PS LA 2021/1 - Application of the promoter penalty laws

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PS LA 2021/1
Application of the promoter penalty laws

This Practice Statement provides guidelines on the application of the promoter penalty laws.

This Practice Statement is an internal ATO document and is an instruction to ATO staff.

1. What this practice statement is about

This Practice Statement provides guidance on the application of Division 290 of Schedule 1 to the *Taxation Administration Act 1953* and section 68B of the *Superannuation Industry (Supervision) Act 1993* (SISA). Together, these are the promoter penalty laws.

All legislative references in this Practice Statement are to Schedule 1 to the *Taxation Administration Act 1953,* unless otherwise indicated.

This Practice Statement discusses:

- some of the indicators of potential promoter behaviour
- the process for making decisions about the promoter penalty laws, covering the roles of the Promoters and Tax Exploitation Program (Promoters Program), the promoter penalty decision-maker (Decision-Maker) and the Promoter Penalty Review Panel (Panel)
- application of the promoter penalty laws, in particular, the sanctions and remedies available.

2. What are some of the indicators of potential promoter behaviour?

If you become aware of information suggesting that someone has been involved in the promotion of a tax or superannuation scheme in a way that may breach the promoter penalty laws, a referral must be made to the Promoters Program. This should happen even where consideration of the substantive tax law has not yet concluded. The referral should be made as soon as possible, as time limits apply to Federal Court applications under the relevant laws. Timely referrals will also assist to ensure that the proper evidence is gathered to satisfy the legal burden of proof, which rests on the ATO in these matters.

What should be referred?

All matters where the promoter penalty laws might apply must be referred to the Promoters Program.

Some factors that may indicate promoter behaviour include:

- advisers who have encouraged one or more taxpayers to seek a tax or superannuation benefit to which they are not entitled
- advertisements or marketing for tax or superannuation schemes that seem 'too good to be true'
- tax agents, consultants or other advisers (whether registered or unregistered) offering tax savings or early access to superannuation in return for a percentage of the tax saved, or amount of superannuation accessed
- tax agents, consultants or other advisers marketing a scheme that was developed by others
- tax agents, consultants or other advisers promoting or implementing a scheme that they claim conforms with a public, private or oral ruling made by the ATO where there is a material difference between the scheme and the ruling
- multiple clients of the same adviser engaging in similar arrangements that are unnecessarily complex or seem designed primarily to get a tax or superannuation benefit
- schemes where we have applied the anti-avoidance provisions (for example, in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936)) which were marketed by an adviser
- tax agents, consultants or other advisers (whether registered or unregistered) offering or encouraging early access to superannuation before a condition of release has been met.

How can a referral be made to the Promoters Program?

You should refer information to the Promoters Program by using the process described on the Promoters and Tax Exploitation Program SharePoint page (link available internally only).

A member of the public can call **1800 060 062**, use the form at ato.gov.au/tipoffform or use the ATO app.

3. How are decisions about the promoter penalty laws made?

The Promoters Program is part of the Behaviours of Concern stream of the Private Wealth business line. Its objective is to address the behaviours of those intermediaries that promote or encourage tax avoidance in the tax and superannuation systems, including consideration of remedies or sanctions that can be imposed under the promoter penalty laws.

Proper application of promoter penalty laws

The application of the promoter penalty laws is a serious matter. Their potential application should not be raised lightly. Heavy sanctions are associated with a finding of a breach of the promoter penalty laws. In addition, there are other potentially negative consequences including reputational damage and impacts on tax agent registration.

Promoter penalty decision-maker

Senior Executive Service officers are delegated the power to make applications to the Federal Court or accept a voluntary undertaking under the promoter penalty laws. Generally, the Decision-Maker will be the Assistant Commissioner of the Promoters Program.

For matters involving the exercise of the Commissioner's self-managed superannuation fund (SMSF) regulatory powers pursuant to section 68B of the SISA, the Assistant Commissioner of the Promoters Program will consult with the Assistant Commissioner in Superannuation and Employment Obligations responsible for SMSFs prior to making a decision.

