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

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Note: This practice statement is being amended as a result of the publication of PS LA 2012/1. Guidance can be obtained from the contact officer until this amendment is finalised.

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Practice Statement Law Administration

PS LA 2008/7

Note: this practice statement is being amended as a result of the publication of PS LA 2012/1. Guidance can be obtained from the contact officer until this amendment is finalised.

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This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or is considered incorrect. Where this occurs, tax officers must follow their business line's escalation process.

SUBJECT:	**Application of the promoter penalty laws (Division 290 of Schedule 1 to the *Taxation Administration Act 1953*) to promotion of tax exploitation schemes**
PURPOSE:	**To provide guidance to staff on the principles to be followed in application of the promoter penalty laws to potential tax exploitation schemes**

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STATEMENT

1. Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (the promoter penalty laws) applies to conduct engaged in, on or after 6 April 2006. The objects of the promoter penalty laws are to deter:

   - the promotion of tax avoidance schemes and tax evasion schemes (the first limb), 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 (the second limb).

2. This practice statement provides guidance to staff on the application of the promoter penalty laws to entities that may have engaged in conduct relating to the first limb of the promoter penalty laws. It sets out:

   - an explanation of the laws, including the key defined terms, and
   - the principles to be followed in applying these laws, including consideration of the exceptions and some examples.

3. For guidance on the second limb of the promoter penalty laws, please see Law Administration Practice Statement PS LA 2008/8 Administration of Division 290 of Schedule 1 to the *Taxation Administration Act 1953*: Promotion and implementation of schemes (the promoter penalty laws) – application to schemes in relation to product rulings.

4. This practice statement has three attachments:

   - **Attachment 1** is a flowchart for the process outlined in Section 3: What is a tax exploitation scheme?
   - **Attachment 2** is a flowchart for the process outlined in Section 4: Identifying entities that have engaged in prohibited conduct for the purposes of the promoter penalty laws.
   - **Attachment 3** is a flowchart for the process outlined in Section 5: Exceptions.

Interpretation

5. All legislative references in this practice statement are to Schedule 1 to the *Taxation Administration Act 1953*, unless otherwise stated.

6. For the purposes of this practice statement:

   - 'ATPBSL' means the Tax Office's Aggressive Tax Planning business service line
   - 'Commissioner' includes relevant SES officers delegated with responsibilities in respect of the promoter penalty laws
   - 'prohibited conduct' means conduct covered by the first limb of the promoter penalty laws
   - 'promoter' means an entity engaged in prohibited conduct under the promoter penalty laws[1]

[1] This term may be otherwise used in wider commercial contexts and mere promotion by itself does not create liability under the promoter penalty laws.

- 'promoter penalty application' means an application by the Commissioner to the Federal Court for:
  - orders relating to the breach of a voluntary undertaking
  - an injunction (including an interim injunction), or
  - an order that the entity pay a civil penalty,[2]
- 'LSB' means Legal Services Branch
- 'SES' means a member of the Senior Executive Service in the Tax Office, and
- 'TCN' means a member of the Tax Counsel Network
- 'TES' means tax exploitation scheme[3] under the promoter penalty laws.

SECTION 1: PROMOTION AND IMPLEMENTATION OF TES – OVERVIEW

7. The purpose of the first limb of the promoter penalty laws is to deter the promotion of tax avoidance and evasion schemes.

8. The first limb applies to an entity that engages in conduct that results in it, or another entity, being a promoter of a TES[4] (the prohibited conduct).

9. The laws provide the Commissioner with several flexible options to achieve this deterrence, being:
   - accepting voluntary undertakings from entities to further the objects of the Division
   - applying to the Federal Court for orders to remedy a breach of a voluntary undertaking
   - applying to the Federal Court for injunctions where an entity has engaged, is engaging or is proposing to engage, in the prohibited conduct, and
   - applying to the Federal Court for the imposition of a civil penalty upon an entity that has engaged in the prohibited conduct.

10. In Federal Court proceedings, the Tax Office has to prove on the balance of probabilities that a contravention of the promoter penalty laws has occurred, is occurring or may occur in the future.

Exclusions from the promoter penalty laws[5]

11. An entity that merely provides independent and objective tax advice, including advice regarding tax planning, will not be a promoter for the purposes of the promoter penalty laws.

12. Conversely, an entity will be a promoter if they have a substantial role in marketing or otherwise encouraging the growth of, or interest in, a TES. The promoter penalty laws will not apply to entities or employees that are peripherally involved in conduct prohibited by the promoter penalty laws.

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[2] This term excludes the acceptance of a voluntary undertaking by the Commissioner, as this does not require an application to the Federal Court.
[3] See section 290-65(1)
[4] Subsection 290-50(1) states that: [A]n entity must not engage in conduct that results in that or another entity being a *promoter of a *tax exploitation scheme.
[5] See paragraphs 139 to 170 of this practice statement.

13. In order to achieve their deterrent effect, the promoter penalty laws are designed to prevent individuals from using a business entity to avoid personal liability. As a result, individuals who are the 'controlling mind' (rather than an agent or employee) behind another entity's prohibited conduct will usually be the more appropriate subject for application of these laws than the controlled entity. Promoter penalty applications will therefore not generally be made in respect of employees or agents who are not the controlling mind of another entity.

Exceptions to the promoter penalty laws[6]

14. An entity is not liable for a civil penalty if:

- The conduct in respect of which the proceedings are instituted is due to:
  - (i) a reasonable mistake of fact, or
  - (ii) the act or default of another, or due to an accident or some other cause beyond the entity's control, if that entity took reasonable precautions and exercised due diligence to avoid the conduct.
- The scheme in question treats the taxation law as applying in a way that agrees with:
  - (i) advice given to the entity or the entity's agent by or on behalf of the Commissioner, or
  - (ii) a statement in a publication approved in writing by the Commissioner.
- More than four years have elapsed since the entity last engaged in the prohibited conduct.[7]

15. The Commissioner cannot seek penalties in regard to an employee if a civil penalty has already been imposed on the employer entity under the promoter penalty laws.

16. Although not expressed as an exception, a scheme will not fall within the definition of a TES if it is reasonably arguable that the scheme benefit obtained from the scheme is available at law.[8]

SECTION 2: ADMINISTRATION OF THE PROMOTER PENALTY LAWS

Referrals of potential cases to ATPBSL

17. Staff who become aware of information that may relate to the potential promotion of a suspected TES must refer this information to the Promoter Intelligence Branch of ATPBSL. There is an ATPBSL Referral Template for this purpose. Guidance for staff on the hallmarks of promotion, the hallmarks of a TES and the ATPBSL Referral Template are available on the Australian Taxation Office (Tax Office) intranet. Staff requiring advice or information about the promoter penalty laws, including whether a referral should be made should also contact ATPBSL via the contact points on the Tax Office intranet.

18. Information referred to the ATPBSL about potential promotional activity of a TES will be assessed by Promoter Intelligence according to the objects of the promoter penalty laws. On the basis of a risk assessment, Promoter Intelligence will then refer suitable cases to ATPBSL Promoter Compliance Branch.

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[6] See paragraphs 257 to 267 of this practice statement.
[7] Except where tax evasion is present.
[8] See section 290-65(1)(b).

19. Promoter Compliance Branch staff will then undertake active compliance functions regarding the promoter penalty laws, including promoter risk reviews and civil investigations.

20. Throughout their activity, Promoter Compliance must consider whether sanctions under the promoter penalty laws may be appropriate in the circumstances. In this context, Promoter Compliance will seek relevant technical support, including support from the Legal Services Branch (LSB), Centres of Expertise (CoE) and Tax Counsel Network (TCN).

21. As the application of the promoter penalty laws is a serious matter that may damage an entity's reputation, staff outside ATPBSL must not refer to the potential application of the promoter penalty laws in their dealings and communications with any entity (either potential promoters of, or suspected participants in, a possible TES). Instead, they should escalate the matter to ATPBSL via the ATPBSL Referral Template. Specialist ATPBSL staff will then deal with the entities concerned regarding promoter penalty law issues, as considered appropriate.

22. Staff must refer any advice requests (for example, private ruling, class ruling or product ruling applications) which involve questions that may relate to the application of the promoter penalty laws (such as whether an entity is a promoter, whether an arrangement is a TES or whether it is reasonably arguable that the scheme benefit obtained from a scheme is available at law for the purposes of the TES definition, etcetera) to ATPBSL prior to providing the advice. ATPBSL will then provide guidance and support to the other area of the Tax Office regarding the potential application of the promoter penalty laws to the particular arrangement, whether it is appropriate to provide such advice and, if so, the wording of the relevant parts of the advice to be provided.

23. Staff should note that the application of the promoter penalty laws is not dependent upon other compliance action being undertaken in relation to participants or other entities involved in a TES.

Selecting the appropriate remedy under the promoter penalty laws

24. As discussed in paragraph 9 of this practice statement, the promoter penalty laws provide the Commissioner with a flexible range of remedies to deter promotion of TESs. As with all Tax Office compliance responses, the facts and circumstances of the conduct will determine the most appropriate response.

25. The Taxpayers' Charter, the Compliance Model and associated publications[9] which provide guiding principles for staff in the administration of the tax laws will also guide the potential application of the promoter penalty laws in the selection of the appropriate remedy.

26. The following factors are examples of matters that may be relevant in determining the most appropriate action or actions to deter promotion of TES:

- the facts and circumstances of the conduct, such as the entity's motivations for engaging or not engaging in the conduct, the availability of alternative income sources, and other factors that may impact on its behaviour, such as the entity's health
- the seriousness of the prohibited conduct including:
  - the revenue potentially at risk
  - the level and extent of consideration received or payable

[9] Examples include the Access and Information Gathering Manual and the 2006 Large Business and Tax Compliance booklet.

- the potential level and extent of participation (both generally and within industries or sectors of the economy)
- the consequences for participants such as the loss or damage suffered
- the degree to which the scheme benefit is arguably available at law, and
- the duration of the prohibited conduct,

- the deliberateness of the prohibited conduct, including whether the entity was wilfully blind to the result of its conduct and whether the results of its conduct were reasonably foreseeable
- the steps the entity took, if any, to restrict the effect of its conduct, such as internal governance procedures or controls and caveats or limitations in marketing documents
- the entity's compliance history and any relevant or related past promotional conduct
- the level of the entity's cooperation with the Tax Office's enquiries about their own conduct and the conduct of others
- the entity's willingness to address the potential prohibited conduct in the current case, including recompensing participants as well as altering its own future behaviour
- the merits and deterrent effect of each remedy including the effect of litigation on the entity and other relevant entities that may be affected
- balancing deterrence of prohibited conduct with the legal, administrative and commercial risks resulting from the action, and
- the current availability of other sanctions that are more appropriate for the entity's behaviour and circumstances.

27. The Commissioner has a choice of the appropriate remedy and there may be circumstances where it will be appropriate to seek more than one remedy to effectively address the conduct. In this context, civil penalties are focused upon providing a sanction against past prohibited conduct and voluntary undertakings and injunctions are focused upon deterring future prohibited conduct.

28. As a consequence of these differing purposes, where a remedy is required in respect of deterring future prohibited conduct, Promoter Compliance should consider seeking a voluntary undertaking in most cases where this is appropriate (see paragraphs 30 to 35 of this practice statement). Cases where an injunction is more likely to achieve future deterrence will include situations where the promoter is unwilling to make such an undertaking or an undertaking is unlikely to be complied with because of the entity's tax compliance history or record of promotion of other TES (see paragraphs 36 to 40 of this practice statement).

29. Similarly, in circumstances where there has been past prohibited conduct, a civil penalty may not be appropriate in all cases (see paragraphs 41 to 45 of this practice statement). This may include where the promoter entity has otherwise made restitution for the consequences of their promotion of the TES (for example, by payment of relevant participant penalties). The level of cooperation shown by the entity may also be relevant, such as where a voluntary undertaking has been entered into and the promoter has then complied fully with it (for example, immediate removal of advertising content, changes to website materials, cessation of seminar presentations, etcetera).

Voluntary undertakings

30. The Commissioner may accept a voluntary undertaking from an entity in order to deter future promotion of TES. This will be appropriate in cases where there is a high likelihood of the entity voluntarily complying with the undertaking and where other factors do not argue more strongly in favour of seeking an injunction. The content of voluntary undertakings will be kept confidential.

31. In many circumstances, a voluntary undertaking will be a more flexible, timely, and cost-effective outcome than an injunction or civil penalty application. This also provides entities with the option of voluntarily modifying their conduct and therefore potentially avoiding the reputational damage that may arise from proceedings in the Federal Court.

32. After a voluntary undertaking has been accepted, it may only be varied or withdrawn with the consent of the Commissioner.

33. If an entity breaches its voluntary undertaking after it has been accepted by the Commissioner, the Commissioner may make an application to the Federal Court. The Court may issue an order instructing the entity to comply with its undertaking, or make any other order it considers appropriate.

