



Australian Government
The Treasury



Review of tax promoter penalty laws

Consultation paper

October 2024

Consultation Paper 5

treasury.gov.au

© Commonwealth of Australia 2024

This publication is available for your use under a [Creative Commons Attribution 3.0 Australia](https://creativecommons.org/licenses/by/3.0/au/legalcode) licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.



Use of Treasury material under a [Creative Commons Attribution 3.0 Australia](https://creativecommons.org/licenses/by/3.0/au/legalcode) licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

Treasury material used 'as supplied'.

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics — then Treasury prefers the following attribution:

Source: The Australian Government the Treasury

Derivative material

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

Based on The Australian Government the Treasury data

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the Department of the Prime Minister and Cabinet website (see <https://www.pmc.gov.au/honours-and-symbols/commonwealth-coat-arms>).

Other uses

Enquiries regarding this licence and any other use of this document are welcome at:

Manager
Media and Speeches Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: media@treasury.gov.au

In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

Contents

- Contents ii
- Consultation Process 3
 - Request for feedback and comments 3
- Review of tax promoter penalty laws 4
 - Introduction 4
 - Objective of this consultation 7
 - Background 7
 - Tax intermediaries 7
 - Purpose of the tax promoter penalty laws 8
 - Operation of the tax promoter penalty laws 9
 - Exceptions 10
 - Consequences of breaching the tax promoter penalty laws 11
 - Administration of tax promoter investigations 14
 - Time limitations 14
 - Other frameworks 14
- Summary of consultation questions 16
- Appendix 1: Summary of recent updates to the tax promoter penalty laws 18

Consultation Process

Request for feedback and comments

Closing date for submissions: 01 November 2024

Email	taxintegrity@treasury.gov.au
Mail	Director, Tax Agent Regulation Unit Personal, Indirect Tax and Charities Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be initially directed to taxintegrity@treasury.gov.au

The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Review of tax promoter penalty laws

Introduction

Recent events have exposed limitations in the current regulatory framework for tax practitioners and the broader system in which they operate. On 6 August 2023, the Albanese Government announced a significant package of reforms to crack down on misconduct and rebuild confidence in the systems and structures that keep our tax system and capital markets strong.

The first stage of the government response included enhancements to the regulatory framework that have recently been implemented (via *Treasury Laws Amendment (2023 Measures No.1) Act 2023 (Cth)*), including:

- requiring tax and Business Activity Statement (BAS) agents, collectively referred to as tax practitioners, not to employ, use or enter into arrangements with a disqualified entity without Tax Practitioners Board (TPB) approval
- changing the registration period for tax practitioners from three years to an annual renewal
- requiring tax practitioners to report to the TPB, significant breaches of the Code of Professional Conduct relating to their own conduct, and conduct of other tax practitioners. This requirement commenced on 1 July 2024.
- enabling the relevant Minister to supplement the Code of Professional Conduct for tax practitioners (initial consultation regarding changes to the Code closed on 21 January 2024). Further consultation regarding changes to the Code via the *Tax Agent Services (Code of Professional Conduct) Determination* closed on 2 October 2024.

The second stage of the government response included measures that strengthen the integrity of the tax system and increase the powers of relevant regulators. These measures were recently implemented via *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 (Cth)*, which received Royal Assent on 31 May 2024. These measures:

- increase the scope and penalty amount of penalty provisions that apply to promoters of tax exploitation schemes
- improve information exchange between government agencies as well as professional representatives on potential misconduct
- extend whistleblower protection for those who wish to disclose alleged misconduct to the TPB
- enable enhanced TPB investigations and improve transparency of tax practitioner misconduct on the TPB public register.