Promoter Penalty Review Panel

We established the Panel to advise the Decision-Maker on the application of the promoter penalty laws to particular circumstances. The Panel is chaired by the Deputy Commissioner of the Behaviours of Concern stream of the Private Wealth business line and consists of senior ATO staff, as well as external experts.

When must a matter be referred to the Promoter Penalty Review Panel?

In considering a remedy or sanction under the promoter penalty laws, the Decision-Maker will refer all matters to the Panel for advice prior to making a decision. In exceptional circumstances (for example, when seeking an urgent injunction), the Decision-Maker can make a decision after consulting only the chair of the Panel.

Where the Decision-Maker is considering accepting an undertaking offered by an entity, the Decision-Maker may seek the advice of the Panel but is not required to do so.

What is the role of the Promoter Penalty Review Panel?

The Panel is governed by the Promoter Penalty Review Panel Charter.

The Panel will consider submissions made to the Decision-Maker about recommended actions under the promoter penalty laws.

The Panel has no statutory basis; its role is purely advisory. The Panel will not investigate or find facts. Instead, it will examine submissions and provide independent advice on the strengths and weaknesses of each case, the appropriateness of the recommended action and the strength of the evidence provided.

The referring ATO officers and relevant risk owners may be invited to attend the Panel's session to provide input into the Panel's discussions.

The Decision-Maker is not obliged to follow the Panel's advice, but a decision that is contrary to the advice of the Panel must only be made after discussion with the chair of the Panel.

The decision process

The Promoters Program will form a recommendation based on available information as to whether a breach of the promoter penalty laws has occurred, as well as to which entity or entities the promoter penalty laws might apply.

A Promoters Program case officer will, in consultation with other ATO stakeholders, make a written submission to the Decision-Maker.

The submission should include a recommendation of which promoter penalty laws apply and recommend appropriate action. There may be circumstances where it will be appropriate to seek more than one action to effectively address the behaviour.

The Decision-Maker, in consultation with the Panel, will consider the written submission, determine the most appropriate response and decide whether there is sufficient evidence to support the recommended action.

4. How do the promoter penalty laws in Division 290 work?

What is the purpose of Division 290?

Division 290 is designed to deter the:

- promotion of tax exploitation schemes (TES) (the first limb)[1]
- promotion of schemes on the basis of conformity with a public, private or oral ruling if the scheme is materially different from that described in the ruling (the second limb)[2], and
- implementation of schemes, that have been promoted on the basis of conformity with a public, private or oral ruling, in a way that is materially different from that described in the ruling (the third limb).[3]

When does Division 290 apply?

Division 290 applies to conduct within Australia occurring on or after 6 April 2006[4] and to conduct outside Australia occurring on or after 28 June 2013.[5] Apart from conduct in relation to a product ruling under the third limb, the second and third limbs of Division 290 only apply to conduct engaged in on or after 1 July 2024.[6]

What conduct is subject to Division 290?

An entity must not engage in prohibited conduct that results in[7]:

- that entity or another entity being a promoter of a TES
- a scheme that is materially different from that described in a public, private or oral ruling being promoted on the basis of conformity with that ruling, or
- a scheme that has been promoted on the basis of conformity with a public, private or oral ruling being implemented in way that is materially different from that described in the ruling.

What is a tax exploitation scheme?

If the scheme has been implemented, a TES arises where[8] it is reasonable to conclude that an entity that entered into or carried out the scheme did so with the sole or dominant purpose of that entity, or another entity, getting a scheme benefit from the scheme. It must also not be 'reasonably arguable'[9] that the scheme benefit is available at law.

If the scheme has not been implemented, a TES arises where it is reasonable to conclude that the entity (that would have entered into or carried out the scheme) would have done so with the sole or dominant purpose of that entity, or another entity, getting a scheme benefit from the scheme. It must also not be reasonably arguable that the scheme benefit would be available at law if the scheme were implemented.

A scheme is also a TES[10] if it has been implemented and Part IVA of the ITAA 1936 applies to the scheme because of section 177DA[11] or 177J[12] of that Act, and it is reasonable to conclude the scheme was entered with a principal purpose of an entity obtaining a scheme benefit and it is not reasonably arguable the benefit is available at law.