34. The Commissioner cannot require an entity to furnish an undertaking, and the Commissioner is not required to accept an undertaking from an entity. However, in appropriate circumstances staff may suggest that the entity consider offering the Commissioner a voluntary undertaking.

35. Factors that might weigh in favour of an undertaking as the appropriate remedy include that:

- the entity is willing to provide full disclosure about its own activities and the 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, and/or
- the conduct was apparently inadvertent.

Statutory injunctions

36. Injunctions allow the Commissioner to take immediate action where there is evidence of contemplated or current and ongoing prohibited conduct, thereby potentially limiting the period in which there is a risk of prohibited conduct. This would be more appropriate than a voluntary undertaking if the entity is unwilling to voluntarily modify its behaviour.

37. The Commissioner may apply to the Federal Court for injunctive relief, in the form of a restraining injunction (an order to refrain from doing something) or a performance injunction (an order to do something).

38. The Federal Court may:

- grant an injunction against an entity on such terms as it considers appropriate, and may discharge or vary an injunction granted, at any time, and/or
- grant an interim restraining injunction against an entity to restrict its conduct prior to the full consideration of the Commissioner's application for an injunction.

39. The Federal Court may require the Commissioner to give an undertaking as to damages for future compensation as a condition of granting an interim injunction. When making an interim injunction application, staff must take into account the financial risk of the Commissioner's application for a final injunction not being granted.

40. Factors that might weigh in favour of an injunction application as the appropriate strategy include where:

- there is potential for further participation to be obtained as a result of future prohibited conduct
- there is a significant ongoing level of risk to revenue
- the entity has an adequate degree of control over whether the prohibited conduct occurs
- the entity is not willing to assist the Commissioner in resolving the issue or to modify its conduct without compulsion and/or it has breached or circumvented undertakings, and/or
- there is a need for urgency in addressing prohibited conduct (such as a forthcoming promotional seminar), as this may also be a significant factor in determining whether it is appropriate to seek an interim injunction.

Civil penalty applications

41. If the Federal Court is satisfied on the balance of probabilities that an entity has engaged in conduct that results in that or another entity being a promoter of a TES, and that no exception or exclusion applies, it can order the entity to pay a civil penalty to the Commissioner.

42. The ability for the Commissioner to seek a civil penalty is a strong deterrent measure and also ensures there is not an imbalance in the consequences of involvement in a TES between promoters and their clients.

43. The maximum penalty that may be imposed by the Court is the greater of:

- 5,000 penalty units (currently equal to $850,000) for an individual, or 25,000 penalty units (currently equal to $4.25 million) for a body corporate, and
- twice the consideration received or receivable, directly or indirectly, by the entity or its associates in respect of the scheme.

44. It may be appropriate to recommend a civil penalty application where the course of conduct has concluded and involved the promotion of a TES, or where the conduct forms part of a pattern of similar conduct over time which is unlikely to be deterred through other means. The prevalence of such conduct can undermine the integrity of the tax system and will greatly affect the wider community.

45. Factors that might weigh in favour of a civil penalty application as the appropriate remedy include where the entity:

- is knowingly engaging in conduct that is likely to be prohibited and evidence indicates that the entity is unwilling to modify its behaviour
- has as its main income source the promotion of TES
- has a history of prohibited conduct as a major source of income
- has a large degree of control or influence over whether the prohibited conduct occurs
- uses tactics to frustrate the progression of the Tax Office's investigation
- has engaged in prohibited conduct on a significant scale in terms of the number of entities or amounts involved, and/or
- has promoted a TES for which participants have or will receive penalties.

Making a recommendation regarding promoter penalty action

46. If active compliance work indicates that prohibited conduct has occurred, Promoter Compliance staff should make a written recommendation about promoter penalty action to an appropriately authorised decision-maker (see paragraph 48 of this practice statement) for the promoter penalty laws. This recommendation should summarise the available evidence and outline the relevant factors in favour for and against the recommendations made.

47. Promoter Compliance staff will also monitor compliance with voluntary undertakings and injunctions, as well as liaising with Debt business line staff regarding the collection of civil penalties imposed against an entity.

The role of the Promoter Penalty Decision Maker

48. While all SES officers in ATPBSL and several SES in Law & Practice have been delegated powers from the Commissioner to make decisions under Division 290, in normal circumstances it will be the Assistant Commissioner of Promoter Compliance in ATPBSL who will be the decision maker regarding promoter penalty applications and the acceptance of voluntary undertakings.[10]

49. The promoter penalty decision maker is required to consider the recommendations and decide whether there is sufficient evidence to provide reasonable grounds to support:

- making a promoter penalty application[11], or
- accepting a voluntary undertaking offered.

50. Due to the serious consequences of such an application, the decision maker must seek advice from the Promoter Penalty Review Panel (the Panel) before deciding whether or not to commence proceedings, except in exceptional circumstances.

[10] Staff should familiarise themselves with the most recent delegation of the promoter penalty law powers by checking the electronic taxation authorisation guidelines prior to making any decisions under the promoter penalty laws.
[11] See definition in paragraph 6 of this practice statement

51. Where the decision maker and the Chair of the Panel (Deputy Commissioner of ATPBSL) consider that exceptional circumstances exist (for example extreme urgency such as those seeking interim or ex parte injunctions), a decision may be made without obtaining advice from the Panel.

The role of the Promoter Penalty Review Panel

52. The primary purpose of the Panel is to assist the Tax Office in its administration of the promoter penalty laws by:

- considering submissions made to the promoter penalty decision maker, and
- providing independent advice on whether proposed promoter penalty applications are appropriate in a particular circumstance.

53. The Panel is made up of senior tax officers and other professional persons chosen for their ability to provide expert and informed advice.

54. The Promoter Compliance case officer responsible for the case would ordinarily be present at the Panel meeting when the case is discussed.

55. As set out above, the role of the Panel is purely to provide advice to support the decision maker. The Panel will not investigate or find facts, but rather will provide its advice on the strengths and weaknesses of the case, the appropriateness of remedies (including other options available), the sufficiency of evidence put forward in the submission and may suggest additional evidence be collected.

56. The promoter penalty decision maker is not obliged to follow the Panel's advice. However, a decision that is contrary to the advice of the Panel will only be made after discussion with the Chair of the Panel, the Deputy Commissioner ATPBSL.

57. The issue of whether an entity's conduct has contravened the promoter penalty laws and whether an order should be made is a matter for determination by the Federal Court.

58. The operations of the Panel will be supported by a charter and standardised referral templates to ensure quality.

Litigation principles and the role of LSB and TCN

59. LSB is responsible for the management of all Tax Office litigation on behalf of the Commissioner as laid out in the Tax Office's litigation management policies.[12] Where the promoter penalty decision maker decides that a promoter penalty application should be made, the matter must be discussed with LSB and TCN in accordance with Law Administration Practice Statement PS LA 2005/22: Litigation and priority technical issues.

60. When undertaking litigation, the Tax Office will act in accordance with its obligations under the model litigant policy[13] to act honestly and fairly in the conduct of litigation.

[12] Which include PS LA 2007/12 (Conduct of Tax Office Litigation in Courts and Tribunals), PS LA 2007/15 (Briefing counsel), PS LA 2007/16 (Risk management in litigation) and PS LA 2007/18 (Tax technical litigation in Federal Court matters).

[13] The model litigant policy is one of the Legal Service Directions which have been issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903*, having regard to the Attorney-General's responsibility, as First Law Officer, for legal services to the Commonwealth and its agencies, including for Commonwealth litigation and for legal advice to Cabinet.

61. LSB will also provide advice on the admissibility and the extent of the factual evidence required to support Tax Office litigation.

Collection of promoter penalties

62. Under subsection 290-50(6), civil penalties under the promoter penalty laws are a civil debt payable to the Commonwealth. The Commissioner may, on behalf of the Commonwealth, enforce the order of the Court as if it were an order made in civil proceedings against the entity to recover the debt as a judgment debt.

63. The penalty is not a tax-related liability.[14] If it is not paid within the time ordered by the Court, the Commissioner may initiate proceedings for its recovery and apply for orders, including judgment interest. The Commissioner will seek to enforce such orders by all appropriate means available.[15]

Schemes involving suspected criminal behaviour and the role of Serious Non-Compliance

64. All cases involving the potential application of the promoter penalty laws should be referred to ATPBSL, including where the same case may also involve criminal behaviour.

65. Where suspected criminal behaviour may also be involved, the case should also be referred to Serious Non-Compliance (SNC) in accordance with the SNC referral guidelines, with an explanatory note that the matter has been referred to ATPBSL. ATPBSL and SNC will liaise regarding the approach to be taken in such matters.

66. Subdivision 298-B contains provisions governing the interaction between civil and criminal proceedings for conduct that may be the subject of a promoter penalty application, including applications for civil penalties.

67. The effect of this Subdivision is that if criminal proceedings are commenced in relation to substantially the same conduct as that for which a civil penalty order might be sought, the civil penalty proceedings are stayed. If a criminal conviction for that conduct is obtained, the civil penalty proceedings are then dismissed.

68. Subdivision 298-B does not apply to applications for injunctions or orders relating to a breach of voluntary undertakings.

69. However, the promoter penalty decision maker should still consider the appropriateness of making such applications if criminal proceedings are also underway against the promoter.

[14] Subsection 255-1(2).
[15] See ATO Receivables Policy.

SECTION 3: WHAT IS A TES?

70. The practice statement on the application of the general anti-avoidance rules provide important context to staff in identifying potential TES.[16] However, not every case that involves the application of the general anti-avoidance rules will be a TES or involve conduct that warrants the application of the promoter penalty laws. For example, the arrangement may not have been marketed or encouraged, or it may be reasonably arguable at the time of the conduct in question that the anti-avoidance provision would not apply.

71. In considering whether a scheme is a TES (defined in section 290-65) staff must review the scheme with respect to:

- the time of the conduct in question
- whether or not the scheme has been implemented
- whether it would be reasonable to conclude that the sole or dominant purpose of an entity entering into or carrying out the scheme was or would be able to obtain a scheme benefit for themselves or another entity, and
- whether or not it is reasonably arguable that the scheme benefit sought is available at law.

Time of conduct

72. Whether a scheme is a TES must be determined as at the time of the relevant conduct of the entity in question.

Scheme implementation

73. A scheme may be a TES whether or not it has been implemented.

74. If the scheme has not been implemented, staff must consider whether:

- it is reasonable to conclude that if an entity had entered into or carried out the scheme, it would have done so with the sole or dominant purpose of obtaining a scheme benefit for itself or others in entering into or carrying out the scheme if it had been implemented, and
- it is not reasonably arguable that the scheme benefit would be available at law if the scheme were implemented.

[16] The laws include a sole or dominant purpose test that is modelled on the scheme penalty provisions in Subdivision 284-C. These provisions are commonly associated with the potential application of the general anti-avoidance rules. Law Administration Practice Statement PS LA 2005/24 (Application of General Anti-Avoidance Rules) provides instruction and practical guidance to staff on the application of Part IVA of the *Income Tax Assessment Act 1936* and other general anti-avoidance rules, including where a sole or dominant purpose of obtaining a tax benefit is considered.

Example 1

75. *Mark develops a scheme and specifically markets it to doctors carrying on a sole practice by placing advertisements in medical journals. The Tax Office identifies the scheme before it is implemented. In drawing conclusions about the purpose an entity would have in entering into or carrying out the scheme and the availability of any scheme benefit, it would be relevant for staff to consider factors and circumstances likely to be particular to sole medical practitioners. This may lead to the conclusion that in the circumstances the sole or dominant purpose an entity would have in entering into or carrying out the scheme would be a legitimate commercial or family purpose and that the scheme is therefore not a TES.*

Sole or dominant purpose

76. Staff need to consider whether it is reasonable to conclude that an entity had a sole or dominant purpose of getting a 'scheme benefit'. This test determines if an entity that entered into or carried out the scheme did so for this purpose, or that an entity would have entered into or carried out the scheme (a participant), for this purpose. Such an entity may include a participant in the scheme or another entity who enters into or carries out the scheme.

77. When considering whether an entity had or would have had the sole or dominant purpose of getting a scheme benefit for themselves or another entity, staff should consider the two circumstances described in subsection 284-150(1) which cover a decrease in a tax-related liability, or the Commissioner paying or crediting an increased amount, as a result of the scheme.

78. In both cases, the law requires consideration of the expected effect of the scheme on the tax outcome for an entity in an accounting period.

79. The sole or dominant purpose requirement does not require that an entity obtain, or be able to obtain, a scheme benefit. For example, the precondition may be satisfied although the intended scheme benefit is unavailable at law.