The next phase of the government response is a suite of consultations that focus on proposals to further strengthen the regulatory framework and the broader system in which tax intermediaries operate. In this stage of the response, Treasury will be undertaking the following:

- a review of the sanctions regime that the TPB administers (consultation on proposed enhancements closed on 21 January 2024)

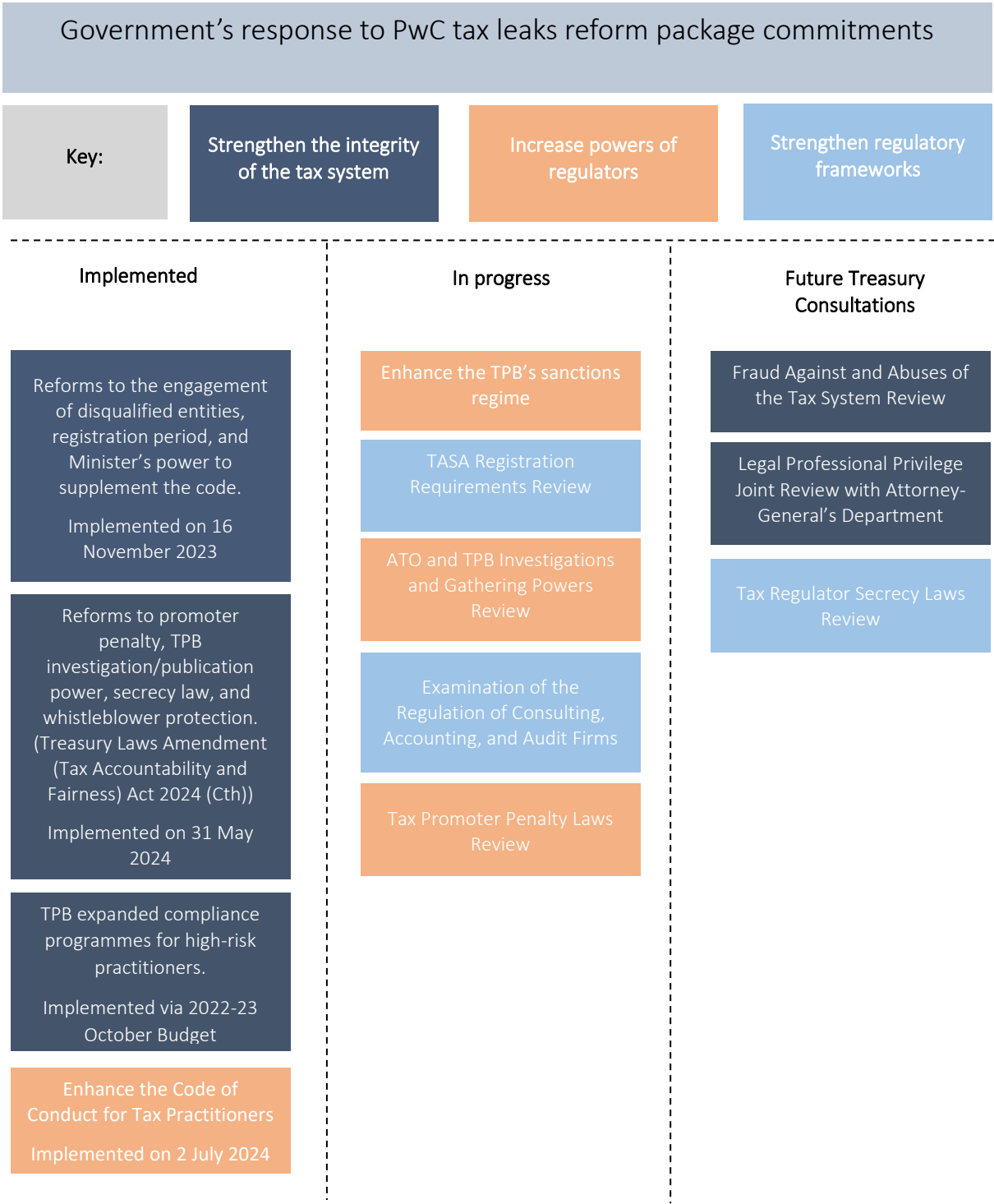
- a review of the Australian Taxation Office's (ATO) and TPB's respective investigation and information gathering powers (consultation closed 31 May 2024)
- an examination of the regulation of consulting, accounting and audit firms (consultation closed on 28 June 2024)
- a review of the tax practitioner registration requirements (consultation closed 14 August 2024)
- a review of the penalty regime that applies to promoters of tax exploitation schemes ([this consultation paper](#))
- a review of the secrecy provisions that restrict information sharing by government bodies such as the ATO and TPB
- a review of emerging fraud and systemic abuse of the tax and superannuation systems
- a joint review with the Attorney-General's Department of the use of legal professional privilege in Commonwealth investigations.