If the scheme has not been implemented, a TES also arises where it is reasonable to conclude that had the scheme been implemented, Part IVA of ITAA 1936 would apply to the scheme because of section 177DA or 177J of that Act, there would have been a principal purpose for an entity obtaining a scheme benefit and it is not reasonably arguable the benefit is available at law.

What is a 'scheme' and a 'scheme benefit'?

A 'scheme' is any arrangement, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.[13]

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[1] Paragraph 290-5(a) – tax avoidance schemes and tax evasion schemes referred to as tax exploitation schemes.
[2] Paragraph 290-5(aa).
[3] Paragraph 290-5(b).
[4] Section 2 and item 17 of Schedule 3 to the *Tax Laws Amendment (2006 Measures No. 1) Act 2006.*
[5] Section 2 and item 36 of Schedule 8 to the *Tax Laws Amendment (2012 Measures No. 6) Act 2013*.
[6] Section 2 and item 37 of Schedule 1 to the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024.*
[7] Subsections 290-50(1), (1A) and (2).
[8] Subsection 290-65(1).
[9] A 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 (section 284-15). For further explanation of what is 'reasonably arguable', refer to Miscellaneous Taxation Ruling MT 2008/2 *Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable*. In deciding whether it is reasonably arguable that a scheme benefit would be available at law, section 290-65 requires taking into account anything that the Commissioner can do under a taxation law.
[10] Subsection 290-65(1A).
[11] Concerning the multinational anti-avoidance law.
[12] Concerning the diverted profits tax.
[13] Section 995-1 of the *Income Tax Assessment Act 1997*.

An entity gets a 'scheme benefit' from a scheme if[14]:

- a tax-related liability of the entity for an accounting period is, or could reasonably be expected to be, less than it would be apart from the scheme or part of the scheme, or
- an amount that we must pay or credit to the entity under a taxation law for an accounting period is, or could reasonably be expected to be, more than it would be apart from the scheme or a part of scheme.

The first limb – what is a promoter of a tax exploitation scheme?

An entity is a promoter of a TES if[15]:

- the entity markets the TES, or otherwise encourages the growth of, or interest in, the TES
- the entity or an associate directly or indirectly receives a benefit in respect of that marketing or encouragement, and
- having regard to all matters, it is reasonable to conclude that the entity has a substantial role in the marketing or encouragement.

An entity can be a promoter regardless of whether the TES is tailored and marketed to one client or to a broad population.[16]

An entity that merely provides advice about the TES, or an employee that merely distributes information or materials prepared by another, is not a promoter.[17]

Whether or not an entity has a substantial role in the marketing or encouragement is a question of fact, and you must assess the role played by all parties involved in the design and implementation of a TES.

The second limb – what is promoting a scheme otherwise than in accordance with a ruling?

The second limb is concerned with an entity causing a scheme to be promoted on the basis that it conforms to a public private or oral ruling when the scheme promoted is materially different to that described in the ruling.[18]

This limb will apply whether or not the promoted scheme is ultimately implemented. It covers the promotion of schemes before, during or after implementation. It also covers situations where a scheme is not yet implemented.[19]

The third limb – what is implementing a scheme otherwise than in accordance with a ruling?

The third limb is concerned with an entity causing a scheme that has been promoted on the basis of conformity with a public, private or oral ruling being *implemented* in a way that is materially different from that described in the ruling.[20] Unlike the first and second limbs of Division 290, the third limb is concerned with implementation rather than promotion.[21]

The scheme that is promoted on the basis of conformity with a ruling does not actually need to be the subject of that ruling.[22]

Material differences between schemes and the relevant ruling

For the second and third limbs of Division 290, a scheme will be materially different from that described in a ruling if the tax outcome for participants in the scheme is not the same as that described in the ruling.[23]

What sanctions and remedies are available under Division 290?

The sanctions and remedies available under Division 290 are:

- voluntary undertakings, enforceable by the Federal Court
- statutory injunctions
- civil penalties.

The appropriate sanctions or remedies will depend on the particular facts and circumstances for each case. More than one remedy may apply (for example, a civil penalty accompanied by a statutory injunction).

