also a partner in the partnership, or was another trustee of that trust, when the conduct occurred.
[Schedule 1, item 19, subsection 290-55(2) of Schedule 1 to the TAA 1953]

1.39 An entity that is a partner in a partnership, or is a trustee of a trust, cannot rely on the exception for having no knowledge (or no reasonable expectation of having known) where the conduct of, the partnership or a partner in the partnership, or the trust or another trustee of the trust, results in that entity contravening the promoter penalty provisions.
[Schedule 1, item 29, subsection 290-55 (7A) of Schedule 1 to the TAA 1953]

1.40 A new note alerts the reader to the potential effect of being penalised under the promoter penalty provisions in relation to entities who are registered tax agents or BAS agents under the TAS Act.
[Schedule 1, item 15, subsection 290-50(3)]

1.41 ***Schedule 1 to the Bill also includes amendments to the TAS Act. These amendments ensure that breach of the promoter penalty laws by one partner does not, by itself, affect the continued registration as a registered tax agent or BAS agent of another partner.***
[Schedule 1, items 1, 2, 3 and 4, section 20-45 of the TAS Act]

Meaning of promoter

1.42 Schedule 1 to the Bill clarifies that for the purposes of the definition of 'promoter', marketing a scheme and encouraging growth or interest in a scheme are two distinct concepts, either one of which can be demonstrated for an entity to be a promoter of a tax exploitation scheme. Schedule 1 to the Bill also broadens the meaning of 'promoter' to include entities that have received a benefit, rather than 'consideration', in respect of the marketing or growth of interest in a scheme.
[Schedule 1, items 30 and 31, paragraphs 290-60(1)(a) and (b) of Schedule 1 to the TAA 1953]

1.43 This change allows the Commissioner to apply for an order that an entity has contravened the promoter penalty laws where the promoter has received a benefit from promoting a scheme that is not necessarily received directly from a client, such as increasing their client base. This amendment allows the Commissioner to apply for an order in situations where the promoter of a scheme has received benefits that are less obvious, intangible or disguised.

1.44 While the concept of a 'promoter' can include both advisers within a professional services firm and in-house advisers, the broadening of the meaning of 'promoter' does not seek to undermine the requirement that the promoter encourage the growth of, or interest in, a tax exploitation scheme. In addition, the exclusion for merely providing advice is unaffected.

Example 1.3 - In-house advice

A tax practitioner is employed to provide in-house advice to a company. The tax practitioner provides advice in relation to a scheme which the company has asked them about and which purports to be consistent with an ATO ruling. The advice notes that the tax structure could be beneficial for the company, but also notes that the assertion that the scheme is consistent with the ATO ruling should be tested before the scheme is adopted.

In these circumstances, the practitioner is not promoting or encouraging the growth of the scheme and would not be considered a 'promoter' for the purposes of the promoter penalty laws.

Example 1.4 – In-house promotion

An in-house adviser develops and promotes a tax exploitation scheme to entities within its corporate group by actively encouraging participation in a scheme of which the related entities were not previously aware. The adviser does not charge the related entities professional fees for providing this advice, but receives a bonus based on the tax saving the group has achieved. Because the benefit element of the promotor penalty provisions is satisfied, in these circumstances the in-house adviser could be considered a 'promoter' for the purposes of the promoter penalty laws.

1.45 *It is not intended that a benefit needs to be quantifiable in order for a civil penalty to be imposed*. It is intended that anything that is 'consideration' is included in the concept of benefit.

1.46 The amendments also update a reference to the amount of consideration received or receivable by an entity to refer to the amount of the benefit. ***[Schedule 1, item 18, paragraph 290-50(5)(a) of Schedule 1 to the TAA 1953]***

Meaning of tax exploitation scheme

1.47 Schedule 1 to the Bill amends the definition of tax exploitation scheme to ensure it includes schemes that are subject to the MAAL or the DPT due to the operation of section 177DA or section 177J of the ITAA 1936, or that would reasonably be expected to be subject to either the MAAL or DPT if the scheme were implemented, where a principal purpose of entering the scheme is, or would be, to obtain a scheme benefit.
[Schedule 1, item 32, subsection 290-65(1A) of Schedule 1 to the TAA 1953]

1.48 This definition of 'tax exploitation scheme' does not apply to a scheme where it is reasonably arguable that a scheme benefit is, or would be, available at law under paragraph 290-65(1)(b).

Example 1.5 – unimplemented anti-avoidance schemes

A partner in a professional services firm promoted a scheme to a client which sought to raise finance for the client's business expansion in a way that reduced the client's tax liability that would not otherwise have been available at law. On a full examination of

all of the factual circumstances and evidence around the scheme, it was reasonable to conclude that, if the scheme were implemented, the provisions of the DPT would have applied because a principal purpose of the scheme would have been to obtain a tax benefit. Given it was not reasonably arguable that the reduction in the client's tax liability (the scheme benefit) would have been available at law if the scheme was implemented, the scheme constitutes a tax exploitation scheme.

