# *PS LA 2008/8 - Application of the promoter penalty laws (Division 290 of Schedule 1 to the Taxation Administration Act 1953) to schemes involving product rulings*

This cover sheet is provided for information only. It does not form part of *PS LA 2008/8 - Application of the promoter penalty laws (Division 290 of Schedule 1 to the Taxation Administration Act 1953) to schemes involving product rulings*

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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Australian Government
Australian Taxation Office

# Practice Statement Law Administration

# PS LA 2008/8

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.

**FOI status: may be released**

*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.*

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| **SUBJECT:** | **Application of the promoter penalty laws (Division 290 of Schedule 1 to the *Taxation Administration Act 1953*) to schemes involving product rulings** |
| **PURPOSE:** | **To provide guidance to staff on the application of the promoter penalty laws to schemes promoted on the basis of conformity with a product ruling but that may have been implemented in a materially different manner from the arrangement described in the product ruling** |

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## STATEMENT

1. Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) (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 second 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 first limb of the promoter penalty laws, see Law Administration Practice Statement 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.
4. This practice statement has two attachments:
   - Attachment 1 is a flowchart for the process outlined in Section 3: What is prohibited conduct?
   - Attachment 2 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.
   - 'CoE' means Centre of Expertise
   - 'Commissioner' includes relevant SES officers delegated with responsibilities in respect of the promoter penalty laws.
   - 'LSB' means Legal Services Branch
   - 'Prohibited conduct' means conduct covered by the second 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]
- ‘Investor’ describes entities that purchase or otherwise participate in a product ruling scheme.
- ‘Product ruling implementer’ describes the entity that implements the scheme. Often the entity that applied for the product ruling will be the product ruling implementer.
- ‘SES’ means a member of the Senior Executive Service in the Tax Office.
- ‘TCN’ means a member of the Tax Counsel Network

## SECTION 1: PROMOTION AND IMPLEMENTATION OF PRODUCT RULING SCHEMES – OVERVIEW

7. The purpose of the second limb of the promoter penalty laws is to deter schemes that have been promoted on the basis of conformity with a product ruling from being implemented in a way that is materially different to that described in the product ruling.

8. As noted in paragraph 1 of this practice statement, the promoter penalty laws apply to prohibited conduct that occurs on or after 6 April 2006. The prohibited conduct may be in relation to product rulings that have issued at any time.

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 Division 290
   - 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.

11. The promoter penalty laws apply to entities, including individuals, and are framed to prevent individuals from using a business structure to avoid personal liability for the penalty. Individuals who are the ‘controlling mind’ behind another entity’s prohibited conduct will usually be the more appropriate subject for action under the promoter penalty laws than the controlled entity. Conversely, an individual merely following the directions of another arm’s length entity and who does not ‘control’ the prohibited conduct will not be the appropriate subject for action under the promoter penalty laws.

[2] This term excludes the acceptance of a voluntary undertaking by the Commissioner, as this does not require an application to the Federal Court.

12. 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.
- More than four years have elapsed since the entity last engaged in conduct in relation to the implementation of the scheme.[3]

13. 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.

14. The exceptions relating to civil penalty applications are further discussed in Section 5 of this practice statement.

## SECTION 2: ADMINISTRATION OF THE PROMOTER PENALTY LAWS

### Product rulings issued by the Tax Office

15. When applying this practice statement, Tax Office staff must familiarise themselves with Product Ruling PR 2007/71 Income tax and fringe benefits tax: the Product Rulings system.

16. Product rulings enable the Commissioner to rule on the way in which relevant provisions of the tax laws apply in relation to a class of entities in relation to a particular scheme. Product rulings provide investors with certainty about the tax consequences of entering into a particular scheme provided the scheme is carried out (implemented) in accordance with details provided by the applicant for the product ruling and described in the product ruling.

17. To maintain and monitor the integrity of the product ruling system, the Tax Office conducts integrity checks which are designed to identify whether a scheme has been implemented as described in a product ruling. The effectiveness of the product ruling system is contingent on the compliance behaviour of those entities implementing the products and it is an objective of the promoter penalty laws to enhance the integrity of this system by deterring the prohibited conduct.

18. The Tax Office works cooperatively with product ruling applicants and implementers. It is expected that most matters relating to the implementation of the product ruling can be resolved within existing processes. For example, an addendum may issue due to changes in the scheme that do not affect the application of the tax law, or the product ruling applicant may request that the product ruling be withdrawn.

### Referrals of potential cases to ATPBSL

19. Staff who become aware of information that may relate to prohibited conduct must refer this information to the Promoter Intelligence Branch of ATPBSL. There is an ATPBSL Referral Template for this purpose. 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.

[3] Except where tax evasion is present.

20. 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.