Additionally the Government has:

- Provided \$30.4 million in funding to the TPB over the four years from 1 July 2023 in the 2022-23 October Budget to enable the roll out of an expanded compliance program, targeting higher risk tax practitioners who may be unregistered, designing schemes, driving tax avoidance, or promoting tax evasion or other criminality.
- Provided \$187.0 million in funding to the ATO over the four years from 1 July 2024 in the 2024-25 Budget to strengthen its ability to detect, prevent and mitigate fraud against the tax and superannuation systems.

Figure 1 summarises past, current, and future work Treasury is undertaking to strengthen the regulatory framework.

Figure 1: Work being undertaken by Treasury to strengthen the regulatory system



Objective of this consultation

This consultation seeks views on whether the tax promoter penalty laws (TPPL) operate as intended, are fit for purpose, and are adequate to deter, and to protect the community from contemporary forms of misconduct. With the rise in social media usage and changes in and the use of technology, promoter behaviours have evolved, making the proliferation of tax misconduct easier and more expansive.

Emerging behaviours such as those set out below have been increasing:

- facilitation and promotion of schemes via social media
- promotion of non-lodgement and non-payment of tax debts
- promotion of schemes across jurisdictions
- schemes to make fraudulent claims
- promotion of bespoke but similar schemes
- involvement of multiple tax intermediaries in the promotion of a scheme
- tax intermediaries encouraging aggressive tax positions on existing transactions which are contrary to the law.

This review also seeks views on whether the existing tax promoter penalty law framework has kept up with new emerging threats to the integrity of the tax system and if the tax promoter penalty laws should be expanded to capture lower-level promoter behaviour.

This process invites feedback on the opportunities, barriers, and challenges to improving the operation of the tax promoter penalty laws. Treasury welcomes views on how these issues should be tackled and the merits and risks of different approaches. Treasury is aware that views raised in relation to the tax promoter penalty laws may also be relevant to the promoter penalties in relation to promotion of illegal early release schemes under section 68B of the *Superannuation Industry (Supervision) Act 1993 (Cth)*.

Treasury encourages feedback from stakeholders on any elements of this consultation paper. Stakeholders do not need to provide responses to all questions posed in the paper within their submission.

Should any gaps or challenges of the tax promoter penalty laws be identified during this consultation, Treasury intends to publish an options paper detailing proposed policy changes in response to these gaps and challenges.

Background

The tax promoter penalty laws play an important role in maintaining the integrity of, and confidence in, the Australian tax system. A robust tax promoter penalty regime provides a strong deterrent to wrongdoing and provides for the ATO's ability to effectively penalise those who engage in misconduct.

Tax intermediaries

Within the tax system, taxpayers may engage a tax agent or BAS agent (collectively referred to as tax practitioners) to assist with the management of their tax affairs. As detailed further below, tax practitioners are regulated by the TPB. This paper also refers to tax intermediaries. Tax intermediaries

are a wider subset of entities that include tax practitioners, but also other entities that may engage in the tax system on behalf of, or with the authorisation of, a taxpayer (such as unregistered advisers, lawyers, digital service providers, and insolvency practitioners amongst others).

Relevant regulators

At a high level, the roles of the relevant regulators can be summarised as follows:

The ATO is the principal revenue collection agency of the Australian Government and is responsible for the administration of Australia's tax and superannuation systems.

The TPB is responsible for the registration and regulation of tax practitioners. The TPB's role is to support public trust and confidence in the integrity of the tax profession and of the tax system by ensuring that tax practitioner services are provided to the public in accordance with appropriate standards of professional and ethical conduct. While the TPB is included in the ATO program structure in accordance with the *Public Governance, Performance and Accountability Act 2013 (Cth)* it operates independently of the ATO.

