

EXPOSURE DRAFT

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TAX LAWS AMENDMENT (2005  
MEASURES NO. 6) BILL 2005

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EXPLANATORY MATERIAL



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# ***Detering the promotion of tax exploitation schemes***

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## **Overview**

1. This bill amends the *Taxation Administration Act 1953* (TAA 1953) and the *Income Tax Assessment Act 1997* (ITAA 1997) to introduce a range of measures – civil penalties, statutory injunctions and voluntary undertakings – aimed at deterring the promotion of schemes that exploit the tax system and the tax laws by avoidance or evasion.

## **Summary of the new law**

2. To deter the promotion of tax exploitation schemes, the bill amends the tax laws to introduce a range of measures that may apply to an individual who is a promoter or implementer of a tax exploitation scheme. The measures available to the Commissioner of Taxation (the Commissioner) include:

- seeking a civil penalty
- seeking an injunction to stop the promotion of a tax exploitation scheme, and
- entering into voluntary undertakings with promoters or implementers that address concerns about the way in which schemes are being promoted.

3. A civil penalty may apply to an individual who:

- is a promoter of a tax exploitation scheme or
- implements a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different to that described in the product ruling, resulting in a different tax outcome for investors.

4. The penalty will be imposed by the Federal Court of Australia (the Court). The maximum amount of penalty the Court can impose on an individual is the greater of 5,000 penalty units (currently equal to

\$550,000) and twice the consideration received directly or indirectly from the promotion or the implementation of the scheme.

5. The individual is not liable for penalty if their conduct in respect of which the proceedings are instituted is due to:

- reasonable mistake of fact or
- the act or default of another entity, to an accident or to some other cause beyond the individual's control, if the individual took reasonable precautions and exercised due diligence to avoid the conduct.

6. The provisions do not apply to tax and legal practitioners who merely provide tax advice in the course of their employment and do not engage in other conduct that would be considered promotion of a tax exploitation scheme, or implementation of a scheme inconsistently with its product ruling, resulting in a materially different tax outcome for investors.

7. The bill ensures that individuals (scheme promoters and implementers) cannot use an entity or business structure to avoid personal liability for the penalty.

8. The bill also enables the Commissioner to seek statutory injunctions against entities. The Commissioner can apply to the Court for an interim, restraining or performance injunction to stop or remedy the promotion of a tax exploitation scheme or implementation of a scheme contrary to its product ruling or other ruling.

9. The Commissioner may also enter into enforceable voluntary undertakings with entities on matters relating to deterring the promotion of tax exploitation schemes, or implementation of schemes inconsistently with its product ruling.

## **Background to the legislation**

10. On 5 December 2003 the then Minister for Revenue and the Assistant Treasurer, Senator the Hon Helen Coonan, announced the Government's intention to introduce a civil penalty regime to deter the promotion of tax exploitation schemes.

11. There are currently no administrative penalties that can be imposed on the promoters of tax exploitation schemes; however, taxpayers found to have participated in tax exploitation schemes may be

subject to scheme penalties. These amendments seek to address this inequity, and create a deterrent to the promotion of tax exploitation schemes.

12. The regime introduces a risk for promoters and implementers of tax exploitation schemes through a penalty that mirrors those faced by taxpayers. The direct financial risk to promoters and implementers – in addition to the injunctive measure enabling the Commissioner to stop the promotion of a scheme – should limit widespread promotion of these activities and the period during which taxpayers remain at risk of investing in a tax exploitation scheme.

13. Deterring the promotion of tax exploitation schemes will protect revenue and provide more certainty for taxpayers. Symmetry in the framework should enhance fairness and taxpayer confidence in the tax system. These measures will also make more investment funds available for legitimate and productive projects that are not primarily driven by tax benefits.

## **Detailed explanation of the new law**

14. As previously mentioned, the bill introduces three measures to deter the promotion of tax exploitation schemes and the implementation of schemes inconsistently with an ATO ruling.

15. In order to further the objects of the provisions, the Commissioner can accept a voluntary undertaking from the entity, apply to the Court for an injunction against the entity, or seek a civil penalty against the promoter or scheme implementer. It is envisaged the Commissioner would pursue undertakings and injunctions as enforcement actions before seeking a civil penalty.