21. Promoter Compliance Branch staff will then undertake active compliance functions regarding the promoter penalty laws.

22. 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 LSB, CoE and TCN.

23. 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. 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.

24. Staff must refer any advice requests (for example private rulings) which involve questions that may relate to the application of the promoter penalty laws 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.

**Selecting the appropriate remedy under the promoter penalty laws**

25. As discussed in paragraph 9 of this practice statement, the promoter penalty laws provide the Commissioner with a flexible range of remedies to counter conduct that results in the materially different implementation of a scheme that has been promoted on the basis of conformity with a product ruling. As with all Tax Office compliance responses, the facts and circumstances of the conduct will determine the most appropriate response.

26. The Taxpayers' Charter, the Compliance Model and associated publications[4] which provide guiding principles for staff in the administration of the tax laws which will also guide the potential application of the promoter penalty laws in the selection of the appropriate remedy.

27. The following factors are examples of matters that may be relevant in determining the most appropriate action or actions to treat or deter the prohibited conduct:

- the facts and circumstances of the conduct, such as the entity's motivations for engaging or not engaging in the conduct, including the availability of alternative income sources, and other factors that may impact on their 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

[4] 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 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 outcome of its conduct was 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 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.

28. 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.

29. 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 31 to 36 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 prohibited conduct (see paragraphs 37 to 41 of this practice statement).

30. Similarly, in circumstances where there has been past prohibited conduct, a civil penalty may not be appropriate in all cases (see paragraphs 42 to 46 of this practice statement). This may include where the promoter entity has otherwise made restitution for the consequences of their prohibited conduct (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.

### *Voluntary undertakings*

31. The Commissioner may accept a voluntary undertaking from an entity in order to deter future prohibited conduct. 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.

32. 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.

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

34. 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.

35. 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.

36. 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 implementing the scheme
    - the risk to revenue is low, and/or
    - the conduct was apparently inadvertent.

### *Statutory injunctions*

37. 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.

38. 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).

39. 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.

40. 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.

41. 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*

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

43. 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 prohibited conduct by promoters and investors.

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

- 5,000 penalty units (currently equal to $550,000) for an individual, or 25,000 penalty units (currently equal to $2.75 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.

45. It may be appropriate to recommend a civil penalty application where the course of conduct has concluded 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.

46. 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 the scheme
- 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 scheme for which investors have or will receive penalties.

### Making a recommendation regarding promoter penalty action

47. 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 49 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.

48. 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

49. 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 (Promoter Compliance) in ATPBSL who will be the decision maker regarding promoter penalty applications and the acceptance of voluntary undertakings.[5]

50. 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, or
- accepting a voluntary undertaking offered.

51. 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.

52. However, where the decision maker and the Chair of the Panel (Deputy Commissioner 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.

[5] 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.

### The role of the Promoter Penalty Review Panel

53. 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.

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

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

56. As set out above, the role of the Panel is purely to provide advice as an administrative process 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.

57. 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.

58. 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.

59. 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

60. 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.[6] 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.

61. When undertaking litigation, the Tax Office will act in accordance with its obligations under the model litigant policy[7] to act honestly and fairly in the conduct of litigation.

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

63. In some cases, the promoter penalty decision maker may determine that it will be appropriate to seek advice from LSB on the content of an enforceable voluntary undertaking.

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[6] 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).

[7] 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.

### Collection of promoter penalties

64. 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.

65. The penalty is not a tax-related liability.[8] 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.[9]

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

66. 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.

67. 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.

68. 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.

69. 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.

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

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

## SECTION 3: WHAT IS PROHIBITED CONDUCT?

### Overview of prohibited conduct

72. In considering whether an entity has engaged in prohibited conduct, Tax Office staff must review the facts and circumstances with respect to:

- the existence of a scheme
- whether the scheme was promoted on the basis of conformity with a product ruling
- whether the scheme was implemented
- whether the scheme was implemented in a materially different way to that described in the product ruling, and
- whether an entity has engaged in conduct that has resulted in the scheme being implemented in a materially different way.

[8] Subsection 255-1(2).
[9] See ATO Receivables Policy.

## Scheme

73. 'Scheme' is defined in subsection 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.

74. '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.

### *Was the scheme promoted on the basis of conformity with a product ruling?*

75. For the promoter penalty laws to apply, the scheme must have been promoted on the basis of conformity with a product ruling. 'Conformity' means a correspondence in form or character, or being in accordance with something.

76. The promotion must refer to a particular product ruling and indicate that the scheme is the scheme identified and dealt with by the product ruling. In other words, the promotion must indicate that the scheme is covered by the product ruling identified.

