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6 November 2024

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Review of tax promoter penalty laws

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 173,000 members working in over 100 jurisdictions and regions around the world. CPA Australia has over 30,000 members in public practice in Australia, serving our communities as trusted advisers who provide business advisory, tax, financial planning, reporting, auditing/assurance and insolvency-related services.

CPA Australia supports a robust regime to dissuade and penalise the promotion of schemes designed, marketed and/or implemented to exploit Australia's tax system. The widely publicised tax exploitation scheme, Operation Protego, involved large-scale GST fraud promoted on social media and resulted in convictions under the *Criminal Code*. Recent changes to the promotor penalties regime pursuant to *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024* have also strengthened the civil penalty regime for tax schemes. Significant funding has also been provided to the ATO to address promoters including through the Tax Avoidance Taskforce. While the consultation paper suggests deficiencies in the law indicating that "the Commissioner may need to bring proceedings in relation to each instance of promotion, rather than bringing one case spanning.... behaviour over time", we question what schemes are being perpetrated that cannot be addressed by already existing rules and regulations.

Attachment A sets out CPA Australia's response to the consultation questions. However, the issues we see of critical importance are:

1. The recent changes to Division 290 of the *Tax Administration Act 1994* (Division 290) have significantly broadened the scope of the promoter penalty regime and we are concerned that the implications of these changes are not well understood by the tax practitioner community. Additionally, sufficient time has not passed to understand the effectiveness of the amendments and the impact of these changes on promoter behaviours.

   CPA Australia is not supportive of additional regulatory change to the regime at this time without further articulation of the specific challenges in utilising current legislation.

2. We question whether there are adequate processes in place to provide appropriate remediation to taxpayers who may have been misled or defrauded, and are the innocent victims of a fraudulent scheme. Our members have provided examples where clients of an advisor convicted of tax fraud remain liable for tax debts incurred in their name despite receiving no benefit or compensation, and with limited or no discretion for the Commissioner to adjust tax returns or debts.

3. As a general principle, regardless of whether a tax exploitation scheme is bespoke or mass marketed, the promoters of the scheme should be prosecuted with the same vigour, taking into

account the harm resulting from the scheme. Accordingly, the scope of the penalties potentially imposed should be tailored to fit the contravention of the promoter penalty regime on a case-by-case basis.

4. The mere advice exception should not be made so restrictive as to deter tax practitioners from opining on schemes, thereby undermining the intent of the exception.

If you have any queries please contact Neville Birthisel, Advisor - Regulation and Standards, at neville.birthisel@cpaaustralia.com.au.

Yours sincerely

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Attachment A: Consultation Questions

Strengthening registration requirements for companies and partnerships

1. ***Are the tax promoter penalty laws effective in deterring and treating the promotion of tax exploitation schemes?***

   As evidenced by tax gap research and the ATO's performance indicators, Australia has one of the highest rates of voluntary tax compliance in the world. The ATO and Tax Practitioners Board (TPB) engage with tax practitioners, professional associations like CPA Australia and the advisor community to minimise opportunities to promote schemes and work with the market to address risks.

   The ATO also has a dedicated focus on behaviours of concern and criminal behaviours, supported by dedicated Government funding including for Taskforces. The small number of cases associated with fraud and evasion, and the successful prosecution of tax frauds indicates a relatively strong and effective focus by the ATO on serious non-compliance.

   As identified in the consultation paper, we also recognise that the promoter penalty laws are only one element of the overall response to tax schemes and promoters. The breadth of existing powers, laws and regulations collectively create a strong deterrent effect due to the increasing weight of penalties and the growing range of potential offences or breaches combined with the growing access and surveillance powers of the ATO and TPB.

   From our observations and feedback from our members, we do not have evidence of a prevalence of tax exploitation schemes. Our Best Practice Reviews have not the promotion of schemes as a risk among our membership.