If a civil penalty is imposed by the Federal Court on:

- a partnership – all the partners in a partnership are jointly and severally liable to pay the civil penalty[24]

[14] Section 284-150.
[15] Section 290-60.
[16] *Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd* [2018] FCA 528.
[17] Subsections 290-60(2) and (3).
[18] Subsection 290-50(1A).
[19] Paragraph 1.55 of the Explanatory Memorandum to the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Explanatory Memorandum).
[20] Subsection 290-50(2).
[21] *Commissioner of Taxation v Ludekens* [2013] FCAFC 100.
[22] Paragraph 1.56 of the Explanatory Memorandum.
[23] See the note in subsection 290-50(2).
[24] Section 444-30.

- one of the trustees of a trust – all the trustees of a trust are jointly and severally liable to pay the civil penalty.[25]

However, the breach of the promoter penalty laws by one partner does not, by itself, affect the continued registration as a registered tax agent or BAS agent of another partner.[26]

What factors should be considered before accepting a voluntary undertaking?

We may accept a written voluntary undertaking[27] from an entity. Once an undertaking is accepted, it may only be varied or withdrawn with our consent. If an entity breaches its undertaking, we may apply to the Federal Court for an order directing the entity to comply with the undertaking, or any other order the Court considers appropriate.[28] The advantages of an undertaking are the:

- matter may be finalised more quickly
- undertaking terms may be more flexible
- parties save costs, as the matter is not presented before the Court in a civil penalty application
- undertaking may also be used to agree future behaviour.

While all relevant considerations should be taken into account, factors that might weigh in favour of an undertaking as the appropriate remedy include the:

- entity is willing to provide full disclosure about its own activities and the activities of others involved in the scheme
- entity is willing to rectify its conduct including by recompensing participants
- entity was lower in the chain of command or decision-making structure than other entities involved in the scheme
- risk to revenue is low.

The Promoters Program will monitor compliance with voluntary undertakings.

What factors should be considered before applying for a statutory injunction?

Where there is evidence of contemplated or ongoing prohibited conduct, we may apply to the Federal Court for relief in the form of a restraining injunction (an order to refrain from doing something) or a performance injunction (an order to do something). The Court may grant an:

- injunction[29] against an entity on such terms as it considers appropriate, and may discharge or vary an injunction granted at any time, or
- interim injunction against an entity restraining it from engaging in prohibited conduct prior to full consideration of our application for an injunction.

While all relevant considerations should be taken into account, the following factors might weigh in favour of an injunction application as the appropriate strategy includes where:

- there is potential for further participation in the scheme as a result of future prohibited conduct
- there is a significant ongoing level of risk to revenue or the superannuation savings of participants
- the entity has an adequate degree of control over whether the prohibited conduct occurs
- the entity is not willing to assist us in resolving the issue or to modify its conduct without compulsion or it has breached or circumvented undertakings
- there is a need for urgency in addressing prohibited conduct (such as forthcoming promotional seminars) or other promotional activities.

The Promoters Program will monitor compliance with injunctions.

What factors should be considered before applying to impose a civil penalty?

We may also apply to the Federal Court for the imposition of civil penalties.[30] The Court can order an entity to pay a civil penalty[31] if it is satisfied that an entity has engaged in prohibited conduct and that no exception or exclusion applies.

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 a history of prohibited conduct as a major source of income

[25] Section 444-120.
[26] Section 20-45 of the *Tax Agent Service Act 2009*.
[27] Subdivision 290-D.
[28] Subsection 290-200(4).
[29] Section 290-125.
[30] Section 290-50.
[31] Subsection 290-50(3).

- has a large degree of control or influence over whether the prohibited conduct occurred
- deliberately frustrates the progression of our investigation
- has engaged in prohibited conduct on a significant scale in terms of the number of entities or amounts involved
- has promoted a TES for which participants that have implemented the scheme have or will become liable to administrative penalty.

When will civil penalties not be imposed?