77. Tax Office staff must consider whether it can be proven, on the balance of probabilities, that the scheme was promoted on the basis of conformity with a product ruling. Evidence of such promotion may include advertisements, disclosure statements in information memoranda, or statements indicating that the proposed scheme is in conformity with a product ruling. This list is not exhaustive and evidence of promotion is not restricted to written material.

### *Was the scheme implemented?*

78. The promoter penalty laws may be applied where an entity engages in conduct that results in a product ruling scheme being implemented in a materially different way.

79. 'Implement' is not defined in the tax laws and should be interpreted in accordance with its ordinary meaning and the intent of the legislation. The Australian Oxford Dictionary defines the term in this context as: to put (a plan, proposal, etcetera) into effect.

### *Was the scheme implemented in a materially different way to that described in the product ruling?*

80. A further element is that the conduct must result in the scheme being implemented in a way that is materially different to that described in the product ruling.

81. 'Materially different' is not defined, however the note to subsection 290-50(2) states:

> A scheme will not have been implemented in a way that is materially different from that described in the product ruling if the tax outcome for participants is the same as that described in the ruling.

82. Accordingly, a change in the way the scheme is implemented will not be materially different if it is merely a difference in the implementation of the arrangement which will not impact upon the tax outcome for investors. A material difference will arise where the difference in implementation will affect the tax outcome for investors.

83. The promoter penalty laws may be triggered regardless of the actual tax treatment of the investors. That is, it is not a requirement of the promoter penalty laws that action is or has been taken to amend assessments of investors. This may occur, for instance, where the period of review may have expired for the relevant investors. Alternatively, the materially different change may be the introduction of a financing arrangement that is not taken up by investors, thereby not requiring the amendment of assessments.

84. The concept of material difference in the context of a product ruling is discussed in *Carey v Field* [2002] FCA 1173. Justice Merkel stated at paragraph 47:

> In my view if it is reasonably open to the Commissioner to form the view on the material before him that, because of a difference between the arrangement implemented and that ruled upon, the tax outcome for a taxpayer who is a member of the class of persons to whom the ruling was intended to apply is capable of being, or is or likely to be, different to that provided for in the ruling, that difference is a material difference…

85. To identify if a material difference exists, Tax Office staff must consider the potential tax outcome for investors. Differences that cannot result in a different tax outcome for investors, even if the differences result in a breach of the terms of the product ruling, are not materially different. A different tax outcome may be evidenced by a change, or a change that will result, in the type, timing and/or quantum of deduction allowed or income assessed. It is not restricted to a change, or a change that will result, to the investor's taxable income, such as changes to entitlement to credits, rebates or offsets.

86. To identify a material difference, Tax Office staff should compare the details of the product ruling scheme against the scheme implemented. Product rulings typically include a section headed 'Scheme' where the scheme is described. This includes an overview of the rights and responsibilities of the parties to the scheme, based on the documents provided to the Tax Office. These documents typically include agreements, memoranda, a scheme constitution and product disclosure documents. Once the details have been compared, Tax Office staff must identify whether any differences in implementation that have occurred or will occur, will result in a different tax outcome for the investors from that set out in the relevant product ruling.

87. A departure from the arrangement described in the product ruling that does not impact on the tax outcome for investors, would not result in the implementation of a scheme in a materially different way.

88. Tax Office staff must carefully evaluate the relevant circumstances. Matters which may give rise to a change in investors' tax outcomes and result in a materially different implementation include:

- failure to complete works within a particular timeframe as described in the product ruling – this could result in non-commerciality and failure to carry on a business where business deductions would not be available
- financing arrangements that are not in accordance with those described in the product ruling, for example, the use of non-recourse or limited-recourse financing, round-robin financing arrangements or promissory notes – this could result in interest now being non-deductible
- changes in key elements, for example, the time of planting or harvesting, the type of crop sown and the density of planting – this could affect the timing of allowable deductions, yield and the income from the arrangement

- a failure to complete the purchase or lease of critical assets described in the product ruling such as the land to be used in the project – this could result in a failure to carry on a business and affect the deductibility of other expenses, or
- additional transactions or arrangements (including financial arrangements) that are entered into – this could change the character of amounts as deductions.

89. As a guide, it may be useful for Tax Office staff to ask: if the Tax Office knew that the scheme would be implemented in that way, would it have ruled differently? If so, this indicates that the implementation is likely to change the investors' tax outcomes and therefore is likely to be materially different.