Although the TPB has the primary responsibility for the regulation of tax practitioners, the administration of the promoter penalty regime under the *Taxation Administration Act 1953 (Cth)* (TAA) is the responsibility of the ATO. Not all promoters of tax exploitation schemes are tax practitioners, and as such the responsibility for enforcing the integrity of the tax system and penalising promoters of tax exploitation schemes lies with the ATO. Under the promoter penalty laws, the ATO brings forward a case against a promoter and the Federal Court is responsible for determining the contravention, quantum, and imposition of any penalties against the promoter.

Purpose of the tax promoter penalty laws

The promoter penalty provisions within Division 290 of Schedule 1 to the TAA aim to deter the promotion of tax avoidance and tax evasion schemes (collectively referred to as 'tax exploitation schemes'), where the scheme benefit to be claimed is not permitted under the law. These provisions also prohibit tax intermediaries from promoting or implementing a scheme and misrepresenting that scheme as being endorsed by the ATO through public, private, or oral rulings.¹ The tax promoter penalty laws operate as a civil penalty regime. The operation of the regime is discussed in further detail in the 'Operation of the tax promoter penalty laws' part of this paper below.

From their inception, the aims of the promoter penalty laws have been to increase consumer protection, to enhance confidence in the integrity of Australia's tax system, and to increase compliance. Laws to deter the promotion of tax exploitation schemes were intended to apply to boutique schemes promoted to one client, to schemes promoted to existing clients concerning their commercial operations, and to schemes where tax intermediaries encourage clients to enter a particular scheme and receive consideration. The laws were to have a real time impact to stop the promotion of schemes before taxpayers participate.

The tax promoter penalty laws were introduced following the mass-marketed tax exploitation schemes prevalent in the 1990s, however the laws are not restricted to applying only to widely offered schemes. Over time, the nature of scheme promoter activity has evolved as tax exploitation schemes have become more bespoke and complex, often operating across jurisdictional boundaries and involve multiple intermediaries. This can result in a separation between the marketing, design,

¹ The *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 (Cth)* extended the application of the tax promoter penalty laws to include the misrepresentation of arrangements as being endorsed via all public, private and oral rulings. Prior to this, the tax promoter penalty laws applied to product rulings only. See Appendix 1 to this paper for further discussion of the changes which came into effect on 1 July 2024.

facilitation, and implementation of the scheme. There has also been an increase in schemes designed to circumvent the anti-avoidance provisions. Currently, schemes that encourage taxpayers not to lodge tax returns, disregard tax debts, and to make fraudulent claims (such as overstating their entitlement to input tax credits in a Business Activity Statement) are becoming more prevalent. There has been an increase in the use of social media to spread facilitate and promote tax exploitation schemes, which in some circumstances reach large audiences and further the promoter’s online profile, providing benefits which aren’t strictly financial.

Marketing of bespoke, but similar, schemes to a variety of taxpayers with similar circumstances is becoming increasingly common. While the tax promoter penalty laws are intended to apply to bespoke schemes (where there is a scheme promoted to a single taxpayer), in addition to ‘mass marketed’ schemes, it is unclear when the law permits distinct bespoke schemes to be grouped together as one course of promoter conduct. To manage this uncertainty, the Commissioner may need to bring proceedings in relation to each instance of promotion, rather than bringing one case spanning the pattern of a promoter’s behaviour over time.

Operation of the tax promoter penalty laws

The tax promoter penalty laws apply to conduct both within and outside Australia that is prohibited conduct, unless an exclusion or exception applies. The table below defines key terms for the purposes of the tax promoter penalty laws.

Concept	Meaning
Tax exploitation scheme	<p>A scheme is a tax exploitation scheme if both of the following apply:</p> <ul style="list-style-type: none"> • at the time of promotion, <ul style="list-style-type: none"> – if the scheme has been implemented – it is reasonable to conclude that an entity entered into the scheme with the sole or dominant purpose of that entity or another entity gaining a scheme benefit from the scheme²; – if the scheme is not yet implemented – it is reasonable to conclude that if an entity had entered into the scheme it would have done so with the sole or dominant purpose of that entity or another entity gaining a scheme benefit from the scheme³; • it is not reasonably arguable that the scheme benefit is or would be available at law.
Scheme benefit	<p>An entity gets a scheme benefit if:</p> <ul style="list-style-type: none"> • the entity’s tax liability is lower than it would have been if the entity had not participated in the scheme; or

² For a scheme to which ss 177DA or 177J would apply, a principal purpose test applies instead of the ‘sole or dominant purpose test’ that generally applies. That is, it is reasonable to conclude that that an entity entered into or carried out the scheme for a principal purpose of that entity or another getting a scheme benefit.