Civil penalties cannot be imposed on an entity under Division 290 where the prohibited conduct was due to[32]:

- a reasonable mistake of fact
- another entity's role or actions, an accident or some other cause which was beyond the entity's control and where the entity took reasonable precautions and exercised due diligence to avoid the conduct (but not if the other entity was an employee or agent of the entity, director of the entity, another partner in a partnership or another trustee of a trust when the alleged conduct occurred), or
- where the scheme in question treats the taxation law as applying in a way that agrees with
  - advice given to the entity or the entity's agent by or on behalf of the Commissioner, or
  - a statement in a publication approved in writing by the Commissioner.

Recommending the amount of civil penalty to be imposed

The Federal Court decides the amount of civil penalty. In doing so, the Court may have regard to all matters it considers relevant, including those specifically mentioned in the law.[33]

We can make submissions to the Court on an appropriate level of penalty and, as laid out under Division 290, will lead evidence on the following relevant factors:

- the benefit received or receivable (directly or indirectly) by the entity and associates of the entity in respect of the scheme
- the deterrent effect that any penalty may have
- the amount of loss or damage incurred by participants
- the nature and extent of the contravention
- the circumstances in which the contravention took place, including the entity's conduct and whether there was an honest and reasonable mistake of law
- the period over which the conduct extended
- whether the entity took any steps to avoid the contravention
- whether the entity has previously been found by the Court to have engaged in the same or similar conduct
- the degree of the entity's cooperation with us.

Time limitation

An application for a civil penalty under Division 290 must be made within 6 years of an entity engaging in the prohibited conduct unless the scheme involved tax evasion.[34]

Schemes involving tax evasion

Where a scheme involves tax evasion or would involve evasion if implemented, there is no period of limitation for when we may make an application for a civil penalty.[35] Where tax evasion exists, Promoters Program case officers may also refer this intelligence to the Criminal Law Program.

5. How do the promoter penalty laws in section 68B of the SISA work?

What is the purpose of section 68B of the SISA?

Section 68B of the SISA is specifically designed to deter the promotion of a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards prescribed under subsection 31(1) of the SISA (referred to as illegal early release schemes).

Who does section 68B of the SISA apply to?

Section 68B of the SISA applies to a person who promotes a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund otherwise than in accordance with payment standards prescribed in subsection 31(1)

[32] Section 290-55.
[33] Subsection 290-50(5).
[34] Subsections 290-55(4) to (6).
[35] Subsection 290-55(6).

of the SISA (which refers to the regulations). It applies to conduct on or after 18 March 2014.

A person who has promoted an illegal early release scheme is taken to have contravened section 68B of the SISA.

The term 'person' is not defined in the SISA and applies to body corporates as well as other natural persons.[36]

What does 'promote' mean for the purposes of the SISA?

For the purposes of the SISA, the term 'promote', in relation to a scheme, includes[37]:

- entering into the scheme
- inducing another person to enter into the scheme
- carrying out the scheme
- commencing to carry out the scheme
- facilitating entry into, or the carrying out of, the scheme.

What is a 'scheme' for the purposes of the SISA?

For the purposes of the SISA, the term 'scheme' means[38]:

- any agreement, arrangement, understanding, promise or undertaking
  - whether express or implied, or
  - whether or not enforceable, or intended to be enforceable, by legal proceedings, or
- any scheme, plan, proposal action, course of action or course of conduct, whether unilateral or otherwise.

What sanctions and remedies can be applied under section 68B of the SISA?

The sanctions and remedies available under section 68B of the SISA are:

- voluntary undertakings, enforceable by the Federal Court
- statutory injunctions
- civil penalty applications
- criminal consequences.

Enforceable undertakings

We may accept a written undertaking[39] from individuals or entities, enforceable by the Federal Court, known as an 'enforceable undertaking'. Once an undertaking is accepted, it may only be varied or withdrawn with our consent. If an entity breaches its undertaking, we may apply to the Court to issue an order instructing the entity to comply with the undertaking, pay an amount up to any financial benefit obtained in relation to the breach, compensate any other person who has suffered loss or make any other order the Court considers appropriate.

The advantages of an undertaking are:

- the matter may be finalised more quickly
- undertaking terms may be more flexible
- parties save costs, as the matter is not presented before the Court in a civil penalty application
- the undertaking may also be used to agree future behaviour.