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?***

   Division 290 contains provisions that enable the Commissioner to apply to the Federal Court to grant an injunction, thereby enabling a real-time response under the promoter penalty regime.

   In addition to injunctions, the ATO, and to a lesser extent TPB, currently have a range of disruption and intervention tools available to respond in real-time. This includes intelligence sharing and joint actions with law enforcement agencies including the Australian Federal Police and Australian Criminal Intelligence Commission, working with key third parties as shown in the role of banks in responding to Operation Protego as well as interventions on taxpayer accounts.

   Given the lack of non-compliance we are observing, the suite of responses to promoter behaviours, including promoter penalty laws appear to be capable of having a real time impact in preventing the promotion of and participation in 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?***

   There have only been a small number of promoter penalty cases undertaken by the ATO and the consultation paper provides no details about deficiencies in the law that prevented cases progressing to litigation. Our members have not reported concerns with or identified gaps in the current promoter penalty regime.

   The recent changes to Division 290 have significantly broadened the scope of the promoter penalty regime. We hold concerns that the regime goes beyond what is required to address the mischief the regime is designed to address. The changes and their breadth are not well understood by the tax adviser community, and litigation under the amended laws is first required to judge their effectiveness and identify deficiencies.

Therefore, in the absence of more specific evidence regarding current deficiencies with Division 290 and impacted cases, CPA Australia is not supportive of any additional legislative changes to the regime at this time.

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?***

   Yes, from our observations, 'promotion' as defined in the question does 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?***

   To our knowledge and based on public disclosures by the ATO and TPB, the current suite of powers and laws provides a range of provisions through which the conduct of associates can be addressed.

   Any identified deficiencies in the law should be more clearly articulated so as to understand what amendments might be required to Division 290 to address any issues.

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?***

   As stated above, from our observations the current promoter penalty regime is effective in deterring non-compliance, noting our previous comments that the regime is now so broad as to risk an inherent lack of understanding of the promoter penalty laws resulting in unintended non-compliance from reasonable mistakes.

   CPA Australia is not supportive of any additional legislative changes at this time without further articulation of the specific challenges that currently prevent litigation under Division 290.

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?***

   Both bespoke and mass marketed schemes can occur at the most egregious end of tax exploitation behaviour or the less egregious end, depending on the nature of the scheme itself. While no scheme envisaged by Division 290 of the *Tax Administration Act 1953* should escape penalty, the severity of the penalty should be determined by a consideration of all aspects of the scheme. How the scheme was marketed should be one of those determining factors, but not the only factor considered.

   While consistency is preferable and limits the ability for schemes to be designed to escape the promoter penalty net, the application of the laws should retain flexibility such that the penalty fits the contravention of the regime. While the perpetrators of the most egregious schemes should be prosecuted to the full extent of the law, consideration should be given to the more ignorant promoters who have not fully understood the implications of their actions.

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?***

   The promotion of schemes is not a common or visible behaviour amongst our membership and there have only been a small number of cases litigated under Division 290. Therefore, most advisors are not impacted by Division 290 nor consider that they would need to rely on an exception to undertake their professional work.

Where changes to the mere advice exception might be contemplated, it is critical to ensure that the ability for tax practitioners to provide advice to their clients in a confidential and trusted manner is protected. The client-agent relationship is essential to the proper functioning of business and family affairs and fundamental to the practice of accounting and law.

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?***

   PS LA 2021/1 briefly discusses the 'mere advice' exception in a single paragraph. The practice statement fails to explore what the term means and would benefit greatly by the inclusion of multiple examples drawing out the intention of the exception.

   One such example, as noted by the Law Council of Australia in their 4 October 2023 Treasury submission, is that *the dissemination of information by tax advisers about how a tax is applied is often a useful tool to help taxpayers understand the outcome of a particular court case and may imply that taxpayers should consider whether the outcome is applicable to their own case. If the decision is later reversed (or a tax avoidance scheme is subsequently found to have existed) the question arises whether the dissemination of the information, in the first instance, would be caught. Notably, marketing material may fall within the new definition of 'benefit'*.