*Example 1*

90. *Dazzler Products Limited applies for a product ruling in relation to an arrangement that invests funds in income-producing shares. The product ruling application discloses that investors will finance the purchase of the shares by a loan from a financial institution that is an unrelated, arm's length party to Dazzler Products Limited. A product ruling issues that states that a deduction will be available for the interest incurred by the investors on the loan used to purchase the shares.*

91. *Subsequent investigations conducted by the Tax Office identify that each investor has, in fact, borrowed funds from The Dazzler Bank (incorporated in New Zealand), an associated entity of Dazzler Products Limited, and that the financing is a limited recourse round robin arrangement. Assuming a deduction would now not be available for the interest payable on the loan for the purchase of shares in these circumstances, investors would have a different tax outcome than that described in the product ruling. As a result, the implementation of the scheme is materially different from that described in the product ruling.*

*Example 2*

92. *Trees Galore Pty Ltd applies for a product ruling in relation to their proposed afforestation project. All documentation in relation to the proposed scheme is supplied to the Tax Office as part of the product ruling application. A product ruling is issued, which fully describes the product ruling scheme, including the location of the land to be used.*

93. *Subsequent site visits conducted by the Tax Office reveal that trees were planted at a different location to that described in the product ruling. However, the land was of the same area, in the same region and had the same soil type and market value as that described in the product ruling. It is relevant for Tax Office staff to consider these factors in assessing whether the scheme was implemented in a materially different manner.*

94. *If the change of location was known at the time of the product ruling application, that ruling would have issued without changes to its conclusions as to the tax outcome for investors, as there is no reason to expect a change in the level of assessable income, allowable deductions or other factors relating to the participants' tax outcome. Consequently, the change in location of the project is not considered to amount to the scheme being implemented in a materially different manner, as this has not impacted on the tax outcome for investors.*

***Did the entity's conduct result in the promoted scheme being implemented in the materially different way?***

95. Tax Office staff must identify an entity[10] whose conduct results in the scheme being implemented in the materially different way. There may be a number of entities associated with a product ruling scheme and the entity's conduct that resulted in the materially different implementation of that scheme may not necessarily be an entity that applied for the product ruling, that promoted the scheme or that implemented the scheme. Tax Office staff are expected to assess all relevant circumstances on a case by case basis and should ensure that the degree of causation is not so remote as to make it unreasonable to reach that conclusion. There needs to be a degree of active engagement by the entity for their conduct to result in another entity implementing a product ruling in a way that is materially different from that described in the product ruling.

96. Tax Office staff must identify the entities linked to the implementation of the scheme and consider each entity's conduct.

97. The product ruling applicant is often the product ruling implementer and is therefore a key entity to consider. The product ruling applicant usually has overall responsibility for the scheme and is the signatory to the terms of use. Other entities will often have an agency, employment or contractual relationship with the product ruling applicant. However, the product ruling applicant may not always be the relevant entity. In relation to identifying the entities to which the promoter penalty laws apply, Tax Office staff should consider:

- the role of associates, independent experts, subcontractors or employees in relation to conduct that results in the materially different implementation of the scheme
- the extent to which that independent expert, subcontractor, or employee can be considered to be in an arm's length relationship with the product ruling implementer, and/or
- the role of other entities, including individuals, in relation to conduct that results in the materially different implementation of the scheme.

*Example 3*

98. *Glenn obtains a product ruling for an almond growing project. The product ruling states that investors will be entitled to deductions on the basis that they will be carrying on a business of growing almonds. Glenn engages Almonds Forever Pty Ltd, an unrelated, arm's length party, as a subcontractor to plant the almond trees. Glenn provides Almonds Forever Pty Ltd with a copy of the product ruling and all relevant documentation identified in the product ruling to ensure that the almond trees are planted in accordance with its terms. Both parties engage in extensive discussions as to the terms of the product ruling and what is required of Almonds Forever Pty Ltd. Glenn also emphasises the importance of adhering to the terms of the product ruling and the consequences of breaching these terms. Almonds Forever Pty Ltd confirms its understanding of the contract it is entering into with Glenn and the need to comply with the terms of the product ruling. It is agreed that Almonds Forever will also provide weekly progress reports to Glenn.*

[10] In subsection 960-100(1) of the ITAA 1997, an entity is defined 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.

99. *However, to reduce their costs, Almonds Forever Pty Ltd decides to plant a lower yield variety of almond trees. Glenn is not informed of this decision and is led to believe that the correct* almond *trees were planted as per the progress reports received.*

100. *As a result of this decision the profitability of the arrangement is reduced such that investors cannot reasonably expect to make a profit over the life of the arrangement. On the balance of indicators, under the scheme as implemented, the investors are not carrying on a business. The implementation of the scheme, which has been promoted on the basis of conformity with the product ruling*, *is materially different from that described in the product ruling.*

101. *Although Glenn may be regarded as the product ruling implementer, Almonds Forever Pty Ltd is the entity whose conduct resulted in the implementation of the scheme in a materially different way and is the appropriate entity to consider in relation to a promoter penalty application. This is in accordance with the exception in paragraph 290-55(1)(b) which states that when the entity's conduct is due to the act or default of another entity, and the entity took reasonable precautions and exercised due diligence, civil penalty proceedings will not apply (see Section 5 of this practice statement).*