Factors that might weigh in favour of undertakings as the appropriate remedy under Division 290 include those listed for voluntary undertaking in section 4 of this Practice Statement.

Statutory injunctions

Statutory injunctions[40] allow us to take immediate action where there is evidence of conduct, contemplated conduct or ongoing prohibited conduct.

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

- grant a restraining or performance injunction against an entity on such terms as it considers appropriate
- discharge or vary an injunction granted at any time
- grant an injunction with consent of the parties, or
- grant an interim injunction against an entity restraining it from engaging in prohibited conduct or requiring certain performances prior to full consideration of our application for an injunction.[41]

In considering whether a statutory injunction is appropriate, you should consider the factors listed in

[36] Section 2C of the *Acts Interpretation Act 1901*.
[37] Subsection 68B(3) of the SISA.
[38] Subsection 68B(3) of the SISA.
[39] Section 262A of the SISA.
[40] Section 315 of the SISA.
[41] *Commissioner of Taxation v Pavihi* [2018] FCA 1603.

relation to statutory injunction in section 4 of this Practice Statement.

Civil penalty applications

We may also apply to the Federal Court for the imposition of civil penalties.[42] The Court must be satisfied that a person has been involved in a serious contravention of section 68B of the SISA, otherwise the Court will not make a monetary penalty order.[43]

The Court will also not make a monetary penalty order if it is satisfied that an Australian Court has already ordered the person to pay punitive damages because of the contravening act or omission.[44]

Recommending the amount of civil penalty to be imposed

The Federal Court may request that we provide guidance on the appropriate recommended penalty. In making this recommendation, you should consider all relevant matters, including those listed in relation recommending the amount of civil penalty in section 4 of this Practice Statement.

Time limitation

An application for a civil penalty must be made within 6 years[45] of the contravention taking place.

Relief from liability for contravention

The Federal Court may relieve a person in part or in full from a liability that the person has, or may have, because of contravention of section 68B of the SISA if the person:

- has acted honestly, and
- ought fairly to be excused from the contravention.[46]

In addition, there is a defence available to persons who can establish that the contravention was due to:

- a reasonable mistake
- a reasonable reliance on information supplied by another person[47], or
- the act or default of another, or an accident or other cause beyond their control, where they took reasonable precautions and exercised due diligence to avoid the contravention.[48]

Compensation

In addition to civil and criminal penalties, the Court may order a person who has contravened section 68B of the SISA to pay compensation to an entity, or trustee of an entity, affected by the breach that has suffered loss as a result of the contravention.[49]

6. How does action under the promoter penalty laws interact with other criminal or regulatory action?

Is the behaviour potentially criminal?

Where criminal behaviour is identified, it will usually be appropriate for Promoters Program case officers to refer the matter to the Criminal Law Program. This can include tax evasion or fraud, which may be a criminal matter.

For cases concerning superannuation schemes, Promoters Program case officers will, in consultation with the Superannuation and Employer Obligations business line, consider whether the conduct involves an entity[50]:

- dishonestly, and intending to gain, whether directly or indirectly, an advantage for that, or any other person, or
- intending to deceive or defraud someone.

Where these elements are present, the matter should be referred for criminal investigation.

Interaction between the promoter penalty laws and the criminal law

The promoter penalty laws contain provisions governing the interaction between civil (promoter penalty) proceedings and criminal proceedings.[51]

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[42] Section 197 and subsection 315(5) of the SISA.
[43] Subsections 196(3) and (4) of the SISA; the maximum penalty is set out in subsection 196(3) of the SISA. Penalty units are stipulated in subsection 4AA(1) of the *Crimes Act 1914.* The dollar amount of a penalty unit is available at Penalty units
[44] Subsection 196(5) of the SISA.
[45] Section 198 of the SISA.
[46] Section 221 of the SISA.
[47] This defence is limited by subsection 323(4) of the SISA. There is no entitlement to rely on this defence unless the Court grants leave or certain written notice within 7 days before the day on which the hearing begins.
[48] Section 323 of the SISA.
[49] Sections 215 to 218 of the SISA.
[50] Subsection 202(1) of the SISA.
[51] For Division 290, the relevant provisions are in Subdivision 298-B of Schedule 1. For section 68B of the SISA, these provisions are in Division 4 of Part 21 of that Act.

