

PROMOTER PENALTY LAWS AND ENFORCEABLE VOLUNTARY UNDERTAKINGS

Brief overview of the Promoter Penalty Laws

The promoter penalty laws are contained in Division 290 of Schedule 1 to the *Taxation Administration Act 1953*¹ ('Division 290'). The objects of Division 290 are to deter:

- the promotion of tax exploitation schemes (tax avoidance schemes and tax evasion schemes)²; and
- the implementation of schemes that have been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling³.

The conduct described above is referred to here as 'prohibited conduct'.

Remedies available under the promoter penalty laws to deter prohibited conduct

The promoter penalty laws provide the Commissioner of Taxation (the Commissioner) with a flexible range of remedies to deter prohibited conduct. The laws enable the Commissioner to do one or more of the following:

- accept a written enforceable voluntary undertaking given by an entity in connection with furthering the objects of Division 290
- apply to the Federal Court for an order that an entity that has breached a term of an enforceable voluntary undertaking (after it has been accepted by the Commissioner and if the Court is satisfied that the entity has breached a term of the enforceable undertaking) comply with that term of the enforceable voluntary undertaking, or for any other order the Court considers appropriate⁴
- apply to the Federal Court for the imposition of a civil penalty upon an entity that has engaged in prohibited conduct
- apply to the Federal Court for an injunction requiring an entity to perform certain actions or to restrain them from promoting a tax exploitation scheme or from implementing a scheme not in conformity with the arrangement in a product ruling.

Guidance on offering the Commissioner an enforceable voluntary undertaking

The facts and circumstances of any prohibited conduct will determine the Commissioner's most appropriate response. Offering the Commissioner an enforceable voluntary undertaking may, in appropriate circumstances, be relevant to a decision about whether proceedings should be initiated in the Federal Court or to certain decisions made by the Federal Court in respect of such proceedings.

The acceptance by the Commissioner of an enforceable voluntary undertaking offer does not mean that the Commissioner cannot make an application to the Federal Court for a civil penalty and/or an injunction against the entity responsible for the prohibited conduct. For example, even though the Commissioner may have accepted an enforceable voluntary undertaking, the Commissioner may form the view that the appropriate way to bring the conduct, or threat of future conduct, to an end is by applying to the Federal Court for an injunction.

NOTE 1: The Commissioner is unlikely to accept a document that does not include meaningful undertakings relating to the cessation of marketing or encouragement of the growth of a scheme or schemes and to actions designed to prevent future involvement in tax exploitation schemes.

NOTE 2: The Commissioner cannot be bound either to take action or to refrain from action in an enforceable voluntary undertakings document.

¹ Subdivision 298-B of Schedule 1 to the *Taxation Administration Act 1953* is also relevant to promoter penalties as it sets out the machinery provisions for civil penalties for the promotion and implementation of schemes.

² For more information on the application of the promoter penalty laws to tax exploitation schemes, refer to [PS LA 2008/7 - Application of the promoter penalty laws \(Division 290 of Schedule 1 to the Taxation Administration Act 1953\) to promotion of tax exploitation schemes](#).

³ For more information on the application of the promoter penalty laws to schemes involving product rulings, refer to [PS LA 2008/8 – Application of the promoter penalty laws \(Division 290 of Schedule 1 to the Taxation Administration Act 1953\) to schemes involving product rulings](#).

⁴ Subsection 290-200(4) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

EXPLANATORY NOTES ON ENFORCEABLE VOLUNTARY UNDERTAKINGS

- 1 An enforceable voluntary undertaking must be in writing.
- 2 Except if breached, the content of an enforceable voluntary undertaking will be kept confidential.
- 3 The Commissioner is not required to accept an enforceable voluntary undertaking from an entity nor can the Commissioner require an entity to furnish an enforceable voluntary undertaking. However, the Commissioner may in appropriate circumstances suggest that the entity consider offering the Commissioner an enforceable voluntary undertaking and discuss terms that are likely to be acceptable.
- 4 An entity may withdraw or vary the enforceable voluntary undertaking at any time, but only with the consent of the Commissioner.
- 5 If the Commissioner considers the entity that gave the enforceable voluntary undertaking has breached any of its terms, the Commissioner may apply to the Federal Court for an order to remedy the breach.
- 6 An enforceable voluntary undertaking is generally an appropriate option where there is a high likelihood of the entity complying with the enforceable voluntary undertaking and where other factors do not argue more strongly in favour of seeking an injunction or civil penalty.
- 7 Factors that may weigh in favour of an enforceable voluntary undertaking as the appropriate remedy include:
 - the nature and extent of the conduct in question and the quality of the remedial action proposed in the enforceable voluntary undertaking
 - the entity is fully cooperative and willing to provide full disclosure about its own relevant activities and the relevant activities of others involved in the scheme
 - the entity is willing to rectify its conduct, including by recompensing participants
 - the entity has alternative sources of income to engaging in the prohibited conduct
 - the entity was lower in the chain of command/decision making structure than other entities involved in the scheme
 - the risk to revenue is low
 - the argument in relation to the availability of the scheme benefit is not clear cut
 - the entity's conduct was apparently inadvertent
 - the entity has a good compliance history
 - the entity has offered an enforceable voluntary undertaking in a timely fashion.