Example 2

80. *George is the promoter of a TES that promises income tax deductions for investors. Sam enters into the scheme and the Commissioner disallows the deductions claimed by Sam on the basis that they are not deductible under section 8-1 of the Income Tax Assessment Act 1997 (ITAA 1997) or alternatively on the basis that Part IVA of the Income Tax Assessment Act 1936 (ITAA 1936) applies to deny the deductions. Sam objects to the disallowance of the claimed deductions and the Federal Court decides that the deductions claimed are very clearly not allowable under section 8-1 of the ITAA 1997. The reasoning of the Court supports the view that it was not reasonably arguable that the scheme benefit was available at the time of George's promotion activities. Provided it can be established that the scheme was carried out for the sole or dominant purpose of Sam getting a scheme benefit, the promoter penalty laws may apply to George even though Sam does not actually obtain the benefit.*

Scheme

81. 'Scheme' is defined in section 995-1(1) of the ITAA 1997 as any arrangement, or any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise. 'Arrangement' is defined in the same subsection to mean any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.

82. Staff reviewing arrangements may find differences between the schemes as they are implemented or likely to be implemented and the description of those schemes as marketed or encouraged. In some cases, this will mean that there is more than one scheme in the circumstances and in other cases it will be appropriate to regard the arrangements as the same scheme.

83. It is very important that staff correctly and specifically identify the scheme(s) in respect of which an entity's conduct will be examined.

84. If the differences between arrangements are not material they should generally be regarded as the same scheme. If there is a material difference between arrangements they should be regarded as different schemes.

Tax related liability

85. 'Tax related liability' is defined in section 255-1 as a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). It encompasses a range of liabilities across the tax laws. This means that the promoter penalty laws have effect with regard to a range of different tax schemes, for example, income tax, GST and FBT schemes.

Accounting period

86. The effect upon an entity's tax outcome is to be considered in respect of an accounting period.[17] The accounting period is the period for which the tax-related liability or credit is calculated. The period is not necessarily a financial year and may differ according to the type of tax involved. This is important in considering different types of TES. For example, those that involve GST laws will be reviewed with respect to the relevant transactional period, which may be monthly, quarterly or yearly.

Availability of the scheme benefit sought

87. This precondition is satisfied where it is **not** reasonably arguable that the scheme benefit was, or would have been, available at law at the time that the prohibited conduct occurred.

88. The precondition requires a two step analysis in order to identify whether it is not reasonably arguable that the scheme benefit was, or would have been, available at law. Staff must consider whether, at the time that the prohibited conduct occurred:

    - it was not or would not have been reasonably arguable that the scheme benefit was available under the general provisions of the law,

[17] The expression 'accounting period' appears in the definition of scheme benefits in subsection 284-150(1) but is not defined. See Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 paragraph 1.56.

and, if it is reasonably arguable that the scheme benefit is available under the general provisions, whether:

- it was not or would not have been reasonably arguable that anti-avoidance provisions of the tax law would not be applied to defeat the scheme benefit.

89. The precondition is satisfied where it is concluded on the balance of probabilities under either of the above steps that it is not reasonably arguable that the scheme benefit was or would have been available at law at the time of the conduct in question.

90. The availability of the scheme benefit sought may depend upon the characteristics or circumstances of those entities that enter into or carry out the scheme and/or upon a particular mode of implementation. See further paragraphs 105 to 108 of this practice statement.

91. The availability of the scheme benefit sought will depend upon the objective conclusions that can be drawn in the context of the potential promoter's conduct. See paragraph 109 of this practice statement.

Reasonably arguable

92. The phrase 'reasonably arguable' has the same meaning for the purposes of the promoter penalty laws as for the tax shortfall penalty provisions in Division 284. Subsection 284-15(1) provides that:

> 'matter is **reasonably arguable** if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect.

93. The 'relevant authorities' are described in subsection 284-15(3) as including a taxation law, extrinsic material able to be taken into account in interpreting the taxation law, the decision of a court (whether or not an Australian court) or the Administrative Appeals Tribunal, or Board of Review and a public ruling.

94. A favourable legal or other opinion obtained by the entity does not of itself make a scheme benefit reasonably arguable at law. What needs to be considered is whether there is a well-reasoned construction of the applicable statutory provision that is based upon the relevant authorities and their application to the facts of the scheme that the interpretation is about as likely to be correct as incorrect.[18]

95. Whether or not an entity had contemporaneous documentary support for the availability of the scheme benefit when they engaged in the prohibited conduct, is not determinative of whether it is reasonably arguable that the scheme benefit was or would have been available at law to an entity at that time. However, the degree of independent enquiry (such as a legal analysis as to whether a reasonably arguable position applies) conducted by a potential promoter will be a relevant factor that may be taken into account in determining whether a promoter penalty application should be made.

96. Taxation Ruling TR 94/5: Income tax: tax shortfall penalties: reasonably arguable sets out the Commissioner's view of what is reasonably arguable. Staff should familiarise themselves with TR 94/5 before considering whether or not it is reasonably arguable that the scheme benefit is or would have been available at law for the purposes of identifying if there is a TES.

[18] See Hill J in *Walstern v. FCT* [2003] FCA 1428 at paragraph 112.

Example 3

97. *A large wholesaling operation is advised by its external accountant (Naomi) of a trading stock scheme that will considerably reduce the company's tax liability. The area of law is unsettled in Australia but Naomi obtains a favourable legal opinion from a respected tax counsel (Rona Silk SC) that the arrangement she is proposing is allowed under the tax laws. Rona's opinion deals with all the relevant authorities.*

98. *After a presentation by Naomi to the Board of Directors, the company's Chief Financial Officer recommends to the Board that they adopt the proposal. The Board is reassured by the legal opinion obtained by Naomi and resolves to enter into the arrangement.*

99. *The company's financial position improves significantly because of the tax savings from the trading stock arrangement and Naomi receives additional remuneration based on the tax savings from the proposal. Rona received a professional fee based on her usual billing rate.*

100. *A year later, after making a determination under Part IVA of the ITAA 1936, the Commissioner disallows the tax benefits claimed. The company challenges the disallowance in the Federal Court and loses. However, it may be inferred from the reasons for the decision that it was finely balanced.*

101. *In deciding whether the arrangement was a TES it is necessary to consider whether, at the time it was presented to the Board, it was reasonably arguable that the scheme benefit was available.*

102. *The reasoning of the Court supports a view that it was reasonably arguable that the scheme benefit was available at the time of Naomi and Rona's conduct. As it was reasonably arguable that the scheme benefit was available at the time of the conduct in question, the scheme is therefore not a TES. Therefore, irrespective of whether Naomi or Rona have engaged in promotion or merely the provision of advice, neither Naomi nor Rona have engaged in prohibited conduct as there is no TES. (Section 4 of this practice statement: Identifying entities that have engaged in prohibited conduct for the purpose of the promoter penalty laws, provides guidance on the definition of a promoter).*

At law

103. The above concept of 'at law' requires consideration of the availability of the scheme benefit under taxation law. For example, the application of the sham doctrine may result in a finding that no legal relations were created between the parties. In such a case no deduction would be available under a general provision and it would not be necessary to show whether an anti-avoidance provision would apply to defeat the scheme.

104. However, as a result of subsection 290-65(2), the potential actions of the Commissioner, including the application of a specific or general anti-avoidance provision requiring a determination or decision, may be taken into account.

Circumstances of relevant entities

105. There may be instances where the availability of a scheme benefit may depend on how the scheme is or would be implemented or the particular characteristics or circumstances of the entity that the participant sought or would have sought the scheme benefit for. For example, the availability of the scheme benefit may be reasonably arguable where the participant is or would be carrying on a business but not reasonably arguable where the participant is, or would be, a salary or wage earner.

106. Tax Office staff should review the relevant information and base their identification of the relevant characteristics, circumstances and requirements for the implementation of the scheme on the conduct of the entity in question and the objectively observable facts.

107. Sometimes, the effectiveness of a scheme depends on the characteristics or circumstances of entities and or a particular mode of implementation. In such cases, the promoter of the scheme should either clearly inform participants about the necessary requirements and any assumptions made, or make enquiries about the circumstances of potential participants. In considering whether there is a reasonably arguable position, staff should take into account such disclosures or the making of such enquiries if they have taken place.

108. The relevant conduct is that of the potential promoter, rather than the conduct of third parties. It is therefore a relevant consideration whether the entity has been misled by a participant about their characteristics, circumstances, or intended implementation.

109. The availability of the scheme benefit sought will depend upon the objective conclusions that can be drawn in the context of the potential promoter's conduct. If a potential promoter makes or relies upon an assumption in relation to the entity that will enter into or carry out a scheme and/or the entity for which the scheme benefit is sought, which they do not communicate, that assumption may not be relevant to determining whether the scheme benefit sought is available in the circumstances. See paragraphs 73 to 74 of this practice statement. However, if a potential promoter's assumptions are based on representations communicated by third parties this may be relevant to the application of the exceptions. See paragraphs 257 to 259 of this practice statement.

Example 4

110. *Elizabeth holds a seminar in April 2007 where she markets a tax effective investment opportunity. Elizabeth markets and sells the structure and advises all clients that they should seek independent advice on implementing the arrangement to suit their circumstances. Elizabeth states that for the arrangement to be tax effective, legal documents need to be signed before 30 June 2007.*

111. *An attendee at Elizabeth's seminar, Patricia, takes detailed notes of the arrangement and pays Elizabeth for the structure at the end of the seminar. Patricia decides to implement the arrangement but does not execute the legal documents before the end of the 2007 tax year. Patricia claims a tax deduction in her 2007 tax return. The Tax Office reviews her return in late 2007 and the Commissioner determines that Patricia is not entitled to the deduction claimed.*

112. *In considering whether Elizabeth promoted a TES, it is necessary to review the arrangement that was marketed in April 2007. To identify whether the scheme is a TES it would not be reasonable to draw conclusions about the availability of the scheme benefit based upon the circumstances of Patricia's case because Patricia is not entitled to a tax deduction due to circumstances that occur after the promotion, beyond Elizabeth's control and contrary to the instructions she provided. Tax Office staff must take into account Elizabeth's advice regarding implementation when drawing conclusions about the availability of the scheme benefit sought.*

Example 5

113. *Rebecca is a licensed financial adviser and registered tax agent. Rebecca's remuneration is earned from fees charged for financial advice and rebates or commissions paid by the fund managers of the products she recommends. Rebecca wants to increase her clientele and conducts a series of free 'financial education' seminars in her community to encourage people to use her services by providing cursory information about a number of investment schemes.*

114. *Rick attends one of these seminars and makes an appointment to see Rebecca for further information about taking advantage of one of the investment strategies. Rebecca makes enquiries of Rick to establish his ownership of various companies and to determine which, if any, of the investment strategies are suitable for Rick's circumstances. She encourages him to adopt one of the strategies she outlined in brief during the 'financial education' seminar. However, Rick chooses to conceal from Rebecca an important factor about his ownership of the companies which, if known by Rebecca, would have altered her recommended strategy as the tax benefits thought to be available would not be available in Rick's circumstances.*

115. *Rick is subsequently audited by the Tax Office and the tax benefit claimed by Rick is denied. The deciding factor in the availability of the benefit is the matter not disclosed to Rebecca by Rick. A tax shortfall penalty is imposed on the basis that there was no reasonably arguable position available.*

116. *In assessing Rebecca's conduct under the promoter penalty laws, it is relevant that she made enquiries and was misled about Rick's circumstances.*

117. *In this case, although Rebecca may have promoted a TES, as she was misled by Rick as to his circumstances, she can rely on the mistake of fact exception. See paragraph 264 of this practice statement. The matter which Rick did not disclose goes to the existence of the TES. If the circumstances had been as Rick led Rebecca to believe, the scheme Rebecca promoted would not have been a TES.*

SECTION 4: IDENTIFYING ENTITIES THAT HAVE ENGAGED IN PROHIBITED CONDUCT FOR THE PURPOSE OF THE PROMOTER PENALTY LAWS

118. The promoter penalty laws apply to an entity. 'Entity' is defined in section 960-100 of the ITAA 1997 to include an individual, a body corporate, a body politic, a partnership, any other unincorporated association or body of persons (which is not a non-entity joint venture), a trust, and a superannuation fund.

119. If a TES is identified, it is necessary for staff to identify whether any entity has engaged in the relevant prohibited conduct (subsection 290-50(1)). This is:

- whether any entity has engaged in conduct that results in it being a promoter of a TES, and/or
- whether any entity has engaged in conduct that results in another entity being a promoter of a TES.

120. Being a promoter requires marketing or other activities that encourage the growth of, or interest in, a scheme. Entities that design or implement a scheme but do not engage in these activities will not be promoters.[19] Staff should also note the advice and employee exclusions discussed below (see paragraphs 140 to 170 of this practice statement).

Is an entity a promoter?

121. Section 290-60 provides that an entity is a promoter of a TES if all of the three following elements are present:

- the entity markets the scheme or otherwise encourages the growth or interest in it
- the entity or an associate of the entity receives (directly or indirectly) consideration in respect of that marketing or encouragement, and
- it is reasonable to conclude that the entity had a substantial role in respect of that marketing or encouragement having regard to all relevant matters.