102. *This outcome is premised on Glenn having taken reasonable precautions to ensure Almonds Forever Pty Ltd complied with the product ruling, and that Almonds Forever Pty Ltd has breached its contract with Glenn by its actions.*

103. *Almonds Forever Pty Ltd will not be able to rely on the exception in paragraph 290-55(7)(b) as it could not argue that it did not know, and could not reasonably be expected to have known, that its conduct would cause the product ruling to be implemented in a materially different way, as Glenn had previously informed it of the consequences of not complying with the terms of the product ruling.*

## SECTION 4: SELECTING THE APPROPRIATE ENTITY FOR ACTION UNDER THE PROMOTER PENALTY LAWS

104. When recommending or approving actions under the promoter penalty laws, Tax Office staff must select for action the entity or entities that are most appropriate in the circumstances to advance the objects of Division 290. LSB or TCN should be consulted to assist in identifying the appropriate entity where a promoter penalty application is being recommended.

105. 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
- use contrived employment arrangements to remove the appearance of being the controlling mind of another entity.

106. When making recommendations for action under the promoter penalty laws, Promoter Compliance 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.

### Application in regard to the controlling mind of entity structures

107. 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.

### Application in regard to agency

108. 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 the prohibited conduct.

109. 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.

110. 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.

111. 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.

112. 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.

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

- the circumstances surrounding the employee, agent or contractor's involvement in the prohibited conduct, 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
- 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.

114. 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 130 of this practice statement).

### Application in regard to partners and partnerships

115. A partnership is an entity for the purposes of the promoter penalty laws.[11] However, a partnership is a group of individual entities bound by contract rather than a separate legal person.

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

117. If it is determined that it is appropriate in the circumstances to accept a voluntary undertaking in relation to a partnership, Tax Office staff should ensure that the partner or partners making the voluntary undertaking are authorised to bind the partnership in that way unless the undertaking is sought in relation to the individual partner's own conduct.

118. 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.[12] 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.

119. 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.

[11] 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.

[12] Order 42 of the Federal Court Rules allows for an action to be brought in (or against) the partnership name.

120. To assist in identifying the appropriate entity for a promoter penalty application Tax Office 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 within the set of behaviours 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 in isolation from the partnership entity.

### Application in regard to joint venture arrangements and consolidated groups

121. 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.[13] Furthermore, 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

122. 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.

123. 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 104 to 121 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

124. 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.

125. Both types of exceptions apply to civil penalty provisions[14] where an entity has otherwise engaged in prohibited conduct.

[13] 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.
[14] Subdivision 290-B.

126. As the exceptions are limited to the civil penalty provisions and do not extend to the injunction[15] or voluntary undertaking provisions[16] 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

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

- 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
- it is more than four years after the entity last engaged in conduct that relates to the implementation of the scheme that was promoted on the basis of conformity with a product ruling (subsection 290-55(5)), except where the scheme involves tax evasion (subsection 290-55(6)).

128. 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.

129. 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

130. 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. 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)).

131. 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 a scheme that has been promoted on the basis of conformity with a product ruling being implemented in a way that is materially different from that described in the product ruling 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)).

[15] Subdivision 290-C.
[16] Subdivision 290-D.

132. 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).

133. 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: INTERACTION WITH PRODUCT RULING WITHDRAWALS

134. Where the scheme has been implemented in a way that is materially different from that described in the product ruling, the Commissioner may consider withdrawing the product ruling,[17] in addition to applying the promoter penalty laws.

135. The withdrawal of a product ruling will not always mean the Commissioner should take action under the promoter penalty laws. Similarly, if the Commissioner does take action under the promoter penalty laws, the associated product ruling may not always be withdrawn.

*Example 4*

136. *Greg is the product ruling implementer for a scheme. The Tax Office has expressed concerns to Greg that the scheme is being implemented in a way that could result in a material difference from that described in the product ruling. Greg offers to enter into a voluntary undertaking with the Tax Office to address these concerns, which the Tax Office accepts.*

137. *Greg implements the scheme in a manner that does not cause a material difference to occur. In this situation, withdrawing the product ruling is not appropriate. Investors are still able to rely on the ruling.*

*Example 5*

138. *Karen is the product ruling implementer for a scheme for which a product ruling is issued. In carrying out the planned arrangement, but before investors have invested, Karen identifies an opportunity to implement the scheme in a materially different way that achieves a more beneficial financial outcome. Karen consults with the Tax Office and provides all necessary information on the proposed difference. Karen also advises that no investors have entered into the scheme and that she does not intend to accept any investors into the scheme while discussing this matter with the Tax Office. The Tax Office withdraws the original ruling and issues a new ruling, incorporating the changes. The promoter penalty laws cannot apply to the withdrawn product ruling because there was no implementation of that product ruling.*

139. Where a product ruling is withdrawn, the Commissioner may still apply the promoter penalty laws in relation to the scheme if it was promoted on the basis of conformity with that product ruling but is implemented in a materially different way.