Draft enforceable voluntary undertaking template (Promotion of tax exploitation schemes)

Attachment 1 sets out the format and information required for an enforceable voluntary undertaking; example text has been included to assist your understanding of the requirements. This template provides guidance as to the type of undertakings the Commissioner may consider appropriate. However, it should be noted that each case depends to a significant degree on its own facts and circumstances.

Any ideas for changes to the suggested text may be discussed with the ATO officers working on this issue.

ATTACHMENT 1

AUSTRALIAN TAXATION OFFICE

ENFORCEABLE VOLUNTARY UNDERTAKING GIVEN FOR THE PURPOSES OF DIVISION 290 OF SCHEDULE 1 TO THE TAXATION ADMINISTRATION ACT 1953

The commitments in this undertaking are offered to the Commissioner of Taxation by:

<person's full name/entity's name>
<address line 1>
of <address line 1>,
 <address line 2>

Definitions

'the Commissioner' means	the Commissioner of Taxation of the Commonwealth of Australia
'associated entity' means	an entity that is an 'associate' of <person's/entity's name> as defined by section 318 of the <i>Income Tax Assessment Act 1936</i>
'the arrangement'	<p><i>Provide a brief (1-2 lines) description of the arrangement under consideration; include the name under which it was promoted if it has one.</i> <i>FOR EXAMPLE:</i></p> <p>the arrangement known as the <name of arrangement> and promoted by <person's/entity's name> involving participants providing services to end users through a labour hire firm and in return receiving distributions from discretionary trusts established as part of the arrangement, and associated actions</p>
'a similar arrangement'	<p><i>Provide a brief description of the scope of similar arrangements to that under consideration; include the name of the relevant Taxpayer Alert if it exists.</i> <i>FOR EXAMPLE:</i></p> <p>means an arrangement described in <Taxpayer Alert TA 20XX/XX> and includes any arrangement that has a substantially similar taxation effect to the arrangement</p>
'client' means	Any client of <person's/entity's name> or an associated entity.

Interpretation

1. In this document, unless the contrary intention appears:
 - 1.1. the singular includes the plural and vice versa.
 - 1.2. all legislative references are to Schedule 1 to the *Taxation Administration Act 1953*.

Outline the capacity in which the entity is making the undertaking (if relevant).
FOR EXAMPLE:

- 1.3. a reference to <person's name> is to <person's full name> acting in any capacity; including in his/her personal capacity and as director, agent or trustee of any other entity.

Background

2. The Commissioner is responsible for administering the provisions of the *Taxation Administration Act 1953* and in particular, the provisions relating to the promotion and implementation of tax exploitation schemes in Division 290.
3. The objects of Division 290 are to deter:
 - the promotion of tax avoidance schemes and tax evasion schemes; and
 - the implementation of schemes that have been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling.
4. Provisions in Division 290 provide that the Commissioner may apply to the Federal Court for orders against the promoter of a tax exploitation scheme.

Outline the view of the arrangement that the Commissioner has communicated to you.

FOR EXAMPLE:

5. The Commissioner has reviewed the <scheme promoted by person's/entity's name> and holds the view that it is a tax avoidance or evasion scheme for the purpose of section 290-5, and is likely to be a tax exploitation scheme for the purpose of section 290-65.

Outline the relationships between the entity entering the undertaking and related entities that were involved in the arrangement under review.

FOR EXAMPLE:

6. <person's name> is the <officer> of <entity name>.
7. <person's name> is a <officer> of <entity 2 name>. <entity 2 name> is the corporate trustee of <entity 3 > Trust.
8. <person's/entity's name> is a partner in <partnership name>.

Outline the conduct of the entities in relation to the arrangement under review that concerns the Commissioner.

FOR EXAMPLE:

9. <person's/entity's name> communicated with clients and made referrals of clients willing to participate in the arrangement to the scheme promoter.
10. <person's/entity's name> was in receipt (directly or indirectly) of \$XXXX in commissions from the scheme promoter.
11. There was no ruling sought by <person's/entity's name> or the clients from the Commissioner on the way in which the Commissioner considered relevant taxation provisions applied in relation to [the arrangement, the transactions, or the subject matter of the advice].

Outline the contact between the entities covered by this undertaking and the Commissioner and the entities' subsequent behaviour.

FOR EXAMPLE:

12. The Commissioner has informed <person's/entity's name> verbally and in writing that their conduct in connection with the arrangement may be prohibited conduct under Division 290.
13. <person's/entity's name> and associated entities have cooperated with Australian Taxation Office investigations and are offering to voluntarily modify their behaviour in response to the concerns expressed by the Commissioner and have given undertakings to that effect in relation to their future conduct.
14. On <date>, <person's/entity's name> made a written voluntary disclosure in relation to her/his and associated entities' participation in the arrangement and undertook to cease and desist from any further promotion of the arrangement.
15. <person's/entity's name> and associated entities have not claimed any <name of arrangement> <scheme benefits> in their lodged 20XX income tax return(s).