122. A number of entities may be associated with a scheme and carry out one or more activities, for example:

- devisers or designers of the scheme
- persons that provide advice on the scheme
- parties that finance the scheme
- marketers of the scheme to intermediaries such as financial planners, business or financial consultants and tax agents
- marketers of the scheme to participants
- entities that implement the scheme or elements of the scheme, and
- participants that invest or are likely to invest in the scheme.

123. Due to the differing nature and scope of their activities and their differing levels of involvement with the scheme, it is likely that only some of the entities undertaking such activities will be promoters of that particular scheme.

124. Note that even though an entity does not satisfy the requirements for being a promoter in its own right, the entity may still have engaged in prohibited conduct if its conduct results in another entity being a promoter. See further paragraphs 171 and 172 of this practice statement.

Marketing or encouragement element

125. To be a promoter of a TES, an entity must market the TES or otherwise encourage its growth or the interest in it. Whilst the general expression *encouraging the growth of the scheme or interest in it* would ordinarily include most forms of marketing, the specific reference to marketing highlights the most common case. The inclusion of the broader phrase *otherwise encourages the growth of, or interest in, the scheme* clarifies that the promoter penalty laws are not restricted to marketing in a commonly understood sense.

[19] However, note that even where an entity does not satisfy the definition of promoter their conduct may contravene the promoter penalty laws where it results in another entity being a promoter (see further at paragraphs 171 and 172 of this practice statement).

Example 6

126. *Graeme is a financial planner and registered tax agent who specialises in taxation, wealth creation and high net wealth client management. Graeme develops strategies that would be attractive to his high wealth clients.*

127. *Graeme persuades Matthew, one of his high wealth clients, to adopt an arrangement developed by him that involves an offshore tax haven.*

128. *Graeme receives a fee for providing and implementing the arrangement for Matthew that is significantly higher than his normal billing rate.*

129. *A Tax Office review of the arrangement implemented by Graeme for Matthew concludes that it is a TES.*

130. *Although he has only marketed the scheme to one client, Graeme's conduct constitutes marketing or otherwise encouraging the growth of, or interest in, the scheme.*

Consideration element

131. For an entity to be a promoter of a TES, that entity or its associate[20] must receive consideration in respect of the marketing of the scheme, or in relation to encouraging the growth of, or interest in, the scheme.

132. The description of the consideration will not necessarily determine whether it has been received in respect of the marketing or encouragement of a TES. However, salary, wages and professional fees that genuinely reflect the time and expertise spent in merely providing independent advice to clients about a scheme, will not generally be consideration in respect of marketing or encouraging the growth of, or interest in, the scheme.

133. Factors which may indicate that consideration was received for marketing or encouragement include consideration calculated (whether directly or indirectly) on the basis of tax savings or scheme benefit potentially delivered, or that was contingent upon the nature of advice provided.

Example 7

134. *Michael is an accountant who provides general accounting and taxation advice to his clients as well as preparation of their tax returns. Michael also devises TES for his clients. Michael provides one of his schemes to a number of clients and encourages them to enter into the arrangement. In addition to the time Michael spends encouraging clients to enter into the scheme Michael spends some time considering and advising each client about the impact of the scheme in their particular circumstances. The fee Michael charges his clients is more than he would normally charge for his expertise and time spent providing advice.*

135. *The fee charged by Michael in these circumstances is not solely for his time and expertise in advising the client. An element of the fee is consideration for the marketing or encouraging the growth of, or interest in, the scheme regardless of how Michael describes, charges or receives the consideration.*

[20] Associate has the meaning given by section 318 of the ITAA 1936.

136. *Whilst only the question of whether consideration was received in respect of his marketing or encouragement is relevant to determining if Michael is a promoter, the amount of the consideration he received for activities in respect of the scheme is relevant to the Federal Court in deciding the appropriate penalty[21] in the circumstances.*

Substantial role element

137. Numerous entities may be involved with, or participate in, the marketing or encouragement of the growth of, or interest in, a TES. However, not all of these entities will necessarily be subject to the promoter penalty laws. Only those entities that have a substantial role in the marketing and encouragement activities (in addition to receiving consideration) will be a promoter. An entity that has only minor involvement in marketing or encouraging the growth of, or interest in, a TES, or whose conduct is peripheral to the marketing or encouragement of a TES, will not satisfy this element of the promoter definition.

138. Whether or not a particular entity has a substantial (considerable or large) role will depend on the facts of the case. Relevant matters include:

- the entity's degree of involvement in activities that marketed or encouraged the growth of, or interest in, the scheme
- the nature and level of the consideration received by the entity in respect of those activities
- the degree of the entity's participation in the management, direction or control of the marketing or encouraging of the scheme (also see the employee exclusion in paragraphs 169 and 170 of this practice statement), and
- the significance of the entity's role in those activities compared to the role played by others. An entity that plays a key role in devising the scheme and giving instructions to others in the course of its establishment and implementation will have a more significant role than an entity that merely acts in accordance with those instructions.

Exclusions

139. There are two exclusions which will prevent an entity from being considered to be a promoter. These are the 'advice exclusion' in subsection 290-60(2) and the 'employee exclusion' in subsection 290-60(3).

Advice exclusion

140. Subsection 290-60(2) provides that an entity is not a promoter of a TES merely because the entity provides advice about the scheme.

141. Mere provision of independent and objective advice by an entity is not of itself conduct that results in the advisor or another entity being a promoter of a TES, even if the advice is supportive of a particular arrangement, and even if a taxpayer might not have entered into a scheme without it.

[21] Paragraph 290-50(5)(a).

Example 8

142. *Nada is a barrister who is asked to advise on the tax consequences of an arrangement that is to be marketed by Peter. Nada receives draft documents including management agreements. Based on her initial review, Nada is concerned that Peter's expectation that investors will receive a tax benefit is flawed. Nada holds a conference with Peter and outlines the perceived flaw and suggests changes to the proposal. Peter re-submits the arrangement to Nada for advice. Nada provides a favourable opinion on the application of the general tax laws. Nada's advice is qualified as it is based on the documents provided and that the circumstances of individual investors were not considered. Nada's advice is included in the marketing material for the arrangement.*

143. *The Tax Office investigates the arrangement marketed by Peter and concludes that it is a TES.*

144. *Nada's conduct does not result in her being a promoter because it does not amount to marketing or otherwise encouraging the growth of, or interest in, the scheme.*

145. *In any event, Nada has merely provided advice about the scheme and subsection 290-60(2) ensures that she is not a promoter. The fact that in the course of providing advice Nada suggests changes to the design of the scheme does not alter this conclusion.*

146. The fact that an entity describes their conduct as 'advice' or that they are an 'advisor' is not conclusive as to whether or not an entity is a promoter.

Example 9

147. *Assume the facts in Example 8, however Nada is approached by Peter to be the public face of the scheme, as interest in the scheme is low. Nada agrees and negotiates a fee for each investor that participates. Nada agrees to participate in marketing activities including speaking at seminars. Nada also agrees that Peter can refer potential investors to Nada for 'independent' legal advice.*

148. *In these circumstances Nada is a promoter as her activities have gone beyond the mere provision of advice and she has marketed or otherwise encouraged the growth of the scheme. Nada will not be able to rely on the 'mere advice' exclusion. Nada's conduct clearly goes beyond what would be normal professional advice and her speaking at marketing seminars is clearly distinguishable from instances of providing normal professional advice upon which several named parties may rely on.*

149. An entity is not a promoter merely because they provide advice about a scheme. Accordingly, financial planners, tax agents, accountants, legal practitioners and others are not promoters merely because they provide advice about a TES, even if that advice provides alternative ways to structure a transaction, or sets out the tax risks of the alternatives.

Example 10

150. *Quincy is shown a copy of an arrangement for minimising tax which involves an offshore structure.*

151. *Quincy is very keen to increase his cash flow and studies the arrangement closely. He prepares documents based on the structure, and he independently makes enquiries of a financial entity about putting in place a structure that will enable him to not declare income in Australia.*

152. *Quincy seeks advice on the arrangement from Fred of Farrier Finance & Accounting (Farrier Finance), who has traditionally provided accounting and taxation services to Quincy.*

153. *Fred reviews the arrangement proposed by Quincy and prepares a memo outlining the advantages and risks of the arrangement. Fred points out that the arrangement is similar to those that are described in a Taxpayer Alert as being of concern to the Tax Office. Fred also qualifies his advice indicating that he has no knowledge of the financial entity that Quincy approached nor of the bona fides of their services. Fred concludes that as a professional he could not recommend the arrangement to Quincy due to the risks regarding the availability of the tax benefits.*

154. *Quincy is not happy with Fred's advice and is keen to proceed. Quincy instructs Fred to prepare the documentation. Fred charges his normal fee for these services and Quincy enters into the arrangement.*

155. *A Tax Office review of the arrangement entered into by Quincy concludes that it is a TES.*

156. *On consideration of the relevant factors, neither Fred nor Farrier Finance are promoters. Although Fred's services are significant in the implementation of the arrangement, the activities do not amount to marketing or encouraging an interest in the scheme. Further, Fred and Farrier Finance are able to rely on the advice exclusion.*

157. *As Quincy has put the arrangement together and made the decision to further the implementation, there is no promoter for this TES. However, Quincy will be exposed to administrative penalties in relation to any tax shortfall.*

Example 11

158. *TaxFin Limited, an investment bank, develops a product to structure a cross border financial security to achieve a tax benefit for a user of funds in Australia. The security requires a specialist funding package that TaxFin can offer. TaxFin will receive an advisory fee and fees in relation to the financing transaction. The structure is marketed to three companies for valuable consideration. A Tax Officer auditing one of the companies identifies the arrangement and refers the matter as a potential promoter penalty case to ATPBSL.*

159. *Discussions with TaxFin reveal that it sought advice in relation to the arrangement from a well known tax advisor, Anna, a partner in an accounting firm. Anna produced a letter of advice which fully set out the risks and issues including the risk of Part IVA of the ITAA 1936 being applied to the arrangement. Her advice was that Part IVA of the ITAA 1936 would not apply to the transaction. However, Anna's advice failed to consider a recent case directly on point where Part IVA of the ITAA 1936 applied. The fee charged by Anna's firm to TaxFin was in line with the firm's normal billing rates for significant tax advice and was not affected by the potential tax benefit achieved by the arrangement.*

160. *The Tax Office concludes that the arrangement is a TES as the sole or dominant purpose of the participants would have been to obtain a tax benefit which would have been disallowed under Part IVA of the ITAA 1936.*

161. *As Anna has merely provided professional advice upon the arrangement she is not a promoter of the TES and the advice exclusion will apply to her.*

162. *TaxFin offers a voluntary undertaking to not market the scheme to any other entities. The terms of the undertaking and relevant circumstances are considered and the undertaking is accepted by the Commissioner after taking into account the objectives of the promoter penalty laws and other options that may be available under those laws in relation to the prohibited conduct.*

163. In determining whether the advice exclusion applies, staff need to examine the conduct of the entities to identify whether they have merely provided advice. For example, if advice was limited in its scope based on the client's request or was given negligently, this would not ordinarily indicate that the entity had done more than merely provide advice. However, if incomplete material information was given in order to sway a client's decision making (for example, material which might discourage entry into the scheme was excluded or intentionally not covered), this would indicate that the entity has done more than merely provide advice.

164. Whether any relevant quality assurance procedures of a sufficient standard were followed or whether they were circumvented in order to achieve a particular outcome may also be relevant.

Example 12

165. *Ruth is a barrister who is briefed by a firm of solicitors at Lisa's instruction, to provide an opinion on the operation of the tax laws with respect to a specific element of an arrangement that has been devised by Lisa. Ruth is provided brief details of the arrangement and a summary of the technical taxation issues that she is briefed to advise upon.*

166. *In providing her opinion on the questions asked in the brief, Ruth advises that she will have to make certain assumptions as to how the arrangement will be implemented. Neither the instructing solicitors, nor their client Lisa, identifies any error or misstatement in the assumptions that Ruth has made as a result of her enquiries about the tax position. Clearly stating the assumptions relied upon, and that the scope of her consideration has been limited to the specific questions asked, Ruth provides an opinion that the operation of the tax laws in relation to the specific question asked in the brief properly results in a relevant tax benefit being available.*

167. *However, the implementation of the arrangement involves steps that were not made known to Ruth in providing her advice. The Tax Office considers that the tax benefit sought in the arrangement is not available and identifies the arrangement as a TES. As Ruth has merely provided advice about the scheme, she is not a promoter of the TES and the advice exclusion applies.*

168. In some professions an entity may have an ongoing relationship with a client and part of the duty owed to their client may be to be proactive in bringing new opportunities to their client's attention. Although it is considered that this would constitute more than the mere provision of advice in some circumstances, this does not imply that the entity is automatically the promoter of a TES. All the elements of the promoter definition still need to be considered, including whether the scheme is a TES and whether any consideration was received in respect of its marketing.