ATO rulings

1.49 Schedule 1 to the Bill extends the scope of the promoter penalty laws to apply to all ATO rulings, specifically public, private and oral rulings. This ensures the promoter penalty laws prohibit an entity from promoting a scheme on the basis of conformity with a public ruling, private ruling or oral ruling where the scheme is materially different from the scheme described in the ruling. ***[Schedule 1, items 8, 9, 10, 11, 13, 21, 25, 27 and 28, subsections 290-50(1A), (2), (2A) and (5), and subsections 290-55(5) and (7) of Schedule 1 to the TAA 1953]***

1.50 The majority of public rulings that are not class rulings or product rulings are of broad application and may not sufficiently describe a scheme for the purposes of the promoter penalty laws. However, the scheme in this context takes its meaning as defined in subsection 995-1(1) of the ITAA 1997 and therefore may be narrowly or broadly determined. By extending the promoter penalty regime to cover all public rulings, the intention is to cover as many rulings as possible that may be relied upon by promoters for false endorsement of a scheme as conforming with an ATO ruling. By extending the promoter penalty regime to cover private rulings, this amendment ensures promoters are also held accountable for their part in the promotion of conformity of a scheme with one described in a private ruling (as represented in an edited version or as set out in the private ruling itself) that is materially different.

1.51 Oral rulings cannot be provided in relation to complex matters and are limited in scope. Nonetheless, covering oral rulings will ensure that promoters who advise clients, including partners in multidisciplinary firms on their personal tax affairs by asserting they are relying on oral advice from the ATO, but are applying a materially different scheme, are also potentially subject to promoter penalties being imposed.

1.52 Extending the promoter penalty regime to cover private, public and oral rulings deters entities from promoting schemes which incorrectly purport to conform with a ruling by the ATO.

1.53 Schedule 1 to the Bill makes consequential amendments to the objects clause of Division 290 and to provisions throughout the promoter penalty regime to reflect these changes.

[Schedule 1, items 5, 6, 7 and 34, paragraphs 290-5(a) and (b) and paragraph 290-135(a) of Schedule 1 to the TAA 1953]

Promoting and implementing schemes otherwise than in accordance with rulings

1.54 These amendments ensure that a civil penalty can be imposed on an entity that engages in conduct which results in:

- an entity being a promoter of a tax exploitation scheme; or
- a scheme that is materially different from that described in a public, private or oral ruling being promoted on the basis of conforming with that ruling (whether the scheme is implemented or not); or
- a scheme that is promoted on the basis of conformity with a public, private or oral ruling, being implemented in a way that is materially different from the ruling, regardless of whether the scheme is the subject of the ruling.

[Schedule* 1*, items 8, 9, 10, 11, 12, 13 and 14, subsections 290-50(1A), (2), (2A) and (3) of Schedule 1 to the TAA 1953]

1.55 Schedule 1 to the Bill clarifies that the promoter penalty provisions do not require that a scheme be implemented for a civil penalty to be imposed.

1.56 It is intended that civil penalties can be imposed for the promotion of schemes as being in conformity with a public, private or oral ruling before, during or after implementation and also in situations where the scheme is not ultimately implemented. This covers situations where a scheme is in the preparatory states of being implemented but is not yet fully implemented.
[Schedule 1, items 8, 14 and 17, subsections 290-50(1A), (3) and (5) of Schedule 1 to the TAA 1953]

1.57 Further, these amendments clarify that the scheme that is promoted on the basis of conformity with a ruling, whether implemented or not, does not need to be the subject of that ruling. In particular, a civil penalty may still be imposed where the scheme promoted as conforming with a ruling is materially different from the description of the scheme outlined in the ruling. This overcomes the decisions in the cases of *Commissioner of Taxation of the Commonwealth of Australia v Ludekens [2013] FCA 142* and *Commissioner of Taxation v Ludekens [2013] FCAFC 100*, where the Court held that it was necessary for the scheme that was promoted as conforming with a ruling, to be the subject of a product ruling for the promoter penalty provision (subsection 290-50(2)) to apply.
[Schedule 1, item 9, subsection 290-50(2) of Schedule 1 to the TAA 1953]

1.58 The amendments do not penalise conduct which results in mere advice being given in relation to a scheme. The amendments are intended to capture conduct which results in the encouragement of a scheme described in paragraph 1.54. For example, merely giving advice about the tax consequences of a scheme is unlikely to constitute promoting the scheme.

Time limitations

1.59 Schedule 1 to the Bill amends the time limitation provisions within the promoter penalty regime to:

- ensure that an application for a civil penalty in relation to a scheme that has not yet been implemented must be made within six years of the scheme last being promoted or implemented; and
  [Schedule 1, items 20, 22 and 23, subsections 290-55(4) and (5) of Schedule 1 to the TAA 1953]

- clarify that there is no time limitation in relation to schemes that have not been implemented where the scheme that is subject of an application by the Commissioner involves tax evasion, or would involve tax evasion if it were implemented.
  [Schedule 1, item 24, subsection 290-55(6) of Schedule 1 to the TAA 1953]

Commencement, application, and transitional provisions

1.60 Schedule 1 to the Bill commences on 1 July 2024 (or, if not commenced by that date, on the first day of the first quarter following Royal Assent).

1.61 The amendments to section 290-55 of Schedule 1 to the TAA 1953 apply in relation to conduct engaged in before, on or after the commencement of the amendments.
[Schedule 1, subitem 37(2)]

1.62 The remaining amendments have effect from the date of commencement.
[Schedule 1, subitem 37(1)]

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