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## **Submission from the Tax Justice Network Australia to the consultation on the review of tax promoter penalty laws 1 November 2024**

The Tax Justice Network Australia (TJN-Aus) welcomes the opportunity to make a submission to the review of tax promoter penalty laws.

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

The assessment of the effectiveness of the tax promoter penalty laws is difficult to make in the absence of the ATO disclosing all the penalties they have applied to tax avoidance promoters. However, compared to the US Internal Revenue Service (IRS), it would appear that the ATO has applied proportionally far less sanctions for tax avoidance promoters (see Table 1 for IRS promoter investigations for 2021 and 2022).

**Table 1. IRS Promoter Investigations 2021 and 2022.<sup>1</sup>**

	2021			2022		
	Cases Opened	Cases Closed	Penalties assessed (US\$ m)	Cases Opened	Cases Closed	Penalties assessed (US\$ m)
<b>Criminal</b>	99	145	25	111	113	41
<b>Civil</b>	56	81	22	103	77	29
<b>Total</b>	155	226	47	214	190	71

The ATO disclosure of promoter penalty case studies lists five cases.<sup>2</sup> The US extensive list of actions against promoters is available at <https://www.justice.gov/tax/program-shut-down-schemes-and-scams>

A 2006 study by the IRS estimated that in 2004 there were approximately one million tax returns involving between 11,000 and 15,000 promoters of tax exploitation schemes involved in abusive transactions in 2004.<sup>3</sup>

<sup>1</sup> US Government Accountability Office, "Abusive Tax Schemes. Additional Steps Could Further IRS Efforts to Detect and Deter Promoters", GAO-23-105843, December 2022, 13.

<sup>2</sup> <https://www.ato.gov.au/about-ato/tax-avoidance/understanding-tax-schemes/promoter-penalty-laws/case-studies>

<sup>3</sup> Ibid., 13.

It is difficult to assess if the lower number of promoter cases in Australia is a result of lower levels of promotion of tax exploitation schemes, flaws within the laws to deal with promoters, or a lack of commitment from the ATO to target tax avoidance promoters compared to other tax integrity priorities.

We believe the ATO has less tools available to it to apply to cases of tax avoidance promoters compared to the IRS and the UK His Majesty's Revenue and Customs (HMRC) and therefore the Australian Government should expand the tools the ATO can easily use to address tax avoidance and evasion promoters.

**2. Are the tax promoter penalty laws capable of having a real time impact in preventing the promotion of schemes before taxpayers participate in tax schemes?**

The HMRC appears to have more effective tools to prevent the promotion of schemes before taxpayers participate in tax schemes.

**4. Does the definition of 'promotion' (marketing or encouraging growth in a scheme, but not specifically design, facilitation, or implementation) capture the appropriate range of promoter behaviour?**

We believe the definition of "promotion" is appropriate and do not see a lack of action of tax evasion and avoidance promotion being a problem of definition.

**7. Should the law apply on the same basis to promoters who engage in the promotion of bespoke but similar schemes to multiple taxpayers as it would to mass marketed schemes?**

The law should apply deterrence to those who engage in the promotion of bespoke but similar schemes to multiple taxpayers as it would to mass-marketed schemes based on the level of harm each represents to government revenue. A bespoke scheme involving one or a small number of large corporations engaging in a large amount of tax evasion or tax avoidance could do more harm to government revenue than a mass marketed scheme that involves hundreds of taxpayers in small amounts of tax avoidance or tax evasion.

**12. Are the tax promoter penalty laws best structured as a civil penalty regime, or would another framework design (such as administrative penalties) be more appropriate instead of, or in addition to, the current civil penalty regime?**

We believe the ATO should have administrative penalties and criminal penalties available to it to deal with promoters of tax exploitation schemes. We note the IRS has access to apply criminal penalties.<sup>4</sup>

**14. Are there opportunities for reform (within the tax promoter penalty laws or separate to the tax promoter penalty laws) to allow the Commissioner to deliver a timely response to promoter conduct? Alternatively, are there any opportunities for reform to address challenges faced in investigating misconduct during the time limitation period?**

There should be reforms to ensure that if a taxpayer is exempted from penalty for tax evasion or tax avoidance because they were reasonably unaware that the tax promoter was engaged in illegal activities on their behalf and they had taken reasonable steps to act lawfully themselves, the penalty should then fall on the promoter of the tax exploitation scheme. We note the issue was touched on in the Keith James review of the Tax Practitioners Board.<sup>5</sup>

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<sup>4</sup> US Government Accountability Office, "Abusive Tax Schemes. Additional Steps Could Further IRS Efforts to Detect and Deter Promoters", GAO-23-105843, December 2022, 5.

<sup>5</sup> Treasury, "Independent Review of the Tax Practitioners Board", 31 October 2019, 61-62.

Like the IRS, to enhance general deterrence of tax evasion and avoidance promotion, the ATO should be required to publish all cases or promoters that have been sanctioned and not just those that have been prosecuted before the courts. That would include all cases where the ATO applies an enforceable undertaking.

The ATO and TPB should be provided with mechanisms to seek an extension of time in cases of promoter penalties for tax exploitation schemes or promoting schemes on the basis of conformance with product rulings.