[17] Section 358-20 allows the Commissioner to withdraw product rulings. The ruling ceases to apply from the time specified in the notice of withdrawal published in the Gazette.

### Interaction with the tax exploitation scheme prohibition

140. Subsection 290-50(1) applies to conduct by an entity that results in that or another entity being a promoter of a tax exploitation scheme.

141. Where an entity continues to promote a scheme after the withdrawal of the product ruling, Tax Office staff should consider whether the entity has engaged in conduct that results in it or another entity being a promoter of a tax exploitation scheme.

142. In instances where there is evidence that an entity has engaged in this type of conduct after the withdrawal of the product ruling, Tax Office staff should consult Law Administration Practice Statement 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.

143. In some circumstances, there may be a choice between action directed at the entity whose conduct resulted in it or another entity being the promoter of a tax exploitation scheme and the entity whose conduct results in a materially different implementation of a product ruling. The Commissioner will pursue the most appropriate action depending on the facts of each case. Promoter Compliance case officers will need to consider both prohibitions in their recommendations.

*Example 6*

144. *William applies for a product ruling for an upcoming stage production of 'Richard III.' The product ruling is issued by the Tax Office on 28 February 2007 detailing the arrangement, the investors and the financing conditions. It is a condition of the product ruling that the minimum subscription to be raised from investors is to be $10 million and the maximum is to be $20 million. Investors may fund the investments themselves or borrow from a financial institution independent from William.*

145. *William is in a joint venture with Anne, who handles all the marketing and sales to the investors. The minimum subscription is raised on 31 March 2007.*

146. *The Tax Office conducts a review of the arrangement in April 2007 and identifies that of the $10 million raised so far, $8 million has been loaned from Bard Financing Limited, an offshore financing entity. It is ascertained that Bard Financing Limited is associated with William; it is involved in the provision of finance to investors in the project but neither has the capacity under the finance agreement, nor any intention, to take legal action against defaulting borrowers.*

147. *The product ruling is withdrawn by the Commissioner on 30 May 2007 on the basis that the arrangement is being implemented in a materially different way from that described in the ruling.*

148. *Anne, who is aware that the product ruling has been withdrawn, continues to promote and sell the arrangement with reference to the product ruling until 30 June 2007 when it is fully subscribed. William continues to facilitate the financial arrangements and Bard Financing Limited continues to be involved.*

149. *In these circumstances, the Commissioner may take promoter penalty action against William as he has engaged in conduct that results in a scheme that has been promoted on the basis of conformity with a product ruling being implemented in a way that is materially different from that described in the product ruling. Anne may also be subject to promoter penalty action in relation to the promotion of a tax exploitation scheme.*

## SECTION 7: ACCESS AND INFORMATION GATHERING PRINCIPLES FOR PROMOTER PENALTY LAWS

150. 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.

151. 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.

152. 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.

153. 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

154. 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

155. When the Commissioner is seeking information from an entity for the purpose of the promoter penalty laws, section 353-10 is to be used.[18]

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

156. 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.