³ For a scheme to which ss 177DA or 177J would apply, a principal purpose test applies instead of the ‘sole or dominant purpose test’ that generally applies. That is, it is reasonable to conclude that that an entity entered into or carried out the scheme for a principal purpose of that entity or another getting a scheme benefit.

	<ul style="list-style-type: none"> the entity is entitled to receive a larger tax refund than it would have had it not entered into the scheme.
Promoter	<p>An entity is a promoter of a tax exploitation scheme if:</p> <ul style="list-style-type: none"> it markets or encourages growth of or interest in the scheme (including schemes promoted but not implemented); it (or its associate) directly or indirectly receives a benefit⁴ in respect of that marketing or encouragement; it has a substantial role in respect of the marketing or encouragement.
Prohibited conduct	<p>Prohibited conduct means conduct by an entity that results in:</p> <ul style="list-style-type: none"> any entity being (or causing another entity to be) a promoter of a tax exploitation scheme; a scheme that has been promoted on the basis of conformity with a public, private or oral ruling being implemented in a way that is materially different to the way it has been described in the ruling.

Practice Statement PS LA 2021/1 provides the Commissioner's guidance regarding the administration of the tax promoter penalty laws (and a separate promoter penalty provision at section 68B of the *Superannuation Industry (Supervision) Act 1993 (Cth)*).

Exceptions

The most significant exceptions to the tax promoter penalty laws include:

- **Reasonable mistake or reasonable precautions:** The Federal Court must not order an entity to pay civil penalties if the entity satisfies the Federal Court that the behaviour was due to a reasonable mistake of fact, accident, or the behaviour was due to an act or default of another entity and reasonable precautions were exercised to avoid the conduct.⁵
- **Mere advice:** An entity is not a promoter of a tax exploitation scheme merely because they provide advice about the scheme.⁶
- **Reliance on advice from the Commissioner:** An entity is not a promoter of a tax exploitation scheme if the scheme conformed with advice given to the entity by the Commissioner in relation to treating a taxation law in a particular way.⁷
- **Time limitation:** The Commissioner cannot apply to the Federal Court for the imposition of civil penalties relating to promotion behaviour that occurred more than six years ago. (Note that this time exception does not apply to schemes involving tax evasion).⁸

⁴ The *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 (Cth)* replaced 'consideration' with 'benefit', with effect from 1 July 2024. See Appendix 1 to this paper for further discussion of the changes.

⁵ Subsection 290-55(1) of Schedule 1 to the TAA.

⁶ Subsection 290-60(2) of Schedule 1 to the TAA.

⁷ Subsection 290-55(3) of Schedule 1 to the TAA.

⁸ Subsections 290-55(4)-(6) of Schedule 1 to the TAA. Note that the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 (Cth)* amended the time limitation to be six years from 1 July 2024. Prior to this, the time limitation was four years.

- **Employees:** The Commissioner cannot apply to the Federal Court for the imposition of civil penalties in relation to an individual's conduct if the Federal Court has ordered the individual's employer to pay civil penalties in relation to the same scheme.⁹ An employee that merely distributes information or materials prepared by another is not a promoter.¹⁰

Illustrated Example

A taxpayer asks a registered tax agent for advice on the tax treatment of a specific scheme the taxpayer will implement. The tax agent provides their objective advice on that scheme. The conduct does not appear to market or encourage growth of the scheme. This conduct is likely to fall within the mere advice exception.

Consequences of breaching the tax promoter penalty laws

If an entity has contravened the tax promoter penalty laws, the Commissioner can apply to the Federal Court to make a finding that an entity has contravened the tax promoter penalty laws and impose a civil penalty. The maximum civil penalty amount is the greatest of:

- Three times the benefits received or receivable (directly or indirectly) by the entity and associates of the entity in respect of the scheme, or
- 5,000 penalty units (currently equal to \$1,565,000) for an entity other than a body corporate or significant global entity (SGE), or 50,000 penalty units (currently equal to \$15,650,000) for a body corporate or SGE;
- 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 tax promoter penalty laws – capped at 2.5 million penalty units (currently equal to \$782,500,000).