   Care should be taken when amendments to the exception are contemplated. Creating a situation where tax practitioners can more easily fail this exception risks tax practitioners becoming reluctant to provide advice to potential scheme investors, undermining the intent of the exception.

   Recent and upcoming compliance obligations imposed on tax practitioners, such as the proposed amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, threaten to result in tax practitioners providing compliance services only, or walking away from the profession entirely. Further changes forcing practitioners down this path should be avoided.

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?***

    We submit that conceptually these exceptions provide the appropriate level of safeguards to involved parties. However, this would be enhanced were PS LA 2021/1 to be expanded to provide clear guidance around the circumstances in which a 'reasonable mistake' could be considered to have occurred.

    Tax practitioners with no intention of being promoters should not end up in the Federal Court as the result of a reasonable mistake resulting from a lack of understanding of the now much broader 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?***

    The 'sole or dominant purpose' test is consistent with other legislation and is 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?***

    Administrative penalties are already available to the Commissioner and are not exclusive to the taxpayer but can be applied more broadly including to advisors. Promoter penalty laws are intended to address behaviours that are more serious than administrative transgressions and are therefore properly designed as civil penalties. Given the severity and consequences of scheme promotion and

the professional and personal impact on the alleged promoter/s, it is appropriate for the Commissioner to be required to prove his case before the Federal Court.

We would make the following points for consideration:

- The civil penalty regime is most appropriate for the most egregious schemes posing significant risk to the revenue.
- Cases whereby the promotor acted predominantly out of ignorance may be better addressed by way of administrative penalties.
- The use of administrative penalties places complete discretion in the hands of the regulator, denying the judicial oversight provided by civil penalties.
- Less sophisticated promoters may not have the means available to them to be appropriately represented in court should they face civil penalties.

13. ***Are there any areas within the tax promoter penalty laws that require further clarification? If so, why?***

    We have not identified areas requiring further clarification.

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?***

    Real time intervention to prevent or stop the proliferation of schemes is within the remit of the ATO and the current promoter penalty laws are sufficient to enable this.

15. ***Are the ATO and TPB appropriately tasked with the correct respective regulatory scopes in relation to tax intermediary misconduct?***

    We note the school of thought that the promoter penalty regime may better sit under the sole remit of the TPB. However, we acknowledge the substantial regulatory reform that would be required to achieve this outcome and submit that this issue should be considered as part of the future reform consultation.

    Tax practitioners are regulated by the TPB with powers bestowed by the *Tax Agent Services Act 2009* (TASA). This includes an obligation on tax practitioners 'to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client'[1]. This concept is well understood by both tax practitioners and the regulator. It is appropriate that this regulatory authority sits with the TPB.

    Additionally, with the introduction of breach reporting obligations[2], the addition obligations introduced in the Tax Agent Services (Code of Professional Conduct) Determination 2024[3], and intended future enhancements to the TPB's sanctions regime, the TPB is well placed to regulate tax practitioner behaviour.

    Financial advisors such as qualified tax relevant providers (under the *Corporations Act 2001*) and other intermediaries, who are not otherwise caught by the TASA are not ordinarily subject to the scope of the ATO or TPB's regulatory oversight. However, there are situations where both agencies may still intervene. One example might be where a legal adviser provides incorrect tax advice which results in

[1] Tax Agent Services Act 2009 section 30-10(10)
[2] Treasury Laws Amendment (2023 Measures No. 1) Act 2023 Schedule 3 Part 5
[3] Treasury Laws Amendment (2023 Measures No. 1) Act 2023 Schedule 3 Part 1

taxpayer non-compliance. In this case, the ATO may investigate and act against the adviser or their clients.