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

The tax promoter penalty laws should require the ATO to refer any person subject to any form of sanction from the ATO for tax evasion or avoidance promotion to the TPB for the TPB to assess if further action is needed to prevent the person from being a risk to the tax system. Further, if the person that engaged in the tax evasion or tax avoidance promotion is a registered tax practitioner the TPB should assess if the person continues to be a fit and proper person.<sup>6</sup> Such referral to the TPB should apply to all level of sanctions applied by the ATO to the tax evasion or avoidance promoter, from warnings, enforceable undertakings and court actions. The ATO should be required to provide the TPB with all the information it has about the promoter that led to the sanction, to ensure the TPB can act efficiently and not have to waste resources on re-investigating the promoter on matters the ATO has already investigated.

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

We urge the Australian Government to adopt more effective measures to deal with promoters of tax exploitation schemes from the UK. The UK allows HMRC to issue three types of notices against promoters of tax avoidance schemes:<sup>7</sup>

- A stop notice, which can be issued by HMRC to a person carrying on business as a promoter where the arrangements they are promoting meet certain conditions. The stop notice requires the promoter to immediately cease promoting the arrangements, along with certain other duties and requirements;
- A conduct notice, which may be issued by HMRC where a person carrying on a business as a promoter meets a threshold condition. Conduct notices impose conditions about how a promoter must behave. There is no right of appeal against a decision to give a promoter a conduct notice, which can last for up to five years; and,
- A monitoring notice, which can be issued by HMRC where an authorised officer determines that a person has breached a requirement in a conduct notice and obtains approval from the First-tier Tribunal. There is a right of appeal against a decision of the First-tier Tribunal to approve the issue of a monitoring notice.

If a monitoring notice is issued the monitored promoter is subject to a more stringent regime that includes:

- Publication by HMRC of information about the promoter;
- Publication by the promoter of its status on the internet and in publications and correspondence;
- A duty on the promoter to tell clients it is a monitored promoter and to provide them with a promoter reference number (PRN);

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<sup>6</sup> <https://www.tpb.gov.au/fit-and-proper-requirements>

<sup>7</sup> UK HM Revenue & Customs, "Promoters of tax avoidance schemes: guidance", 9 February 2022, <https://www.gov.uk/government/publications/promoters-of-tax-avoidance-schemes-guidance/promoters-of-tax-avoidance-schemes-guidance>

- A duty on clients to put the PRN on their returns or otherwise to report the PRN to HMRC;
- Enhanced information gathering powers by HMRC, backed by penalties;
- Preventing any attempt by a promoter to impose confidentiality on clients in relation to disclosure to HMRC;
- Limitations to the defences of reasonable care and reasonable excuse against the imposition of penalties;
- Extended time limits for making tax assessments on clients who fail to report a PRN to HMRC when required to do so; and,
- A criminal offence of concealing, destroying or disposing of documents.

In a 2021 consultation by HMRC on clamping down on promoters of tax avoidance, the Financial Secretary to the Treasury assessed they had driven a significant proportion of promoters out of the avoidance market since 2014.<sup>8</sup> The estimated annual amount of tax lost through avoidance had fallen from £3.7 billion in the tax year 2005 – 2006 to an estimate of £1.7 billion in 2018 – 2019.<sup>9</sup>

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<sup>8</sup> UK HM Revenue & Customs, “Clamping down on promoters of tax avoidance”, 23 March 2021, 5.

<sup>9</sup> Ibid, 6.

## **Background on the Tax Justice Network and Tax Justice Network Australia**

The Tax Justice Network (TJN) is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network believes our tax and financial systems are our most powerful tools for creating a just society that gives equal weight to the needs of everyone. But under pressure from corporate giants and the super-rich, our governments have programmed these systems to prioritise the wealthiest over everybody else, wiring financial secrecy and tax havens into the core of our global economy. This fuels inequality, fosters corruption and undermines democracy. We work to repair these injustices by inspiring and equipping people and governments to reprogram their tax and financial systems.

The Tax Justice Network Australia (TJN-Aus) is the Australian arm of TJN.

In Australia, the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Social Service (ACOSS)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union (AEU)
- Australian Manufacturing Workers Union (AMWU)
- Australian Nursing & Midwifery Federation (ANMF)
- Australian Services Union (ASU)
- Australian Workers Union, Victorian Branch (AWU)
- Baptist World Aid
- Caritas Australia
- Centre for International Corporate Tax Accountability & Research (CICTAR)
- Community and Public Service Union (CPSU)
- Electrical Trades Union, Victorian Branch (ETU)
- Evatt Foundation
- Friends of the Earth (FoE)
- GetUp!
- Greenpeace Australia Pacific
- International Transport Workers Federation (ITF)
- Jubilee Australia
- Maritime Union of Australia (MUA)
- National Tertiary Education Union (NTEU)
- New South Wales Nurses and Midwives' Association (NSWMWA)
- Oaktree Foundation
- Oxfam Australia
- Publish What You Pay Australia
- Save Our Schools
- SEARCH Foundation
- SJ around the Bay
- TEAR Australia
- The Australia Institute
- Union Aid Abroad – APHEDA
- United Workers' Union (UWU)
- Uniting Church in Australia, Synod of Victoria and Tasmania
- UnitingWorld
- Victorian Trades Hall Council
- World Vision Australia