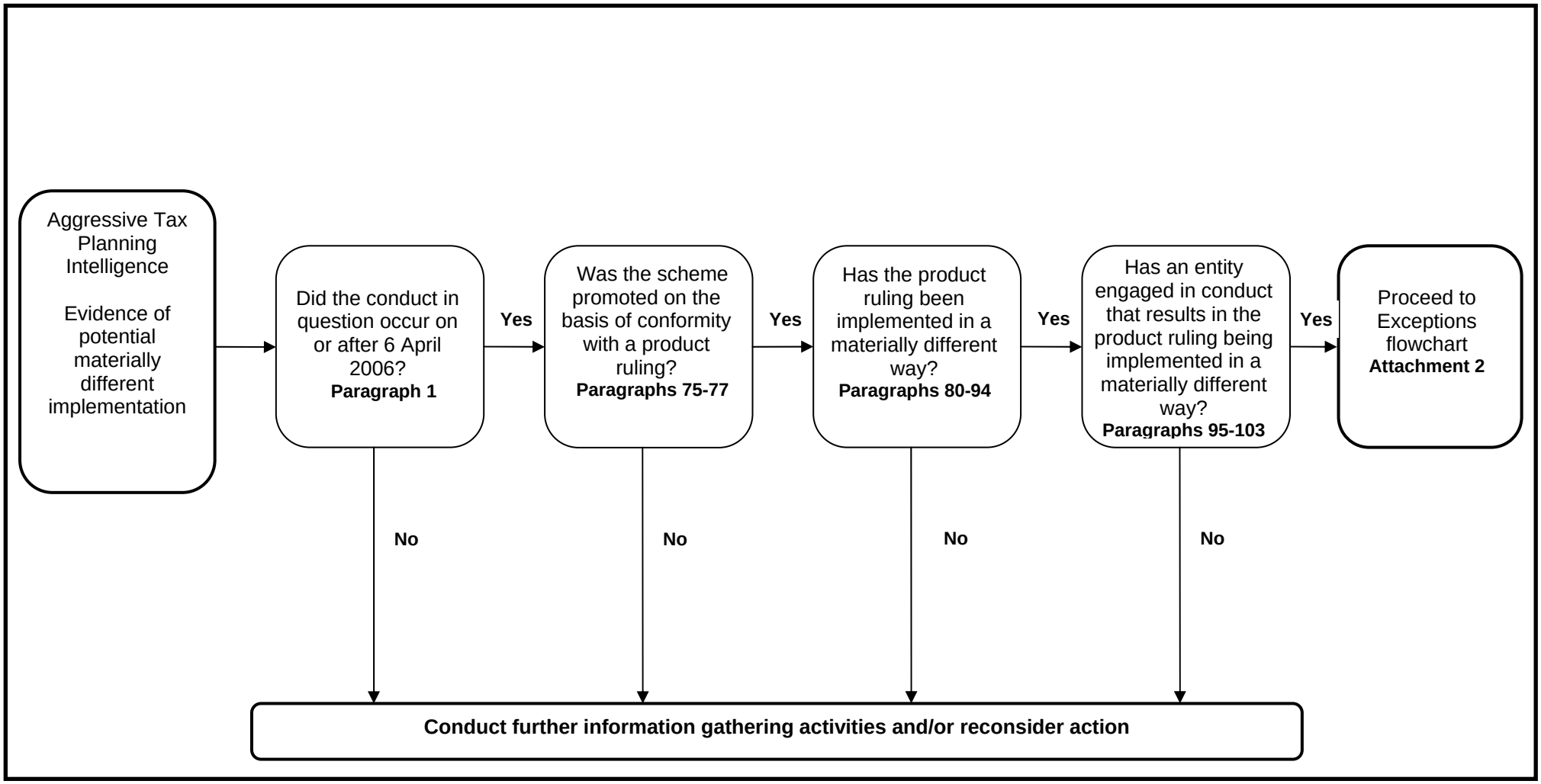
### Information that has been gathered for other purposes

157. 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.

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

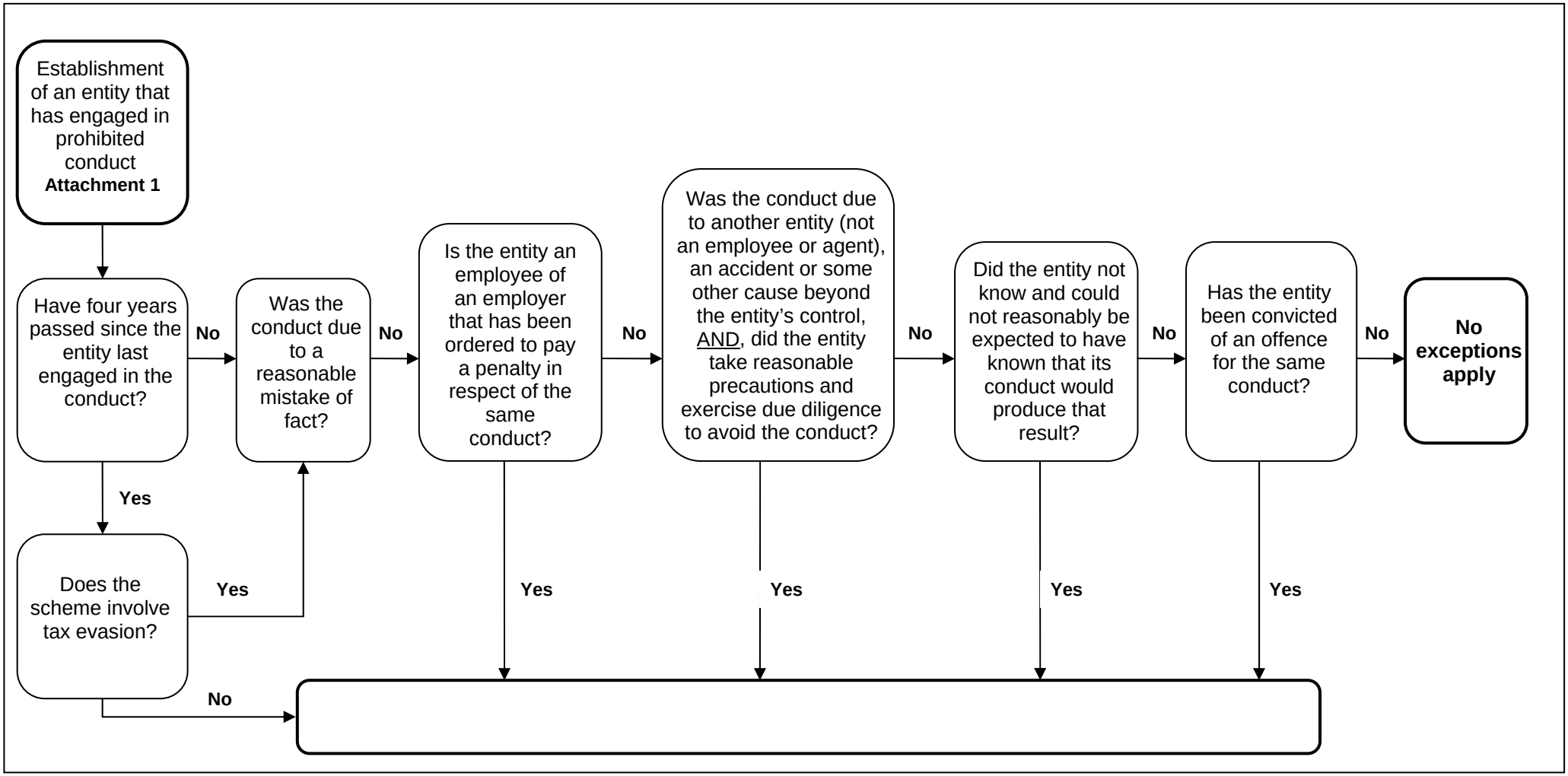
## ATTACHMENT 1 – FLOWCHART FOR IDENTIFICATION OF AN ENTITY ENGAGING IN PROHIBITED CONDUCT