16. The bill provides that an entity (defined in subsection 995-1(1) of the ITAA 1997) can give an undertaking for the purposes of furthering the objects of the bill. The Commissioner can also apply for an injunction against an entity. However, the civil penalty provisions of this bill apply only to individuals who are promoters of tax exploitation schemes or implementers of schemes that do not conform with their product ruling or other ruling. This ensures that individuals who breach these provisions cannot hide behind business structures to avoid personal liability (see paragraphs 36 and 37).

## Civil penalties

17. Where an individual has contravened the civil penalty provisions in this bill, the Commissioner may apply to the Court for a civil penalty against that individual. If the Court is satisfied that the individual has breached the civil penalty provisions, it can order the individual to pay the Commonwealth a financial penalty it determines appropriate. *[schedule #, item #, section 290-50]*

18. The civil penalty provisions are contravened where an individual:

- is a promoter of a tax exploitation scheme or
- implements a scheme that is claimed to, but does not, conform with its product ruling, resulting in a materially different tax outcome to that provided for in the ruling. *[schedule#, item #, subsections 290-50(1) and (2)]*

19. The maximum amount of penalty the Court can impose is the greater of:

- 5000 penalty units (currently equal to \$550,000) and
- twice the consideration received, directly or indirectly, from the promotion or implementation of the scheme. *[schedule #, item #, subsection 290-50(4)]*

20. When a civil penalty is imposed by the Court, the penalty becomes a debt payable to the Commonwealth, and the Commonwealth may enforce an order on the individual to meet the debt. *[schedule #, item #, subsection 290-50(5)]*

## Promoter of a tax exploitation scheme

21. As noted above, the civil penalty will apply only to promoters of tax exploitation schemes. Although there may be numerous individuals undertaking a marketing or promotional role within a scheme, not all will be promoters of a tax exploitation scheme.

### *Who is a promoter?*

22. For the purposes of the civil penalty regime, a promoter is an individual who:

- implements, advances, or encourages the growth or interest in a tax exploitation scheme; and

- receives consideration in respect of the scheme and
- has a substantial and integral role in promoting the scheme. *[schedule#, item #, section 290-60]*

23. For any tax exploitation scheme there may be numerous individuals who market the scheme, however, there would only be one or a few individuals who would be considered promoters for the purposes of the civil penalty provisions. The promoters who are at risk under the civil penalty regime are those who undertake, for consideration, a substantial promotional role in the overall marketing and advancement of a tax exploitation scheme. This would be a question of fact and would be determined having regard to all relevant facts including (but not limited to) the:

- degree of the promoter's involvement in implementing, advancing, actively marketing or encouraging the growth of or interest in the scheme
- level of consideration received by the individual, directly or indirectly, from the scheme and
- individual's participation in the scheme management (including factors such as identification of the individual in the scheme's marketing material).

24. A promoter must have a substantial role in promoting the scheme to be at risk of civil penalty. That is, the promoter's role would need to be integral to the operation and growth of the scheme, such that without them, the scheme would not have been established and widely promoted. *[schedule #, item #, paragraph 290-60(1)(c)]*

25. Tax or legal practitioners, including financial planners, tax agents and accounting and legal practitioners, who merely provide tax planning advice on arrangements, or prepare tax returns based on information provided by other legal or tax advisers are not considered promoters and will not be caught under the provisions. This is because the mere provision of tax advice or the preparation of tax returns is not generally considered to be, in itself, implementing, advancing, or encouraging the growth or interest in a tax exploitation scheme. *[schedule #, item #, subsection 290-60(2)]*

26. The measure is not intended to inhibit the provision of tax advice. The concepts of implementing, advancing, and encouraging, do not include the giving of advice. An individual would be a promoter if they, for example, actively market tax exploitation schemes or proactively advertise and solicit investment in schemes that are tax exploitation

schemes. On the other hand, tax and legal practitioners who advise on tax planning arrangements based on the information provided by another practitioner would not be promoters, even if they advise favourably on a scheme later found to be a tax exploitation scheme. Advising on the consequences of entering into a scheme does not constitute promotion, as the advisor is not intentionally trying to persuade a taxpayer to invest in the scheme. Similarly, a tax or legal practitioner (including in-house advisers) would not be a promoter if, on request, they design a tax effective arrangement for a client that is later found to be a tax exploitation scheme. That is, tax or legal practitioners who provide objective, independent advice to a client at the client's request will not be considered a promoter. *[schedule #, item #, subsection 290-60(2)]*