Employee exclusion

169. The second exclusion is that an employee is not taken to have a substantial role in respect of marketing or encouragement merely because the employee distributes information or material prepared by another entity.

170. Staff examining the potential application of the promoter penalty laws to a scheme should focus on those who are likely to have a substantial role in marketing or encouragement of the scheme, such as the entity or entities that prepared the material and/or directed the employee to distribute the material. Action cannot be taken against an employee or agent where they do not have such a substantial role, but merely distribute information or material prepared by another entity. The application of the laws to employees and other agency relationships in the context of conduct resulting in another entity being a promoter is discussed at paragraphs 189 to 216 of this practice statement.

Is an entity engaging in conduct that would result in another entity being a promoter?

171. The promoter penalty laws also apply where an entity engages in conduct that results in another entity being a promoter of a TES. This aspect of the prohibited conduct recognises that an individual who is the controlling mind behind the promotion of a TES may attempt to structure their affairs to avoid sanction under the promoter penalty laws.

172. In considering whether the conduct of an entity has resulted in another entity being a promoter of a TES, staff are to assess all relevant circumstances on a case by case basis. They need to ensure that the conduct of the entity is not so remote as to make it unreasonable to reach the conclusion that the entity's conduct effectively resulted in the other entity being a promoter. The conduct of the entity must directly or indirectly result in the other entity satisfying each of the three elements of the promoter definition. Conduct that is merely peripheral to the other entity being a promoter will not be sufficient.

Example 13

173. *Paul is a junior associate in a large accounting firm. The firm encourages innovation amongst its staff by offering a cash bonus for novel tax planning ideas. In his own time, Paul reviews new tax legislation providing tax incentives for industry. Paul devises a scheme that inflates the tax benefits and allows them to flow through to retail investors. Paul submits his idea and, after assessment by the relevant partner, receives the cash bonus. The tax division of the firm prepares the arrangement to be marketed by the firm and for entry by clients. The members of the firm encourage clients to participate in the scheme and receive a bonus in relation to each client that participates in the scheme. The Tax Office becomes aware of the scheme and considers it to be a TES.*

174. *Although Paul is the originator of the scheme, he did not actively engage in conduct that resulted in the accounting firm being a promoter in these circumstances.*

Example 14

175. *Assume the facts in the previous example. The firm contributes to a newspaper's special industry feature by placing advertisements promoting the arrangement and providing editorial comment. The newspaper publishes an article that refers to the arrangement favourably and publishes the advertisement.*

176. *The use of the newspaper by the firm has caused a growth in interest in the scheme. However, the newspaper is not an entity that has engaged in conduct that resulted in them or another entity being a promoter. In performing these roles the newspaper is neither actively engaged in causing another entity to be the promoter of a TES, nor does it have a substantial role in the promotion. Further, the fees received by the newspaper firm were consideration for providing advertising services and or space. Receipt of consideration for this activity would not be consideration in respect of marketing or encouraging the growth of, or interest in, the scheme.*

Example 15

177. *In Example 8 (see paragraphs 142 to 145 of this practice statement), it is concluded that Nada's conduct did not result in her being a promoter because she merely provided advice. Assume that Peter satisfies the definition of promoter in relation to the TES Nada advised upon. In the circumstances, without further conduct, Nada's provision of advice is not conduct that results in Peter being a promoter, even if Nada's opinion is an essential element of the marketing material for the arrangement such that the marketing could not have proceeded without the inclusion of Nada's advice.*

Conduct of an Australian entity facilitating an offshore promoter

178. The promotion of tax avoidance structures from offshore locations to Australian taxpayers creates significant practical issues in identifying and reviewing the actions of the offshore entities for the purposes of the promoter penalty laws, especially where the entities have no relevant presence in Australia or only operate through Australian agents (see below regarding agency).

179. Staff need to consider whether the overall conduct of an Australian entity facilitating an offshore promoter is so substantial that it supports a conclusion that its conduct resulted in it or another entity being a promoter of a TES. This should include consideration of whether the Australian entity:

- recommended an offshore service provider to clients or prospective clients
- provided material prepared by the offshore service provider to clients or prospective clients
- facilitated direct contact between the taxpayer and the offshore service provider
- dealt with Australian parts of the scheme, for example, setting up structures, arranging for financing, preparing and lodging documentation
- arranged for the payment of fees
- received payment from the offshore service provider (which may or may not be disclosed to the clients) or from clients or prospective clients, or
- represented the offshore service provider in dealings with Australian entities in respect of the arrangement.

Selecting the appropriate entity for action under the promoter penalty laws

180. As stated in paragraph 137 of this practice statement, there may be a number of entities involved in a particular instance of prohibited conduct. When recommending or approving actions under the promoter penalty laws, staff must select for action the entity or entities that are most appropriate in the circumstances to advance the objects of the Division. LSB or TCN should be consulted to assist in identifying the appropriate entity where a promoter penalty application is being considered.

181. Individuals engaging in prohibited conduct may use other entities in a variety of ways in an attempt to protect themselves from sanction. For instance, individuals may:

- operate through another entity
- formally or informally control the acts of a corporate entity
- institute complex entity structuring
- employ others to carry out the prohibited behaviour, and
- use contrived employment arrangements to remove the appearance of being the controlling mind of another entity.

182. When making recommendations for action under the promoter penalty laws, staff should direct their examination to the source or cause of the conduct and attempt to identify the individuals controlling or directing the engagement in the prohibited conduct.

183. A promoter penalty application in regard to an individual controlling or directing an entity's engagement in prohibited conduct would most likely need to be made on the basis that they have engaged in conduct that has resulted in another entity being the promoter of a TES (see paragraphs 171 and 172 of this practice statement).

Application in regard to the controlling mind of entity structures

184. In order to achieve the deterrence objectives for entities that are not natural persons it will generally be more effective to take action under the promoter penalty laws in regard to the individual who is the controlling mind behind the entity rather than the entity itself. However, in other circumstances it will be more effective or appropriate to take action under the promoter penalty laws in regard to entities that are not natural persons.

Example 16

185. *Fran has worked for many years as an employee of an accounting firm. She decides that she would like to set up her own business providing tax effective advice to a small group of selected high net wealth individuals. Fran sets up a company structure for asset protection purposes with her spouse as the sole director of the company. Her spouse agrees to follow Fran's instructions in the day-to-day running of the company and in the major decisions taken by the company.*

186. *Fran is an employee of the company. Three other employees provide secretarial and office support and take all directions from Fran. All advice is provided under the company letterhead and Fran does not disclose to the other employees or the company's clients her relationship with the company.*

187. *Fran commences her employment activities, some of which includes the promotion of TES.*

188. *In this case the company is the entity that is the promoter. It may be appropriate to seek an injunction to prevent the company from undertaking further prohibited conduct. However, for civil penalty purposes, the Commissioner may decide to make an application in regard to Fran as her conduct has resulted in the company being a promoter. Fran cannot rely on the employee exclusion as she is not merely distributing information or material prepared by another entity. Fran's conduct goes beyond merely providing advice about the scheme because she is the controlling mind of the company and its engagement in prohibited conduct.*

Application in regard to agency

189. As entities may carry out their functions through the acts of employees, contractors and other agents, taking action under the promoter penalty laws in regard to individuals who have carried out elements of the prohibited conduct on behalf of another entity may not always be appropriate or the most effective way to deter prohibited conduct.

190. The acts of employees, agents and contractors acting within their actual or apparent authority will generally be regarded as acts of the employer or the principal.

191. Where an employee, agent or contractor has engaged in prohibited conduct on behalf of, or at the direction of, an employer or principal, it will generally be appropriate to regard the employer or principal as having engaged in that conduct and to take any action under the promoter penalty laws in respect of that entity.

192. If an employee, agent or contractor acts outside the scope of their authority those acts will generally be regarded as acts of the employee, agent or contractor in their own right, rather than the acts of the employer or principal.

193. An employee, agent or contractor may also be regarded as the appropriate entity for action under the promoter penalty laws where they are the controlling mind of the employer or principal.

194. Factors to be considered by staff in identifying which entity has engaged in prohibited conduct include:

- the circumstances surrounding the employee, agent or contractor's involvement in the marketing or encouragement of the TES, including whether the employer or principal could be reasonably taken to have known about the conduct of the employee, agent or contractor
- whether the employee, agent or contractor is a beneficial owner or controlling mind of the employer or principal
- whether the employee, agent or contractor is remunerated for marketing or encouraging the growth of, or interest in, the TES; including whether these payments go beyond the usual method of remuneration in that industry and whether the payments were known about, or approved by, the employer or principal
- any circumstances surrounding the employee, agent or contractor's conditions of employment that are inconsistent with industry norms
- the level of autonomy provided to the employee, agent or contractor in representing the employer or principal

- the employer or principal's applicable policies and approval processes governing product and transaction sign-offs. For example, an employee may have made a submission to an employer's New Product Committee, Management Committee, or Risk Committee for approval
- the employer or principal's process of post-approval certification, periodic reporting, verification, review, or auditing of compliance with the terms of approval; including consideration of any changes in law or emergence of facts not identified at the time of approval
- whether the employee, agent or contractor has breached their contract of employment or engagement
- whether any disciplinary or corrective action is under consideration or has been taken in regard to the employee, agent or contractor, for acting outside the scope of their role, responsibility, and authority
- the regulatory regime to which the employer or principal may be subject to and the obligations under that regime placed on the employer or principal in relation to monitoring and supervising the activities of employees, agents or contractors to prevent them from operating outside the scope of their role, responsibility and authority, and
- for professional services providers, any obligations arising from any relevant code of ethics or standards.

195. Note that a relevant consideration in this context would be whether the employer could rely upon the reasonable precautions exception in relation to the acts of the employee. See paragraph 264 of this practice statement.

Example 17

196. *Geoff is an employee of Brock, who runs a small firm. Brock approaches Hajar, a high wealth client, and markets a product to her that is a TES.*

197. *Geoff works at the direction of Brock and, in the course of his duties communicates with Hajar and drafts documents and correspondence for Brock to send to Hajar.*

198. *Brock receives a fee that is significantly higher than his normal billing rate for professional services. Brock is impressed with the work done for him by Geoff in the course of the engagement and ensures that Geoff receives a promotion which carries with it a substantial increase in fixed annual salary. In addition Geoff is paid an annual performance bonus equal to 20% of his fixed annual salary.*

199. *Brock is considered to be a promoter. Geoff would not be the appropriate entity to consider for the purposes of the promoter penalty laws as he has carried out the relevant activities within the scope of his role as an arm's length employee.*

Example 18

200. *James is employed as an investment consultant by Lane Bank, an investment bank. Lane Bank develops a loan package for customers that want to borrow money for private and investment purposes. The package is based upon customers claiming tax benefits not normally available in usual financial arrangements.*

201. *The New Product Approval Committee of Lane Bank approves the loan package in accordance with the Bank's normal policies and procedures, which includes obtaining an opinion from an external tax advisor that the tax benefits would be available at law in a given set of circumstances.*

202. *Lane Bank provides its investment consultants with training on the loan package, including a software package that performs scenario analysis and demonstrates the tax benefits for customers in using the package when compared with Lane Bank's other investment loans and loans on offer from its competitors.*

203. *As part of his duties, James actively markets the loan package to the bank's customers, such as by modelling the financial outcome for the customer's personal position or by suggesting ways to restructure their existing loan package.*

204. *James is particularly successful in marketing the loan package and as part of his annual appraisal process receives substantial discretionary compensation based on his overall performance which includes his success in marketing the product.*

205. *If the Tax Office identified the product as a TES, Lane Bank would be the appropriate entity to identify as a promoter. James can rely upon the employee exclusion as he merely distributes information or material prepared by his arm's length employer, Lane Bank.*

Example 19

206. *Vincent is employed by a boutique financial institution that provides investment products. Vincent sponsors a product which has the potential to provide a return via a capital gain at maturity in five years and provides the investor with 100% capital protection. The product includes an embedded loan for 100% of the subscription price upon which the investor prepays five year's worth of interest.*

207. *As required by the bank's internal policy for new products, Vincent has obtained an opinion from an external tax advisor that it is more likely than not that the prepaid interest is deductible to the investor.*

208. *The bank's new product approval committee is concerned that the product is a TES and refuses to approve it. Vincent is furious as he believes that the committee is acting unreasonably in rejecting the external opinion as flawed. He calls his clients to vent his frustration at not being able to proceed despite having a favourable tax opinion, which he faxes together with other material outlining the product to some of his clients to gauge their interest in the product. The Tax Office then becomes aware of the scheme and concludes that it is a TES.*

209. *Vincent has not acted within the authority granted to him by his employer. In these circumstances, if Vincent had received any consideration in respect of marketing or encouraging the growth of, or interest in, the scheme he would be the appropriate entity for action under the promoter penalty laws.*

Example 20

210. *Phil and Luke are employed by an investment bank with substantial worldwide operations. Phil sponsors a product that has the potential for investors to receive tax exempt foreign source dividends at a fixed rate for five years and provides investors with security over their investment in the form of a pool of government bonds.*

211. *Phil obtains a tax opinion from a well known external advisor that it is more likely than not that the dividends will be exempt income on the basis of certain assumptions.*

212. *Phil submits the product to the bank's new product approval committee which accepts the tax opinion but thoroughly questions the economics of the transaction upon which the opinion is based. Although the bank has a stringent approvals procedure in place, Phil convinces the committee by misleading them as to the essential elements and complexity of the scheme. On this basis the committee approves the product for marketing.*

213. *Phil enlists the support of Luke, a relationship manager within the bank, and together they successfully market the product to Australian investment fund managers. Both receive substantial discretionary compensation almost entirely attributable to their efforts in relation to the product as part of their annual performance review.*

214. *The Tax Office audits a number of the investors and forms the view that the product is a TES.*

215. *Phil has acted in a manner inconsistent with the scope of his employment by providing misleading information to the committee that resulted in the product being approved, which would not have otherwise occurred. Accordingly the bank takes disciplinary action against Phil.*

216. *In these circumstances Phil is the appropriate entity for action under the promoter penalty laws as he is clearly the cause of the prohibited conduct. The bank was misled by Phil only as Luke was not a party to the deception.*

Application in regard to in-house advisers

217. In-house tax advisers are employed on an arm's length basis to manage the taxation affairs of a company or a group of corporate entities. When conducting compliance activities staff may identify TES that have been developed, recommended and implemented by in-house tax advisers.