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



## ATTACHMENT 2 – FLOWCHART FOR EXCEPTIONS

Refer to Section 5 of this practice statement: Exceptions.



**Amendment history**

| Date of amendment | Part | Comment |
|---|---|---|
| 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<br>product rulings<br>scheme promoters<br>schemes & shams |
| Legislative references | TAA 1953 3AA<br>TAA 1953 Sch 1<br>TAA 1953 Sch 1 255-1(2)<br>TAA 1953 Sch 1 Div 290<br>TAA 1953 Sch 1 Subdiv 290A<br>TAA 1953 Sch 1 Subdiv 290B<br>TAA 1953 Sch 1 290-50(1)<br>TAA 1953 Sch 1 290-50(2)<br>TAA 1953 Sch 1 290-50(6)<br>TAA 1953 Sch 1 290-55(1)(a)<br>TAA 1953 Sch 1 290-55(1)(b)<br>TAA 1953 Sch 1 290-55(5)<br>TAA 1953 Sch 1 290-55(6)<br>TAA 1953 Sch 1 290-55(7)<br>TAA 1953 Sch 1 290-55(7)(b)<br>TAA 1953 Sch 1 290-55(8)<br>TAA 1953 Sch 1 Subdiv 298-B<br>TAA 1953 Sch 1 298-90<br>TAA 1953 Sch 1 353-10<br>TAA 1953 Sch 1 353-10(1)(a)(ii)<br>TAA 1953 Sch 1 353-10(1)(b)(ii)<br>TAA 1953 Sch 1 353-10(1)(c)(ii)<br>TAA 1953 Sch 1 358-20<br>ITAA 1936 263<br>ITAA 1997 960-100(1)<br>ITAA 1997 960-100(1A)<br>ITAA 1997 995-1(1)<br>Judiciary Act 1903 55ZF |
| Related public rulings | TR 95/6<br>TR 97/11<br>TR 2007/8<br>PR 2007/71 |
| Related practice statements | PS LA 1998/1<br>PS LA 2005/22<br>PS LA 2007/12<br>PS LA 2007/15<br>PS LA 2007/16<br>PS LA 2007/18<br>PS LA 2008/7 |
| Case references | Carey v. Field, Assistant Commissioner of Taxation [2002] FCA 1173 |
| Other references | Access and Information Gathering Manual, 2006<br>ATPBSL Referral Template<br>Large Business and Tax Compliance Booklet<br>Compliance Model |

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|---|---|
| | Taxpayers' Charter<br>ATO Receivables Policy<br>ATO Receivables Policy (link available internally only) |
| File references | 2006/20730 |
| Date issued | 17 April 2008 |
| Date of effect | 17 April 2008 |
| Other Business Lines consulted | Law and Practice and Serious Non-Compliance |