The promoter penalty laws were introduced before the creation of the TPB and there is the potential for overlap and inconsistent responses unless the agencies are working collaboratively. However, we recognise the ATO's ability to gather intelligence and evidence in relation to tax and superannuation affairs provides them with greater ability than other agencies to identify and potentially respond to schemes. It is important to ensure that respective responsibilities and accountabilities of agencies are made clear in the law, and that handover or referral processes are enabled by information-sharing and other enabling legislation.

16. ***Are there any other existing comparable regimes which are effective at deterring similar types of misconduct?***

The regulation of financial advisers is one which is aimed at deterring misconduct, similar to the promoter penalty regime. For example:

- Both regimes have a regulatory authority ensuring compliance with the Corporations Act (financial advisers) and the TASA (tax practitioners). For financial advisers, this is ASIC, and for tax agents this is the TPB.
- A body imposes disciplinary actions on both types of advisers. In the case of financial advisers this is the Financial Services and Credit Panel (FSCP) and the TPB is the equivalent body for tax practitioners.
- The FSCP and TPB can suspend, cancel or terminate the registrations of financial advisers or tax practitioners respectively. Both can issue written cautions, or education directives.
- Both regimes emphasise education and training standards, both initial and ongoing, as preventative measures.

The regimes are broadly similar in many respects. However, the framework under which financial advisers are regulated differs from the framework for tax practitioners in a number of key ways:

- The FSCP is a body within ASIC, however the TPB exists separately to the ATO.
- Disciplinary actions available to the FSCP include civil penalties, whereas those available to the TPB include administrative penalties. Additionally, the FSCP can issue infringement notices, whereas the TPB can only issue written cautions prior to imposing sanctions such as suspensions or terminations of registration.
- There are some differences between the TASA code of professional conduct, and the FASEA code of ethics, since the TASA code focuses on tax compliance and the correct application of tax laws, and the FASEA code emphasises ethical behaviour and client care when financial advice is provided.

CPA Australia members are also obliged to abide by the APES standards issued by the Accounting Professional & Ethical Standards Board (APESB). These prescribe requirements in relation to ethical behaviour including responding to non-compliance with laws and regulations. Members in practice are reviewed by our Professional Standards Best Practice teams and reported instances of misconduct are investigated by our Professional Conduct team. Cases are heard by an independent tribunal and decisions are published on a publicly available register.

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?***

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) at section 26 states:

> *A person must not be tried or punished more than once for an offence in respect of which that person has already been finally convicted or acquitted in accordance with law.*

A similar principle exists in ACT[4] and Queensland[5] legislation.

While this principle applies in a criminal law context, the promoter being penalised under two pieces of legislation applies equally here. As examples:

Registered tax practitioner is the promoter

Where a registered tax practitioner is the promoter, as defined in section 290-60 of the Tax Administration Act 1953, the tax practitioner may face penalties under section 290-50 of that Act together with potential sanctions under Subdivision 30-A of the TASA.

Unregistered tax practitioner is the promoter

Where an unregistered tax practitioner is the promoter, the unregistered tax practitioner may face penalties under section 290-50 of that Act together with potential sanctions under Subdivision 50-A of the TASA.

Consideration should be given to whether this is the most efficient and appropriate way to regulate promoter behaviour, or whether sole regulatory responsibility should sit with the TPB. This point should be considered as part of the future reform consultation.

Promoter does not receive a fee or other reward

By virtue of subsection 50-5(1)(c) of the TASA, where the promoter does not receive a fee or other reward for the promotion of the scheme (e.g., the scheme is promoted to cause inconvenience or disruption without reward or benefit) the promoter may not contravene section 50-5 of the TASA. As such, were promoter activities to be solely administrated under the TASA, such promoters may escape sanction under the TASA as it currently stands. This point should be considered as part of the future reform consultation.

[4] Human Rights Act 2004 (ACT) section 24
[5] Human Rights Act 2019 (Qld) section 34