218. In order for an in-house adviser to be the appropriate entity for action under the promoter penalty laws, they must have engaged in conduct that results in them or another entity being a promoter.

219. In some circumstances, an in-house adviser may engage in conduct that would constitute prohibited conduct had they been external to their company. However, in most cases the adviser's activities will be regarded as the acts of the employer entity. The concept of marketing or otherwise encouraging the growth of, or interest in, a scheme requires an external element to be present.

220. Therefore, where a TES is entered into by the employer entity, neither the in-house adviser, nor the employer entity, would ordinarily be considered to have engaged in conduct that resulted in it or another entity being a promoter. The employer entity could not be regarded as a promoter due to the acts of the in-house adviser, as they are regarded as the employer's acts. The in-house adviser could not be considered to have engaged in conduct that resulted in another entity being a promoter because the employer entity would not satisfy the definition of promoter.[22]

[22] Note that although the promoter penalty laws may not apply in this circumstance generally, the employer entity may be subject to significant administrative penalties.

221. However, there are situations where an in-house adviser may have engaged in conduct that results in them or another entity being the promoter of a TES. For example:

- where the employer entity satisfies the definition of promoter (for instance by marketing a scheme to other entities for consideration) and the in-house adviser's conduct has resulted in the employer entity being the promoter of a TES to an external entity
- where the in-house adviser engages in a course of conduct that results in the in-house adviser being a promoter (for instance obtaining various successive employment contracts as an in-house adviser as the means for the promotion of their TES), or
- where the in-house adviser has acted outside their authority and is the promoter of a TES to third parties.

Example 21

222. *A large transport company is advised by its in-house accountant, Edmund, of a method of assigning its contracts between subsidiaries that will significantly reduce the company's tax liability.*

223. *After a presentation by Edmund to the Board of Directors, the company's Chief Financial Officer recommends to the Board that they adopt the proposal.*

224. *The company's financial position improves significantly because of the tax savings from the arrangement and Edmund receives a bonus of 20% of his annual salary.*

225. *A year later the Commissioner issues an amended assessment disallowing the tax benefits claimed. The Commissioner imposes a 50% shortfall penalty under Subdivision 284-C.*

226. *The case is reviewed by Tax Officers for the purposes of the promoter penalty laws. The examination indicates that the arrangement has not been adopted by other entities. There is no evidence that either the company or Edmund have attempted to profit from the arrangement by adapting it for the purposes of marketing it to any outside entities. There is no evidence suggesting that Edmund had devised the scheme prior to his employment, or that his employment was a device to attempt to enable him to promote TES without exposure to the operation of the promoter penalty laws.*

227. *In the circumstances, the case would not be appropriate for any action under the promoter penalty laws.*

Application in regard to financial services

228. The financial services industry is an area where arrangements are often marketed via a network of entities that may be agents of, or otherwise associated with, a promoter. There may be circumstances where it is not clear whether an agency arrangement exists and staff will need to look at the facts of each situation.

229. Agents providing financial product advice under the *Corporations Act 2001* would be clearly identified as Authorised Representatives of an Australian Financial Services Licensee. Note that financial product advice can also be provided by the Australian Financial Services Licensee directly or by their employees. In these circumstances, staff must also consider the due diligence exception (paragraph 264 of this practice statement). For example, it is likely that an Authorised Representative that provides financial product advice in accordance with the relevant requirements of the *Corporations Act 2001* would be considered to have taken reasonable precautions and exercised due diligence.

Example 22

230. *Kelly is an Authorised Representative of a financial services licensee, Advice is Us, which limits its advisers to recommending products from its approved product list unless specific approval for an exception is obtained. Kelly advertises in her local newspaper that she can provide financial planning advice. While Kelly is careful to take the opportunities provided by Advice is Us to update her knowledge and understand the products on the approved product list, she is reliant on the accuracy of the information provided by Advice is Us. Advice is Us has a product on its approved product list that is later identified as a TES. In the circumstances where Kelly has recommended the TES using material provided by Advice is Us, she will not be a promoter as she has not had a substantial role in marketing or otherwise encouraging the growth of, or interest in, the scheme, compared to the role of Advice is Us as Licensee.*

231. *Kelly may have a more substantial role in other circumstances, for example, where she conducts investment seminars and produces tailored financial planning reports for her clients in which she clearly recommends this product over others. However, in undertaking these additional activities, Kelly has acted consistently with her responsibilities as an Authorised Representative and her role as a professional financial planner and is still reliant on information provided by her Licensee, Advice is Us. In these circumstances, any action under the promoter penalty laws should be in respect of Advice is Us.*

232. *However, there may be circumstances where staff should recommend that action under the promoter penalty laws should be taken in regard to an individual or entity purportedly in an agency relationship.*

Example 23

233. *Kelly receives a phone call from Offshore-Firm, an entity based in a tax haven. Offshore-Firm explains that they are aware of the products which Kelly recommends and states that they offer similar products that have substantial tax advantages for investors and higher commissions for Kelly. Kelly asks for information on the products including tax opinions, investment strategies etcetera. Kelly receives the application forms and advertising material but not the requested information. After a cursory examination, Kelly is impressed that the products offered promise extraordinary returns which seem to outperform other investments. Without further enquiry she begins to recommend the products to her clients.*

234. *Kelly has clearly acted outside of her authority as an authorised representative in recommending a product not on her approved product list without her Licensee's consent. In these circumstances, if the Offshore-Firm products are found to be a TES, Kelly may be a promoter of a TES as she has had a substantial role in the marketing or encouragement and has not conducted reasonable due diligence. She cannot argue that her role as a promoter was due to an act of her Licensee.*

Application in regard to partners and partnerships

235. A partnership is an entity for the purposes of the promoter penalty laws.[23] However, a partnership is a group of individual entities bound by contract rather than a separate legal person.

236. As a partnership is an entity for the purposes of the promoter penalty laws staff should consider whether a partnership has engaged in prohibited conduct through the acts of its partners, employees or acts otherwise done in the partnership name.

237. If it is determined that it is appropriate in the circumstances to accept a voluntary undertaking (see paragraphs 30 to 35 of this practice statement) in relation to a partnership, staff should ensure that the partner or partners making the voluntary undertaking offer are authorised to bind the partnership in that way unless the undertaking is sought in relation to the individual partner's own conduct.

238. As a result of these issues, in some instances it will be appropriate for a promoter penalty application to be made against partners in the partnership name[24]. In other instances it will be appropriate to make promoter penalty applications against the particular partner or partners that have engaged in the prohibited conduct.

239. As stated in paragraph 180 of this practice statement where it is proposed to recommend that a promoter penalty application be made in relation to a partnership, LSB or TCN should be consulted in identifying and naming the appropriate entity.

240. To assist in identifying the appropriate entity for a promoter penalty application, staff should examine the circumstances and information available and consider the following matters:

- whether the individuals carrying out the prohibited behaviour were acting (or apparently acting) on behalf of the partnership or in its name
- whether the individual was authorised to act on behalf of the partnership and, if so, whether the individual's acts were explicitly or implicitly authorised by the partnership in the conduct of its business
- whether the individual is an employee or partner of the partnership and their role within the partnership
- whether the conduct can be generally attributed to the partnership, and
- whether a specific individual's conduct satisfies the elements of the prohibited conduct separately from the partnership entity.

[23] See the definition of entity found in subsection 960-100(1) of the ITAA 1997 as per section 3AA of the TAA and subsection 995-1(1) of the ITAA 1997.
[24] Order 42 of the Federal Court Rules allows for an action to be brought in (or against) the partnership name.

Example 24

241. *Boutique is a partnership of 13 partners specialising in the development and marketing of tax minimisation schemes. Some partners specialise in devising schemes and all of the partners encourage clients to participate in the partnership's schemes. Clients that participate in a scheme are billed on the basis of a percentage of the tax savings generated by the scheme.*

242. *The Tax Office identifies a scheme as a TES. In this instance it would be appropriate to make a promoter penalty application in regard to all the partners by naming the partnership as the relevant entity.*

Example 25

243. *Wendy is an employee of a large accounting partnership. The partnership maintains a list of authorised precedents available to partners and employees of the firm. Without her supervising partner's knowledge, Wendy alters a precedent from the partnership's database for a client who intends to seek funds from a number of participants, and arranges with the client that she will be provided a percentage of the tax savings achieved. Wendy develops the product to achieve the maximum remuneration without regard to the commerciality of the arrangement for participants and encourages the client to take up the scheme without fully outlining the relevant considerations for the client. The provision of the unapproved advice to the client, as well as the acceptance of this form of remuneration, are outside the partnership's terms of conduct for employees and the terms of Wendy's employment. The Tax Office identifies the scheme Wendy developed as a TES that has had a significant number of participants. In these circumstances, Wendy would be the appropriate entity in considering action under the promoter penalty laws, rather than the partnership or her supervising partner.*

Example 26

244. *John is a partner in an accounting firm of 400 partners which maintains a list of authorised precedents available to members of the firm as part of its knowledge sharing process. The partnership has approval procedures in place for its precedent database and internal governance arrangements for the database which are diligently followed by all staff. In particular, the partnership requires that the issue of whether the availability of the benefits sought under the arrangement are reasonably arguable to be addressed before each precedent is approved for inclusion on the database. Additionally, the partners are also required to satisfy themselves that the availability of the benefit is reasonably arguable in the context of a particular client's circumstances before the precedent is presented to the client.*

245. *John has a number of clients in similar circumstances and he finds an arrangement on the database which is suited to their circumstances and meets their tax minimisation objectives. In accordance with the firm practice, John advises his clients about the availability of the scheme and its advantages and disadvantages based upon the information on the database, in circumstances where the adviser exception is inapplicable. The Tax Office identifies the scheme in a client compliance review and the case is referred by the area conducting the review as it is considered that the scheme may be a TES. John and the firm's history indicate that the offering of a TES is likely to have had a significant number of participants. In these circumstances, the partnership would be the most appropriate entity in considering the application of the promoter penalty laws and it is likely that a voluntary undertaking would be the most appropriate remedy.*

Example 27

246. *Four partners operate the property finance subgroup of a law firm comprising 120 partners. The partners in the property finance sub-group develop a financing strategy involving property developers incorporating their own special purpose companies, and using a particular financing document with particular tax features.*

247. *The Tax Office subsequently identifies the financing strategy as a TES. The Tax Office also identifies that only the four property finance sub-group partners have engaged in conduct that encouraged clients to enter into the TES.*

248. *The partners in the property finance group did not seek to have the strategy reviewed and recorded in the firm's bank of precedents as required and thereby bypassed the firm's governance processes in preparing the strategy and offering it to clients. As a result the firm's tax division did not have the opportunity to review the arrangement to establish whether the position was reasonably arguable.*

249. *Amongst other things, the Tax Office determines that a civil penalty application is appropriate due to the number of property developers involved in the scheme and the amount of revenue involved. As the property sub-group intentionally circumvented the firm's governance procedures and other partners were not involved in their contravention, Promoter Compliance recommends that the Commissioner make applications for a civil penalty order in respect of the four property finance sub-group partners only.*

250. *As the firm is willing to offer a voluntary undertaking relating to the conduct which involves various strategies to rectify the conduct and prevent it from occurring again, an injunction application is not required at this time.*

Application in regard to joint venture arrangements

251. There may be circumstances where entities in a joint venture may have engaged in prohibited conduct. In these circumstances, the conduct of each joint venturer should be examined separately.[25]

Example 28

252. *Adam and Wendell develop a scheme designed to provide tax benefits to participants and a commission benefit to both salespeople and themselves. They arrange a meeting with a firm known to engage in tax planning to discuss the scheme. Troy, a partner, and Patrick, a senior manager from the firm, examine the scheme and enhance the scheme in collaboration with Adam and Wendell to include financing for the scheme participants. Troy and Patrick also arrange for the utilisation of a tax loss company, provided by Darren. Darren also introduces non-recourse lending to the scheme. They jointly develop a marketing strategy and market the scheme for consideration to investors.*

253. *The Tax Office reviews the scheme and concludes that it is a TES. The Tax Office considers that each individual has engaged in conduct that has resulted in them being a promoter of a TES.*

[25] Note that a non-entity joint venture does not fall within the definition of an 'entity' (subsection 960-100(1A)) and as a result the promoter penalty provisions cannot apply to a non-entity joint venture.