Prior to seeking both criminal and civil sanctions for substantially the same conduct, you should give careful consideration to these provisions.

Can a criminal proceeding be started after a civil penalty application?

A criminal proceeding can be started against an entity, irrespective of whether a civil penalty application or court order has been made in relation to substantially the same conduct.[52] However, if a criminal proceeding commences during a civil proceeding for substantially the same conduct, the civil proceeding would be stayed until the criminal proceeding has been completed.[53]

Criminal proceedings cannot be started against an entity in relation to section 68B of the SISA if the conduct has already been the subject of a civil penalty application, even if the civil penalty application has been finally determined or otherwise disposed of.[54]

Can a civil penalty application be started during criminal proceedings?

A civil penalty application can be made against an entity for the same conduct that is subject to criminal proceedings. This applies to both civil penalty applications for section 68B of the SISA and Division 290.[55]

If civil penalty and criminal proceedings have both commenced, or are under way for substantially the same conduct, the civil proceedings would be stayed pending the outcome of the criminal proceedings.[56]

Can a civil penalty be made or recommended after conclusion of criminal proceedings?

If a criminal conviction is obtained in relation to conduct, a civil penalty order cannot be made in relation to the same or substantially the same conduct under either Division 290, or in relation to section 68B of the SISA.[57] Any civil penalty proceedings under way would be dismissed.

Where criminal proceedings in relation to section 68B of the SISA do not result in a conviction, depending on the circumstances we may still be precluded from seeking civil penalties.

The procedural rules in Division 4 of the SISA and in section 8ZE of the TAA must be closely considered in all circumstances where both criminal and civil proceedings are contemplated or under way.[58]

Interactions with other agencies

Where civil or criminal proceedings are being considered or are under way as instituted by other government agencies in relation to substantially the same factual circumstances, these proceedings should be considered as part of the decision of what action we will undertake. Where possible, you should seek to address the underlying risks holistically in coordination with the other agency or agencies.

7. More information

The promoter penalty laws were considered in the following cases:

- *Commissioner of Taxation v Rowntree* [2020] FCA 1322
- *Commissioner of Taxation v Bogiatto* [2020] FCA 1139
- *Commissioner of Taxation v Pavihi* [2019] FCA 2056
- *Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd* [2018] FCA 528
- *Commissioner of Taxation v Arnold (No 2)* [2015] FCA 34
- *Commissioner of Taxation of the Commonwealth of Australia v Barossa Vines Ltd* [2014] FCA 20
- *Commissioner of Taxation v Ludekens* [2013] FCAFC 100

Additional resources are available on the Promoters and Tax Exploitation Program SharePoint page (link available internally only).

Date issued: 8 April 2021
Date of effect: 8 April 2021

[52] Section 298-100.
[53] Section 298-95.
[54] Section 203 of the SISA.
[55] Section 205 of the SISA and section 298-95.
[56] Subsection 298-95(1) and subsection 205(2) of the SISA.
[57] Section 298-90 and section 206 of the SISA.
[58] Division 4 of the SISA.

Amendment history

21 August 2024

Part	Comment
Section 2	Indicator of promoter behaviour relating early access to superannuation updated for clarification. New indicator of promoter behaviour relating to schemes claimed to be conforming with a public, private or oral ruling added.
Section 4	Updates made to reflect the amendments to promoter penalty laws in Division 290 made by *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024*.
Throughout	Updated in line with current ATO style and accessibility requirements. Links updated.

14 April 2023

Part	Comment
Throughout	Minor stylistic updates made.
Footnote 28	Update to include link to penalty information on ato.gov.au

8 April 2021

Part	Comment
Throughout	PS LA 2008/7 and PS LA 2008/8 have been combined. Update to new format and style. Scope updated to include section 68B of the *Superannuation Industry (Supervision) Act 1993*, concerning the promotion of illegal early release schemes.

References

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