27. For the same reason, fees received for such activities do not generally constitute fees received in respect of a tax exploitation scheme. Generally, tax and legal practitioners would receive a fee-for-service consideration for their advice, whether it is from a client or employer (in the case of in-house advisers).

28. However, scheme promoters would generally undertake promotional activities for scheme profits. Scheme profits are consideration received in respect of a tax exploitation scheme.

29. A person employed to carry out specific tasks related to the promotion of a tax exploitation scheme, for example administrative duties, would not be considered a promoter.

30. There may be more than one promoter of a scheme, for example where several promoters capitalise on a combined, complementary skill set in the overall implementation and advancement of the scheme. More than one promoter may be identified where the scheme is a joint venture or where a scheme 'changes hands' during its life. Where a tax exploitation scheme is established and promoted offshore, any Australian entity who plays a substantial role in promoting the scheme in Australia will be at risk.

31. The Commissioner will be able to determine who the promoter/s is/are by using information supplied through audit activity or acquired through the use of the information gathering powers available under the tax laws.

32. Where the criteria to being a promoter are met, and more than one promoter is identified, each promoter will be individually liable for the civil penalty. For each promoter, the Court may impose a maximum penalty that is the greater of 5000 penalty units and twice the consideration received, directly or indirectly, from the scheme (by the

respective promoter). The maximum penalty for each promoter may be different if each received a different level of consideration.

***Who is a scheme implementer?***

33. The provisions identify two types of individuals to which the measures may apply – promoters and scheme implementers. A promoter is responsible for the promotion of a tax exploitation scheme (see paragraphs 22 to 32). A scheme implementer, however, is at risk of penalty for the implementation of a scheme inconsistently with its product, or other binding ruling, resulting in a different tax outcome for investors. *[schedule #, item #, subsection 290-50(2)]*

34. A scheme implementer has an instrumental role in the operation of the scheme. They are responsible for making the supervisory or managerial decisions that put a scheme into operation or significantly influence the running of the scheme. Scheme implementers are likely to be individuals in a position to make executive decisions about the operation of the scheme.

35. Implementation would not extend to the actual carrying out of specific tasks related to the running of the scheme. For this reason, someone who is employed or contracted to carry out such tasks would not be a scheme implementer.

***What happens if a partnership, company, or another type of entity carries out the promotion?***

36. A promoter can only be an individual. Although tax exploitation schemes may be promoted using different business structures and names, the law enables the Commissioner to look through these structures and commence civil proceedings against those ultimately responsible for the scheme's promotion. This ensures that culpable individuals cannot hide behind a particular entity or business structure to avoid personal liability. *[schedule #, item #, section 290-60]*

37. However, the Commissioner can apply for a statutory injunction against an entity and accept an enforceable voluntary undertaking from an entity (see paragraphs 67 and 86). *[schedule #, item #, sections 290-125 and 290-200]*

**Promotion of a tax exploitation scheme**

***What is a tax exploitation scheme?***

38. Tax exploitation schemes are schemes that exploit the tax system through avoidance or evasion. They include any tax scheme or tax

planning arrangement where the tax planning goes beyond the intention of the law. In tax exploitation schemes, the tax planning is structured around arrangements designed to minimise tax by avoiding the intent of the law or by not following the law itself. Tax exploitation schemes often make claims about the availability of scheme benefits that are incorrect at law. The claims may be incorrect at law because:

- the arrangement involves tax evasion or fraud
- an anti-avoidance provision applies to the scheme or it could be reasonably expected to apply if the scheme had been implemented or
- the benefit sought is unavailable because of another general provision of the tax laws, such as the general deduction rule in section 8-1 of the ITAA 1997.

