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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

[HOUSE OF REPRESENTATIVES/SENATE]

TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL 2023: PWC RESPONSE—PROMOTER PENALTY LAWS REFORM

EXPLANATORY MEMORANDUM

(Circulated by authority of [insert name and title of approving Minister].)

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	***Definition***
ATO	Australian Taxation Office
Bill	Treasury Laws Amendment (Measures for Consultation) Bill 2023: PWC Response—promoter penalty laws reform
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
SGE	significant global entity
TAA 1953	*Tax Administration Act 1953*

Chapter 1: Promoter penalty laws reform

Outline of chapter

Schedule [#] to the Bill amends the TAA 1953 to increase the time the Commissioner of Taxation 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

1.1 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 prohibit entities from misrepresenting arrangements as being endorsed by the ATO through product rulings.

1.2 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.

1.3 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.

1.4 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.

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

Time limitation to commence civil penalty proceedings

1.6 The 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 that commences from the time that the promoter last engaged in the promoter conduct.

1.7 The Commissioner frequently becomes aware of the promotion of schemes during client audits, which often occur well after the 4-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

1.8 The provisions concerning the promotion of tax exploitation schemes are explicit that the scheme need not be implemented for a penalty to be imposed. However, the provisions concerning the misrepresentation of schemes conforming to a product ruling do not explicitly distinguish between implemented and unimplemented schemes like the tax exploitation scheme provisions do.

1.9 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 which are not implemented up to the point where a scheme benefit is in fact obtained.

Penalties

1.10 Under subsection 290-50(4) of Schedule 1 to the TAA 1953, the Federal Court of Australia may impose a maximum civil penalty which 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 the law.

1.11 When the promoter penalty provisions in Division 290 in Schedule 1 to the TAA 1953 were introduced in 2006, the intention was to align the maximum penalty with 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

1.12 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 is a promoter of a tax exploitation scheme, is that the entity has received (directly or indirectly) consideration in respect of marketing a scheme or encouraging growth or interest in a scheme.

1.13 This element has restricted the Commissioner's ability to apply these laws to genuine promoters due to the practical challenges in obtaining sufficient evidence showing 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.

Meaning of tax exploitation scheme

1.14 Currently a tax exploitation scheme may not include specific circumstances where the entity has entered into or carried out a scheme falling within the requirements of the multinational anti-avoidance law (MAAL) or the diverted profit tax (DPT) provisions, or if the scheme is not yet implemented, it would be reasonable to conclude that those requirements would be satisfied. 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.

1.15 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

1.16 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 way in a materially different way from that described in the ruling.

1.17 This means that tax practitioners and other promoters cannot be held accountable, for example, for promoting schemes to clients falsely representing that an arrangement listed on the public register of private rulings (which contains edited versions of private rulings with identifying information removed) has been endorsed by the ATO when in reality, the circumstances of the promoted scheme are materially different and the tax outcome described in the ruling is not available.

1.18 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.

1.19 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.

1.20 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 is 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.
The promoter penalty laws apply where a scheme has been promoted on the basis of conformity with a public ruling, product ruling or oral ruling but that scheme is materially different from the scheme described in the ruling (irrespective of whether the scheme has been implemented).	The promoter penalty laws apply where a scheme has been promoted on the basis of conformity with a product ruling, but implemented in a way that is materially different from that described in the product ruling.
The maximum penalty under the promoter penalty laws is the greatest of:	The maximum penalty under the promoter penalty laws is the greater of:

New law	***Current law***
• 5,000 penalty units (for an individual) 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 or SGE, 10% of the aggregated turnover of the entity for the most recent income year to end before the entity engaged 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 and 177J of the ITAA 1936, respectively.	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.
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 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.

Detailed explanation of new law

Extending time limitation for ATO to commence civil proceedings

1.21 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.

1.22 Schedule # to the Bill extends this timeframe to 6 years. ***[Schedule ##, items 15, 17, subsections 290-55(4) and (5) of Schedule 1 to the TAA 1953]***

1.23 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 consequences of their actions.