Application in regard to consolidated groups

254. There may be circumstances where entities in a consolidated group may have engaged in prohibited conduct. In these circumstances, the conduct of each entity in a consolidated group should be examined separately.

Application in regard to trustees and trust arrangements

255. There may be instances where an entity acting (or purportedly acting) in its capacity as trustee of a trust may have engaged in prohibited conduct on behalf of a trust.

256. In these circumstances, particularly where the trustee is a corporation or is carrying on a business on behalf of the trust, staff should refer to the principles outlined in paragraphs 180 to 255 of this practice statement to determine if the trustee entity or another entity is the appropriate entity for action under the promoter penalty laws. If there is more than one trustee it is appropriate to examine the conduct of each trustee separately.

SECTION 5: EXCEPTIONS

257. When reviewing or investigating a potential promoter penalty case, staff need to consider whether any statutory exceptions may apply. There are a number of exceptions that apply to limit the circumstances in which the Commissioner may make an application to the Federal Court and there are other exceptions that apply to limit Federal Court orders.

258. Both types of exceptions apply to civil penalty provisions[26] where an entity has otherwise engaged in prohibited conduct. These exceptions differ from the 'mere advice', 'employee' and 'insubstantial role' exclusions from activities in relation to an entity being a promoter (outlined in paragraphs 260 to 267 of this practice statement).

259. As the exceptions are limited to the civil penalty provisions and do not extend to the injunction[27] or voluntary undertaking provisions[28] they are relevant to the choice of an appropriate remedy for prohibited conduct – an application to the Federal Court for an injunction may be still an appropriate remedy and may proceed even if an exception would apply to make a civil penalty unavailable.

Exceptions that apply to the Commissioner

260. The Commissioner cannot commence a civil penalty application to the Federal Court where:

- the scheme is based on treating a taxation law as applying in a particular way, and that way either agrees with advice given to the entity or the entity's agent by or on behalf of the Commissioner, or with a statement in a publication approved in writing by the Commissioner (subsection 290-55(3))
- the entity is an individual who was involved in the scheme as an employee where the employer has been penalised in relation to the same scheme (subsection 290-55(8)), and

[26] Sub-division 290-A.
[27] Sub-division 290-C.
[28] Sub-division 290-D.

- it is more than four years after the entity last engaged in conduct that resulted in that entity or another entity being a promoter of the TES (subsection 290-55(4)), except where the scheme involves tax evasion (subsection 290-55(6)).

261. These exceptions relate to matters that should be within the Commissioner's knowledge. If there is insufficient information to identify whether an exception applies, for example it is not known precisely when the conduct in question occurred, further enquiries must be made.

262. The potential for each exception to apply must be specifically addressed in a submission to a decision maker for an application to be made to the Federal Court for a civil penalty. They should also be addressed in submissions for injunctions or voluntary *undertakings* so that the decision maker is fully informed.

Exceptions that apply to the Federal Court

263. Where the Court finds that prohibited conduct has occurred it is open to the entity to take a submission to the Court that a penalty order should not be made based on the exceptions.

264. The Federal Court must not order an entity to pay a civil penalty where:

- the entity's conduct was due to a reasonable mistake of fact (paragraph 290-55(1)(a)), or
- the entity's conduct was due to the act or default of another entity, to an accident or to some other cause beyond the entity's control, and the entity took reasonable precautions and exercised due diligence to avoid the conduct (paragraph 290-55(1)(b)).

265. The Federal Court must not order an entity to pay a civil penalty in relation to the entity's engaging in conduct that results in another entity being a promoter of a TES if the entity satisfies the Court that the entity did not know, and could not reasonably be expected to have known, that the entity's conduct would produce that result (subsection 290-55(7)).

266. The Federal Court must not make a civil penalty order under the civil penalty provisions against an entity if the entity has been convicted of an offence constituted by conduct that is substantially the same as the conduct in relation to which the civil penalty order would be made (section 298-90).

267. Consideration should be given by staff to the likelihood of an entity relying on one of the above exceptions. While the availability of the exceptions is a matter for the Federal Court, the likelihood of the exception being available is a relevant consideration for the decision to commence proceedings. It is also a relevant matter for the conduct of the Commissioner's case before the Court.

SECTION 6: ACCESS AND INFORMATION GATHERING PRINCIPLES FOR PROMOTER PENALTY LAWS

268. Information gathering is a normal compliance activity undertaken by staff in the course of their duties. General guidance for staff is provided in the Access and Information Gathering Manual.

269. When gathering information for the purposes of the promoter penalty laws staff may use an informal approach or formal access and information gathering powers as appropriate.

270. If the use of formal powers is required for the purpose of gathering information or obtaining access in relation to the application of the promoter penalty laws, the relevant powers to be exercised are section 263 of the ITAA 1936 and/or section 353-10 of the TAA.

271. In most, if not all cases, staff will have multiple purposes in gathering information or obtaining access to information regarding participants compliance with other laws administered by the Commissioner in relation to the potential TES. As a result, other statutory powers may be exercised concurrently with those exercised for the purposes of the promoter penalty laws.

272. Staff should also be aware of the potential for legal professional privilege and the accountant's concession to apply in the context of promoter penalty investigations.

Access powers

273. When the Commissioner is seeking formal access to an entity's premises for the purposes of the promoter penalty laws, section 263 of the ITAA 1936 is to be used.

Notice powers

274. When the Commissioner is seeking information from an entity for the purpose of the promoter penalty laws under formal powers, section 353-10 is to be used.[29]

Access and notice powers not to be used when civil proceedings commenced

275. Staff must not use the access and notice powers in relation to action under the promoter penalty laws when civil proceedings have commenced because the matter will be in the jurisdiction of the Federal Court.

Information that has been gathered for other purposes

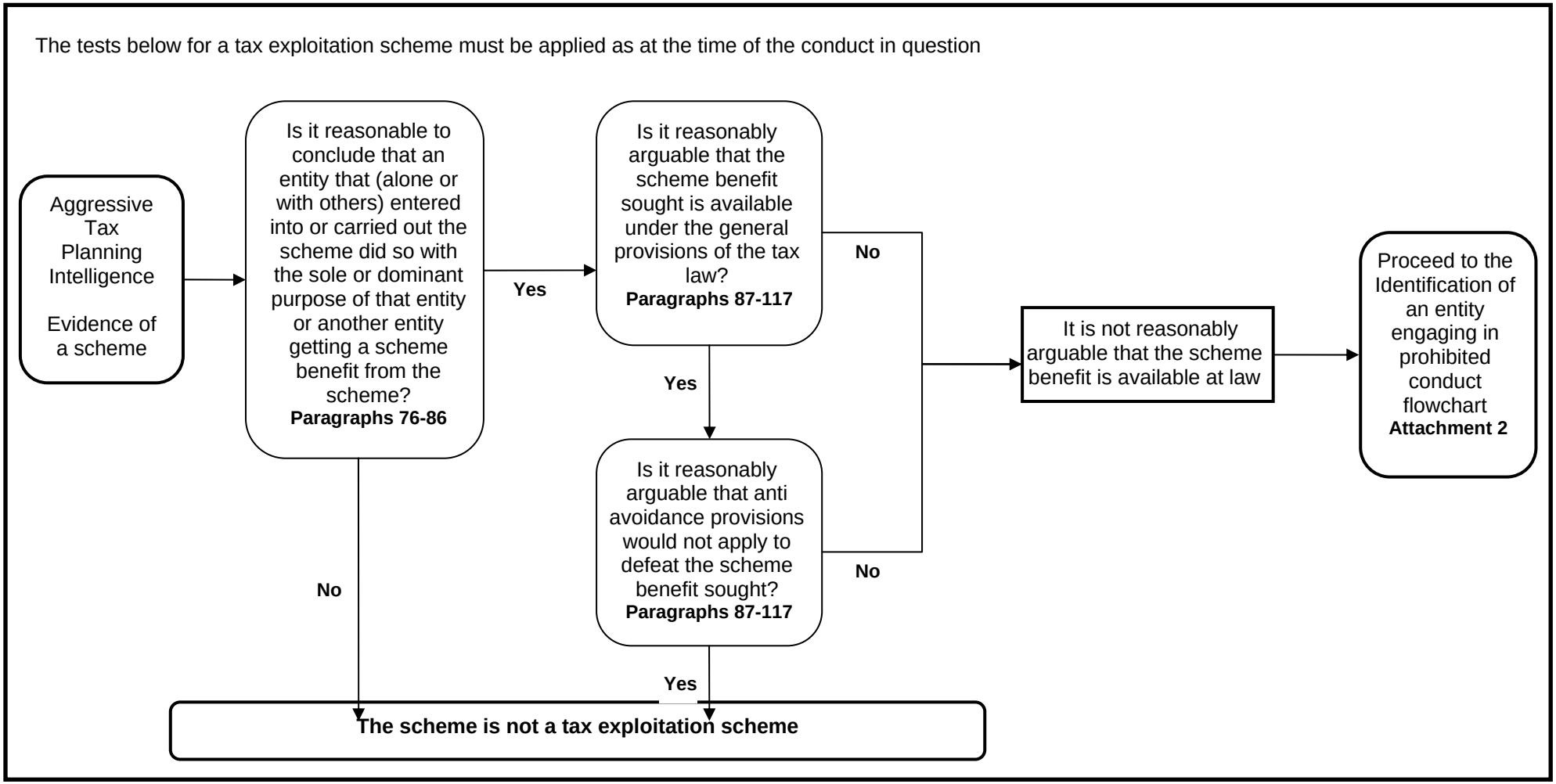
276. Information that has been properly gathered for the purpose of relevant laws administered by the Commissioner can be referred to and used for the purposes of the promoter penalty laws.

[29] The relevant powers are subparagraphs 353-10(1)(a)(ii), 353-10(1)(b)(ii) and 353-10(1)(c)(ii), which provide powers for the purposes of the administration or operation of the Schedule.

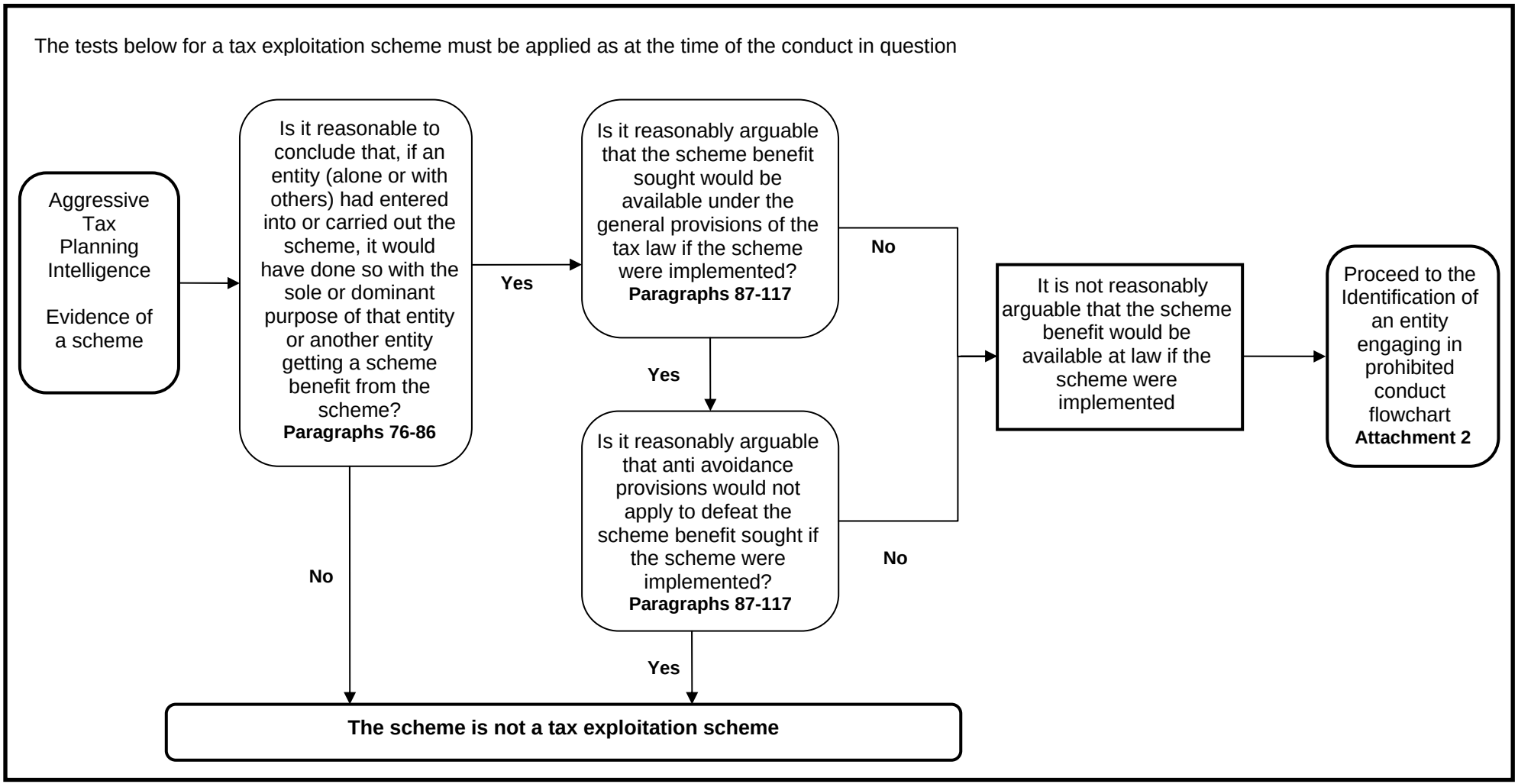
ATTACHMENT 1 – FLOWCHART FOR IDENTIFICATION OF A TAX EXPLOITATION SCHEME

All paragraph references are to this practice statement unless otherwise stated.