The Commissioner can apply to the Federal Court to grant an injunction where an entity has or proposes to engage in conduct that contravenes the promoter penalty laws.

The Commissioner may also accept a written undertaking (enforceable voluntary undertaking, or EVU) from an entity for the purposes of deterring the promotion of tax exploitation schemes.¹¹ It is not necessary for the Federal Court to find that the tax promoter penalty laws have been contravened for the Commissioner to accept an EVU (that is, the Commissioner could accept an EVU from an entity to

⁹ Subsection 290-55(8) of Schedule 1 to the TAA.

¹⁰ Subsection 290-60(3) of Schedule 1 to the TAA.

¹¹ An EVU can be accepted under section 290-200 of Schedule 1 to the TAA, for the purposes of deterring the promotion of tax exploitation schemes, and to deter the promotion of schemes that are materially different to, or the implementation of schemes, that have been promoted on the basis of conformity with a ruling in a way that is materially different from that prescribed in the ruling.



manage behaviours where there is a risk of contravention occurring, or in other cases where an EVU is an appropriate response and where it would not be appropriate to apply to the Federal Court).

A breach of the TPPL by a tax practitioner may impact their ability to remain registered with the Tax Practitioners Board. To maintain TPB registration, an individual must be a 'fit and proper person'. For registered partnership or company tax practitioners, all individual partners and company directors respectively must also be fit and proper. If a tax practitioner has contravened the TPPL, then this must be considered by the TPB in determining if the tax practitioner is 'fit and proper'. If the tax practitioner is found to not be 'fit and proper', then their registration may be terminated.

Where a tax practitioner breaches the TPPL, they may become a 'disqualified entity'. The definition of a 'disqualified entity' includes where an entity has been penalised for being a promoter of a tax exploitation scheme.¹² Becoming a disqualified entity has implications for an entity's ability to provide tax agent services, or be employed by another entity to provide tax agent services under the TASA.

¹² Subsection 45-5(2) of the TASA.

Consultation questions

1. Are the tax promoter penalty laws effective in deterring and treating the promotion of tax exploitation schemes?
2. Are the tax promoter penalty laws capable of having a real time impact in preventing the promotion of schemes before taxpayers participate in tax schemes?
3. Does the scope of the tax promoter penalty laws capture the appropriate range of misconduct, including but not limited to emerging behaviours as described above?
4. Does the definition of 'promotion' (marketing or encouraging growth in a scheme, but not specifically design, facilitation, or implementation) capture the appropriate range of promoter behaviour?
5. What risks and advantages exist in the introduction of grouping rules for conduct of associates (for example, where one party designs the scheme and another markets the scheme)? Is the current regime effective in capturing all parties involved in the promotion of tax exploitation schemes across multidisciplinary firms or other legal intermediaries?
6. Are the definitions of 'promoters' and 'scheme benefit' broad enough to capture schemes designed to circumvent anti-avoidance provisions or emerging behaviours (such as those discussed above) by promoters of tax exploitation schemes? Is law change required?
7. Should the law apply on the same basis to promoters who engage in the promotion of bespoke but similar schemes to multiple taxpayers as it would to mass marketed schemes?
8. Is the mere advice exception able to be clearly understood and applied in practice? Do tax intermediaries understand what behaviour is acceptable under this exception?
9. Does the mere advice exception achieve a clear and adequate balance for tax practitioners between the protection of advice, and the potential application of the TPPL to the development and marketing of schemes to one or more clients?
10. In relation to the other exceptions (e.g. reasonable mistake, reliance on advice from the Commissioner, employees), do these exceptions provide the appropriate level of safeguards to involved parties, without obstructing the operation of the tax promoter penalty laws?
11. Is the threshold of 'sole or dominant purpose' of gaining a scheme benefit appropriate? Would a different threshold be more appropriate?
12. Are the tax promoter penalty laws best structured as a civil penalty regime, or would another framework design (such as administrative penalties) be more appropriate instead of, or in addition to, the current civil penalty regime?
13. Are there any areas within the tax promoter penalty laws that require further clarification? If so, why?