1.24 The extended timeframe available to the Commissioner applies in relation to conduct engaged in before, on or after the commencement of the amendments. ***[Schedule [#], subitem 32(2)]***

1.25 This means the ATO is in a better position to take action against promoters in breach 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 a groundless professional privilege claim is designed to run down a time period.

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 under these amendments would apply so that the ATO could make an application to the Federal Court for the imposition of a promoter penalty on the tax practitioner.

Penalties

1.26 Schedule # 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 benefit 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 #, item 11, subsection 290-50(4), (4A) and (4B) of Schedule 1 to the TAA 1953]

1.27 The amendments do not affect the maximum penalty that can be imposed on an individual of 5,000 penalty units. Consistent with the existing law, the amendments do not limit the power of the Court to ensure the penalty amount is appropriate.

1.28 These amendments align the maximum civil penalties for promoters of tax exploitation schemes with the penalties in the *Corporations Act 2001*.

1.29 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 multidisciplinary firms are accountable regardless of their entity structure.

1.30 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.

1.31 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 #, item 30, section 444-30 of Schedule 1 to the TAA 1953]

1.32 Where a civil penalty may be imposed in relation to a contravention by a trust, the contravention is taken to be committed by the trustee, or by each trustee if there is more than one trustee of the trust. Where it follows that an amount is

payable by more than one trustee, the trustees are jointly and severally liable.
[Schedule #, item 31, section 444-120 of Schedule 1 to the TAA 1953]

1.33 An entity who is a partner in a partnership that is an SGE, or is a trustee of a trust that is an SGE, 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 #, item 14, section 290-55 (2) of Schedule 1 to the TAA 1953]

1.34 An entity who 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 #, item 24, subsection 290-55 (7A) of Schedule 1 to the TAA 1953]

Meaning of promoter

1.35 Schedule # to the Bill 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 #, item 26, paragraph 290-60(1)(b) of Schedule 1 to the TAA 1953]

1.36 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 the test to situations where the benefit is less obvious, intangible or disguised.

1.37 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 will still be included in the concept of benefit.

1.38 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 #, item 13, paragraph 290-50(5)(a) of Schedule 1 to the TAA 1953]

Meaning of tax exploitation scheme

1.39 Schedule # to the Bill amends the definition of tax exploitation scheme. The expanded definition includes schemes that are subject to the Multinational Anti Avoidance Law (MAAL) or the diverted profits tax (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.

[Schedule #, item 27, subsection 290-65(1A) of Schedule 1 to the TAA 1953]

1.40 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).

ATO rulings

1.41 Schedule # 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 #, items 4, 5, 6, 7, 9, 16, 20, 22 and 23, subsections 290-50(1A), (2), (2A) and (5), and subsections 290-55(5) and (7) of Schedule 1 to the TAA 1953]

1.42 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.

1.43 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.

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

1.45 Schedule # 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 #, items 1, 2, 3 and 29, paragraphs 290-5(a) and (b) and paragraph 290-135(a) of Schedule 1 to the TAA 1953]

Promoting and implementing schemes otherwise in accordance with rulings

1.46 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); and
- 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 #, items 4, 5, 6, 7, 8 and 10, subsections 290-50(1A), (2) and (2A) of Schedule 1 to the TAA 1953]

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

1.48 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 #, items 4, 10 and 12, subsections 290-50(1A), (3) and (5) of Schedule 1 to the TAA 1953]

1.49 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 #, items 5, 6 and 7, subsections 290-50(2) of Schedule 1 to the TAA 1953]

Time limitations

1.50 Schedule # 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 being promoted; and
  [Schedule #, items 15 and 17 and 18, subsection 290-55(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; and
  [Schedule #, item 19, subsection 290-55(6) of Schedule 1 to the TAA 1953]

Commencement, application, and transitional provisions

1.51 Schedule [#] 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).

1.52 The amendments to section 290-55 of Schedule 1 apply in relation to conduct engaged in before, on or after the commencement of the amendments.
[Schedule [#], subitem 32(2)]

1.53 The remaining amendments have effect from the date of commencement.
[Schedule #, subitem 32(1)]