(a) Flowchart relating to schemes that have been implemented

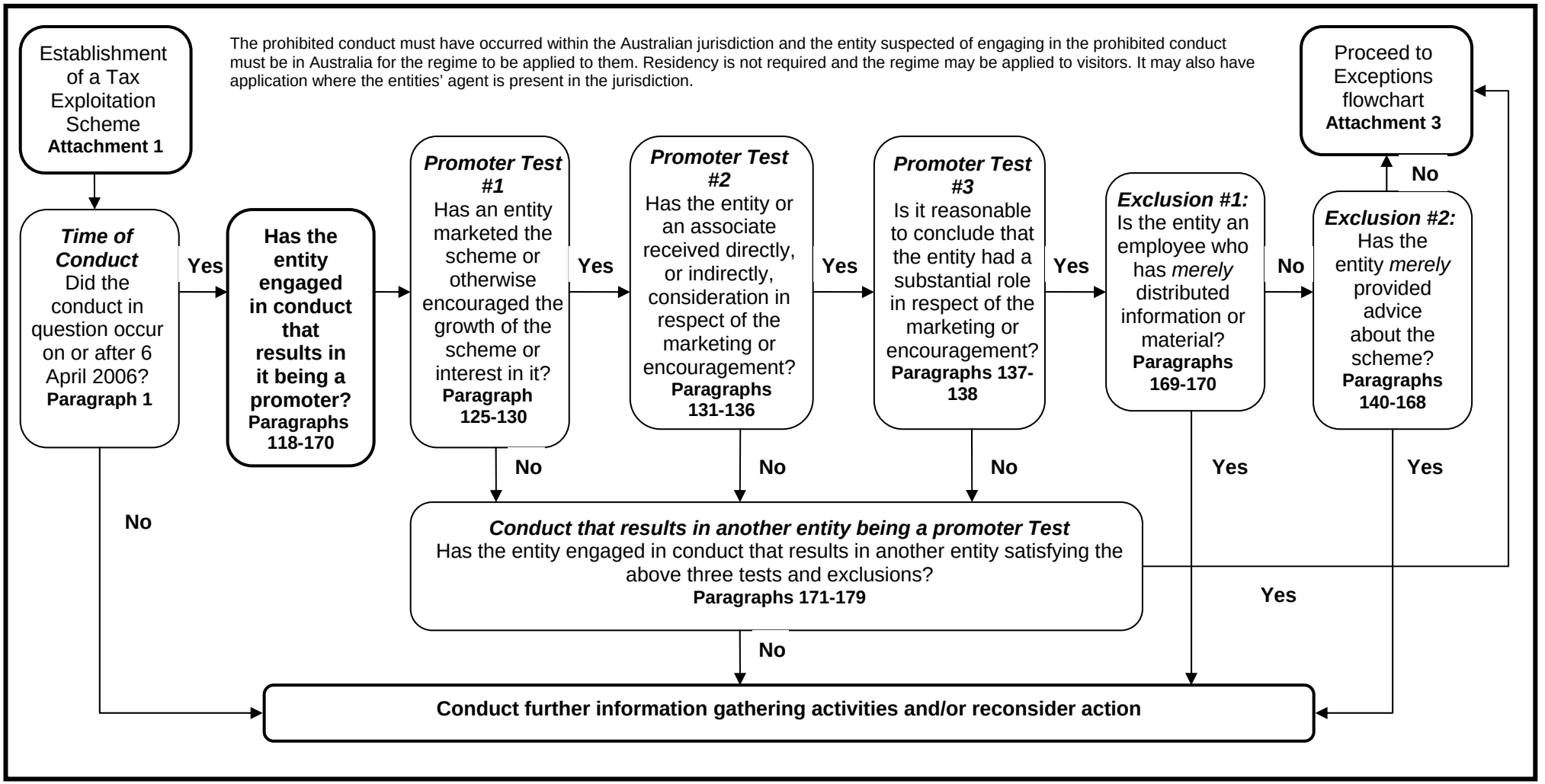


(b) Flowchart relating to schemes that have not yet been implemented



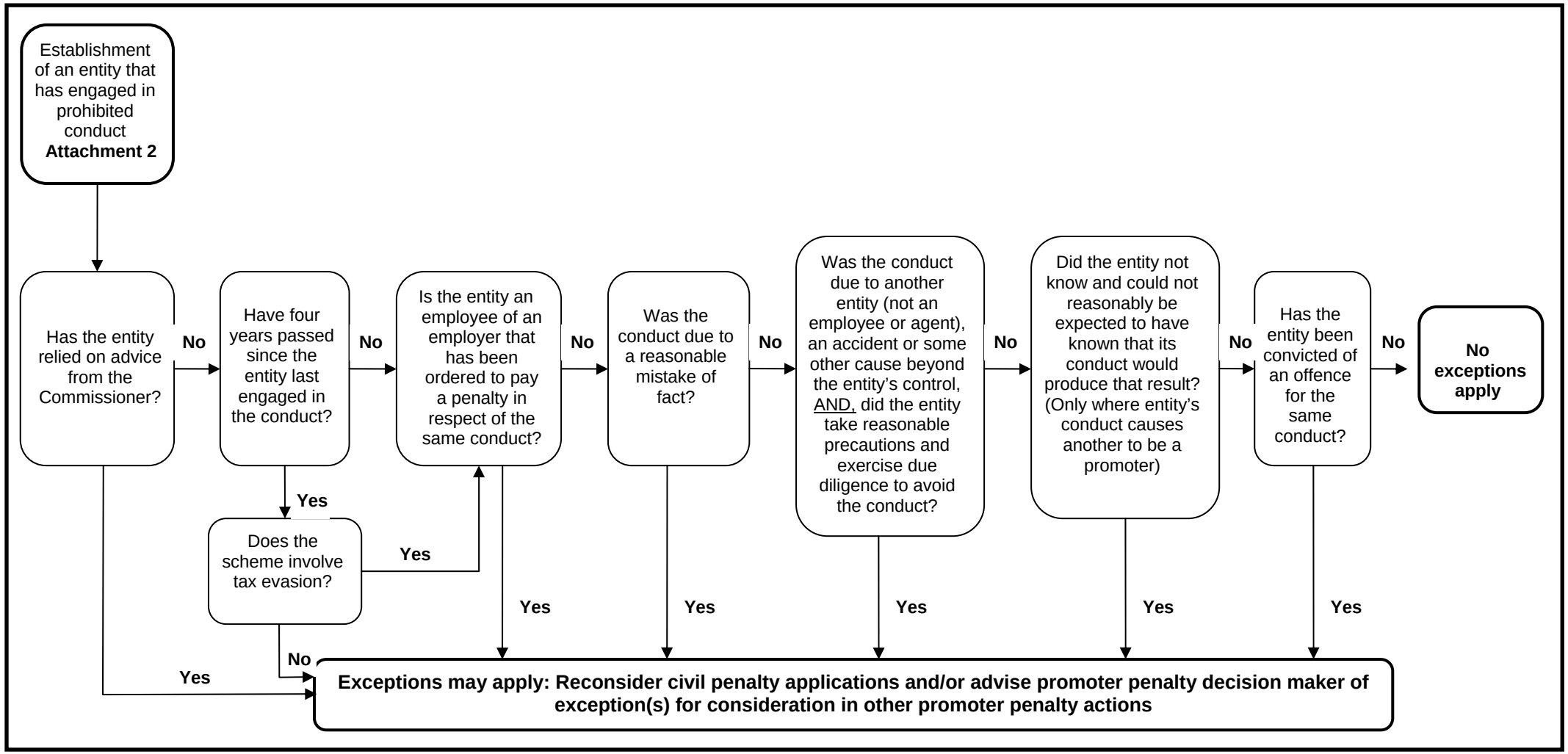
ATTACHMENT 2 – FLOWCHART FOR IDENTIFICATION OF AN ENTITY ENGAGING IN PROHIBITED CONDUCT

All paragraph references are to this practice statement unless otherwise stated.



ATTACHMENT 3 – FLOWCHART FOR EXCEPTIONS

Refer to Section 5 of this practice statement: Exceptions.



Amendment history

Date of amendment	Part	Comment
20 March 2013	Paragraph 43	Dollar amounts changed to reflect increased penalty unit value.
30 October 2012	Contact officer	Updated.
15 November 2011	Contact officer	Updated.
11 September 2008	Footnote 15 & Related practice statements	References to PS LA 2006/11 removed.
	Other references	Link to policy added.
6 August 2008	Contact officer	Updated.

Subject references	civil penalty provisions scheme promoters schemes & shams
Legislative references	TAA 1953 3AA TAA 1953 Sch 1 TAA 1953 Sch 1 255-1 TAA 1953 Sch 1 255-1(2) TAA 1953 Sch 1 Div 284 TAA 1953 Sch 1 284-15(1) TAA 1953 Sch 1 284-15(3) TAA 1953 Sch 1 Subdiv 284-C TAA 1953 Sch 1 284-150(1) TAA 1953 Sch 1 Div 290 TAA 1953 Sch 1 Subdiv 290-A TAA 1953 Sch 1 290-50(1) TAA 1953 Sch 1 290-50(5)(a) TAA 1953 Sch 1 290-50(6) TAA 1953 Sch 1 290-55(1)(a) TAA 1953 Sch 1 290-55(1)(b) TAA 1953 Sch 1 290-55(3) TAA 1953 Sch 1 290-55(4) TAA 1953 Sch 1 290-55(6) TAA 1953 Sch 1 290-55(7) TAA 1953 Sch 1 290-55(8) TAA 1953 Sch 1 290-60 TAA 1953 Sch 1 290-60(2) TAA 1953 Sch 1 290-60(3) TAA 1953 Sch 1 290-65 TAA 1953 Sch 1 290-65(1) TAA 1953 Sch 1 290-65(1)(b) TAA 1953 Sch 1 290-65(2) TAA 1953 Sch 1 Subdiv 290 C TAA 1953 Sch 1 Subdiv 290 D TAA 1953 Sch 1 Subdiv 298-B TAA 1953 Sch 1 298-90 TAA 1953 Sch 1 353-10 TAA 1953 Sch 1 353-10(1)(a)(ii) TAA 1953 Sch 1 353-10(1)(b)(ii) TAA 1953 Sch 1 353-10(1)(c)(ii) ITAA 1936 Pt IVA ITAA 1936 263 ITAA 1936 318 ITAA 1997 8-1 ITAA 1997 960-100 ITAA 1997 960-100(1) ITAA 1997 960-100(1A) ITAA 1997 995-1(1) Corporations Act 2001 Judiciary Act 1903 55ZF
Related public rulings	TR 94/5

Related practice statements	PS LA 1998/1 PS LA 2005/22 PS LA 2005/24 PS LA 2007/12 PS LA 2007/15 PS LA 2007/16 PS LA 2007/18 PS LA 2008/8
Case references	Walstern v. FCT [2003] FCA 1428
Other references	2006 Large Business and Tax Compliance Booklet ATPBSL referral template Access and Information Gathering Manual Compliance model Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 Taxpayers' charter ATO Receivables Policy ATO Receivables Policy (link available internally only)
File references	2006/20728
Date issued	17 April 2008
Date of effect	17 April 2008
Other Business Lines consulted	Law and Practice and Serious Non-Compliance