Administration of tax promoter investigations

Time limitations

Tax law limitation periods balance the need for the Commissioner to have sufficient time to review matters with the rights of entities to know with confidence their liabilities under the law. There is currently a six-year limitation period for the Commissioner to apply to the Federal Court for the imposition of civil penalties under the TPPL. The limitation period begins from the time that the promoter last engaged in promoter behaviour.

As outlined in the Explanatory Memorandum to the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 (Cth)*, the usual way that the Commissioner becomes aware of promotional conduct is on review of a taxpayer's affairs. In practice, the promotional conduct may have occurred long before a review or audit occurs. Amendments in the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 (Cth)* increased the time limitation period for cases of avoidance schemes from four to six years. No time limitation applies to cases of tax evasion schemes.

In cases where the Commissioner becomes aware of the conduct within the time limitation period, the ATO must gather evidence and prepare a case within the remaining time period. Investigating promoter conduct requires that evidence be gathered from participants in the scheme (entities that the scheme was promoted to), who may be involved in a separate or concurrent audit investigation with the ATO. The ATO has powers under Division 353 of Schedule 1 to the TAA to issue notices requiring entities to give information, however the ATO can be faced with uncooperative participants or obstructive legal professional privilege claims. There is no mechanism for the ATO to request an extension of time in cases of promoter penalties for tax exploitation schemes or promoting schemes on the basis of conformance with product rulings.

Consultation questions

14. Are there opportunities for reform (within the tax promoter penalty laws or separate to the tax promoter penalty laws) to allow the Commissioner to deliver a timely response to promoter conduct? Alternatively, are there any opportunities for reform to address challenges faced in investigating misconduct during the time limitation period?

Other frameworks

Tax intermediaries who engage in promotion of schemes may also be subject to:

- Prosecution under the *Crimes (Taxation Offences) Act 1980 (Cth)* (Taxation Offences Act) for aiding or abetting arrangements to avoid the payment of income tax.
- Prosecution under Part III of the TAA for certain taxation offences.
- Prosecution under Division 135 of the *Criminal Code Act 1995 (Cth)* (Criminal Code) for offences relating to fraudulent conduct.
- Prosecution under Section 68B of the *Superannuation Industry (Supervision) Act 1993 (Cth)*.

Prosecutions of tax intermediaries under the Taxation Offences Act, TAA and Criminal Code Act are rare. Where those provisions are invoked, they typically apply only to taxpayer (rather than tax intermediary) misconduct.

Where the tax exploitation scheme promoter is a registered tax practitioner, they may be subject to regulatory action by the TPB, and the TPB may be able to apply to the Federal Court for the imposition of sanctions under the TASA (although it is noted that TPB's sanction regime applies only to misconduct that amounts to a breach of the TASA). It is also possible that the scheme promotion behaviour may amount to a breach of the TPB Code of Professional Conduct.

Tax exploitation scheme promoters may also be subject to strategic ATO audit activity, adviser education or other non-adviser specific treatments such as Taxpayer Alerts or Practical Compliance Guidelines.

Outside the ATO and the TPB, additional legislative frameworks and regulations may apply to a tax exploitation scheme promoter, including consumer protection legislation in the *Competition and Consumer Act 2010 (Cth)* (administered by the Australian Competition and Consumer Commission) or the *Australian Securities and Investigations Act 2001 (Cth)* (administered by the Australian Securities and Investments Commission), and the *Trade Practices Act 1974 (Cth)*.


Additionally, the tax exploitation scheme promoter may be subject to disciplinary action by a professional association if they are a member of a professional body and the conduct amounts to a breach of the association's standards.

Consultation questions

15. Are the ATO and TPB appropriately tasked with the correct respective regulatory scopes in relation to tax intermediary misconduct?
16. Are there any other existing comparable regimes which are effective at deterring similar types of misconduct?
17. Given the nature of the risks to system integrity that promotion behaviour imposes, are there reasons why it might not be appropriate that the same instance of misconduct may result in a person being subject to sanctions under multiple regimes?