A disclaimer may be included.

FOR EXAMPLE:

16. The execution of this document by <person's/entity's name> does not constitute an admission that <person's/entity's name> or any associated entity has engaged in any conduct that may be prohibited under Division 290.

Undertakings

17. Pursuant to, and for the purposes of Division 290, <person's/entity's name> offers the following undertakings to the Commissioner of Taxation:

Outline the undertakings you are entering with the Commissioner.

FOR EXAMPLE:

- 17.1. <person's/entity's name> will not promote, market or otherwise encourage another entity to participate in, enter into or carry out the arrangement or any similar arrangement, or cause any other entity to do so.
- 17.2. Where <person's/entity's name> has caused information to be made publicly available that would encourage another entity to participate in, enter into or carry out the arrangement or any similar arrangement, he/she will make reasonable endeavours to ensure that the information is removed, amended, or retracted so that it will no longer have that effect.
- 17.3. Where <person's/entity's name> is or becomes aware that another entity has entered into the arrangement or any similar arrangement, he/she will advise and provide necessary support to the other entity to review their tax affairs in relation to the periods affected and where appropriate to:
 - 17.3.1. make a voluntary disclosure to the ATO in relation to their participation in the arrangement
 - 17.3.2. take steps to prevent any inappropriate tax consequences of their continued participation in the arrangement; for example, by amending a trust deed to change calculation of income clauses.
- 17.4. Where <person's/entity's name> is or becomes aware that another entity is contemplating entering into or carrying out the arrangement or any similar arrangement, he/she will make reasonable endeavours to ensure that the other entity does not enter into or carry out the scheme.
- 17.5. <person's/entity's name> will not make any attempts to obtain, or to cause any other entity (other than the Commissioner) to obtain, any payment, consideration or further agreement or transaction in relation to the arrangement or any similar arrangement.

Include this undertaking only if relevant to your circumstances.

- 17.6. <person's/entity's name> will reimburse clients any fee paid in relation to the specific promotional activity that is the subject of the Commissioner's concern to redress the affects of the entities' conduct.

Include this undertaking only if investigations and/or actions by the Commissioner against the arrangement or its promotion are ongoing.

- 17.7. <person's/entity's name> will provide assistance to the Commissioner in relation to enquiries and enforcement action taken concerning the arrangement and in particular will:
 - a) promptly respond to any request for information
 - b) promptly provide access to requested documents; and
 - c) make statements (written or oral) in evidence in relevant court proceedings.

17.8. <person's/entity's name> will implement internal governance controls to minimise the entities' potential exposure to the promoter penalty laws through involvement in tax exploitation schemes.

17.9. <person's/entity's name> will inform the Australian Taxation Office of any novel or potentially contentious tax-related arrangement that comes to his/her attention or with which he/she is considering becoming involved,

Acknowledgments

Include standard text outlining the entity's understanding of the effect of this document.

18. I, <person's full name>, acknowledge that:

18.1. I understand the undertakings given.

18.2. This undertaking may be withdrawn or varied only with the consent of the Commissioner of Taxation.

18.3. If any of the terms of this undertaking are contravened or not met, the Commissioner may: apply to the Federal Court for either or both of the following orders:

- i. an order directing compliance with the terms of this undertaking
- ii. any other order which the court considers appropriate.

18.4. Compliance with this undertaking does not depend upon the acts of any other entity.

18.5. This undertaking in no way constitutes a restraint upon the Commissioner's discretion, administration or powers.

18.6. The Commissioner's acceptance of this undertaking does not affect the Commissioner's powers to investigate a contravention arising from past or future conduct.

18.7. This undertaking has no operative force until accepted by the Commissioner.

Severability

19. If any provision of this undertaking is prohibited, invalid or unenforceable for any reason, in any jurisdiction, or held to be so by a court, that provision will, as to that jurisdiction, be ineffective to the extent of the prohibition, invalidity or unenforceability without invalidating the remaining provisions of this undertaking or affecting the validity or enforceability of that provision in any other jurisdiction, unless it materially alters the nature or material terms of this undertaking.

Execution

Outline the capacity in which the entity is making the undertaking
FOR EXAMPLE:

I declare that I am making this undertaking in my personal capacity and as director, agent or trustee of each entity with which I am currently associated.

Signature

Print name

Date

In the presence of

Witness

Print name

Date

THIS UNDERTAKING IS ACCEPTED BY THE COMMISSIONER OF TAXATION PURSUANT TO SECTION 290-200 OF SCHEDULE 1 TO THE *TAXATION ADMINISTRATION ACT 1953* BY A DELEGATE OF THE COMMISSIONER OF TAXATION AND AS SUCH BECOMES ENFORCEABLE BY THE COMMISSIONER OF TAXATION.

.....
Assistant Commissioner of Taxation

Name

ThisDay of