Summary of consultation questions

1. Are the tax promoter penalty laws effective in deterring and treating the promotion of tax exploitation schemes?
2. Are the tax promoter penalty laws capable of having a real time impact in preventing the promotion of schemes before taxpayers participate in tax schemes?
3. Does the scope of the tax promoter penalty laws capture the appropriate range of misconduct, including but not limited to emerging behaviours as described above?
4. Does the definition of 'promotion' (marketing or encouraging growth in a scheme, but not specifically design, facilitation, or implementation) capture the appropriate range of promoter behaviour?
5. What risks and advantages exist in the introduction of grouping rules for conduct of associates (for example, where one party designs the scheme and another markets the scheme)? Is the current regime effective in capturing all parties involved in the promotion of tax exploitation schemes across multidisciplinary firms or other legal intermediaries?
6. Are the definitions of 'promoters' and 'scheme benefit' broad enough to capture schemes designed to circumvent anti-avoidance provisions or emerging behaviours (such as those discussed above) by promoters of tax exploitation schemes? Is law change required?
7. Should the law apply on the same basis to promoters who engage in the promotion of bespoke but similar schemes to multiple taxpayers as it would to mass marketed schemes?
8. Is the mere advice exception able to be clearly understood and applied in practice? Do tax intermediaries understand what behaviour is acceptable under this exception?
9. Does the mere advice exception achieve a clear and adequate balance for tax practitioners between the protection of advice, and the potential application of the TPPL to the development and marketing of schemes to one or more clients?
10. In relation to the other exceptions (e.g. reasonable mistake, reliance on advice from the Commissioner, employees), do these exceptions provide the appropriate level of safeguards to involved parties, without obstructing the operation of the tax promoter penalty laws?
11. Is the threshold of 'sole or dominant purpose' of gaining a scheme benefit appropriate? Would a different threshold be more appropriate?
12. Are the tax promoter penalty laws best structured as a civil penalty regime, or would another framework design (such as administrative penalties) be more appropriate instead of, or in addition to, the current civil penalty regime?
13. Are there any areas within the tax promoter penalty laws that require further clarification? If so, why?
14. Are there opportunities for reform (within the tax promoter penalty laws or separate to the tax promoter penalty laws) to allow the Commissioner to deliver a timely response to promoter conduct? Alternatively, are there any opportunities for reform to address challenges faced in investigating misconduct during the time limitation period?
15. Are the ATO and TPB appropriately tasked with the correct respective regulatory scopes in relation to tax intermediary misconduct?
16. Are there any other existing comparable regimes which are effective at deterring similar types of misconduct?

- 
17. Given the nature of the risks to system integrity that promotion behaviour imposes, are there reasons why it might not be appropriate that the same instance of misconduct may result in a person being subject to sanctions under multiple regimes?

Appendix 1: Summary of recent updates to the tax promoter penalty laws

A number of updates to the tax promoter penalty laws included in *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 (Cth)* have taken effect from 1 July 2024. These updates are summarised below.

Topic	New law	Previous law
Time limitation increase	The Commissioner has six years from the time the conduct that is alleged to contravene the TPPL was last engaged in to apply to the Federal Court for an order that the entity has contravened the TPPL.	The Commissioner has four years from the time the conduct that is alleged to contravene the TPPL was last engaged in to apply to the Federal Court for an order that the entity has contravened the TPPL.
Time limitation exception – extend to unimplemented schemes	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.
Increase maximum penalties	The maximum penalty under the promoter penalty laws is the greatest of: <ul style="list-style-type: none"> 5,000 penalty units (for an entity other than a body corporate or SGE) or 50,000 penalty units (for a body corporate or SGE); three 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. 	The maximum penalty under the promoter penalty laws is the greater of: <ul style="list-style-type: none"> 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.
Meaning of promoter	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	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)

Topic	New law	Previous law
	marketing or encouragement of that scheme.	consideration in respect of the marketing or encouragement of that scheme.
Meaning of tax exploitation 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.
Application of the tax promoter penalty laws to types of ATO rulings	<p>The promoter penalty laws apply in respect of conduct that results in:</p> <ul style="list-style-type: none"> - 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.