39. A scheme is a tax exploitation scheme where it is reasonable to conclude that an entity (which can include individuals, trusts, partnerships, or companies) that entered into or carried out the scheme did so with the dominant purpose of getting a scheme benefit from the scheme. Therefore, the definition refers to the purpose of entities that enter into, or carry out, schemes to determine if it is a tax exploitation scheme. That is, if the purpose of entities entering into such schemes is to obtain a scheme benefit (defined in section 284-150 of Schedule 1 to the TAA 1953), that is to avoid or evade tax, then the scheme is considered a tax exploitation scheme. *[schedule #, item #, section 290-65]*

40. This definition is consistent with the liability to penalty provisions faced by taxpayers who invest in a tax evasion or avoidance scheme (section 284-145 of Schedule 1 to the TAA 1953), reinforcing the symmetry in penalty regimes for promoters and taxpayers.

41. The civil penalty proceedings against a promoter or a scheme implementer can be initiated independently of any action the Commissioner takes against the scheme's investors.

42. Tax planning arrangements that have an ATO ruling are not considered tax exploitation schemes if the arrangements are implemented in the manner detailed in the ruling – in these circumstances, the benefit sought will be available to the taxpayer. However, if the scheme is not implemented in accordance with its ruling and a different tax outcome results, a penalty may apply under these provisions. *[schedule #, item #, subsection 290-50(2)]*

## **Failure to comply with a taxation product ruling**

### ***What is a taxation product ruling?***

43. In 1992, the Government introduced the ruling system to provide greater certainty to taxpayers by explaining how the tax law applies to a set of circumstances. A product ruling is a form of public ruling issued by the Commissioner. Product rulings were introduced in 1998 to rule publicly on the availability of tax benefits from particular investment products. Further details on how and when a product ruling is issued are found in the ATO's ruling PR1999/95.

44. The system provides a degree of certainty to investors that a tax benefit is available at law where the scheme is implemented in the manner described to the Commissioner in their ruling application.

45. Scheme promoters or implementers can apply for a product ruling for their scheme and, providing the scheme is carried out in the manner detailed to the Commissioner, investors will be aware of how the Commissioner will apply the tax law to the scheme. The measures in this bill will not affect investors and promoters of schemes implemented in accordance with their product rulings.

46. However, where a scheme is implemented in a materially different way to that described in its product ruling, the application of the law outlined in the ruling may not be valid. Therefore, investors lose the protection of the ruling and may be subject to disallowed tax benefits, tax shortfall penalties and interest. Promoters and implementers of such schemes will have breached the civil penalty provisions of this bill and be liable for civil penalty. [*schedule #, item #, subsection 290-50(2)*]

47. The civil penalty provisions will also apply to schemes that are implemented in a materially different way to the arrangements described in any other form of ruling issued by the Commissioner that covers the scheme.

### ***What is 'materially different'?***

48. A material difference arises where a difference between the scheme implemented and that ruled upon results in a tax outcome for a taxpayer to which the ruling applies that is, or is likely to be, different to that provided for in the ruling. That is, an action or event will be 'materially different' where that action or event results in a different tax outcome for investors to that provided for in the ruling. An action or event will not be 'materially different' if it is a superficial difference in the way the scheme operates that has no material effect on the final tax outcome. An example would be where a plantation uses micro-sprayers

instead of drip irrigation, and this does not impact on the prospect of the plant sown growing successfully.

49. The measure will strengthen and improve the integrity of the ruling system to enhance investor protection by exposing those scheme implementers who abuse the product rulings system to risk of penalty.

### **Civil penalty quantum**

50. The civil penalty measure aims to deter the promotion of tax exploitation schemes by creating direct financial risks for scheme promoters. Effective deterrence requires penalties to be greater than the expected benefit from illegal activity.

#### ***Why are there two methods for calculating the maximum penalty amount?***

51. To assist the Court to tailor the penalty to the circumstances of each case appropriately, alternative methods of calculating the maximum penalty are provided. This flexibility allows the Court to impose a penalty that reflects the seriousness of individual cases, including the worst possible case.

52. One is a fixed maximum penalty equivalent to 5000 penalty units (currently equal to \$550,000). The other directly reflects the gain to the promoter or implementer from the scheme. [*schedule #, item #, subsection 290-50(4)*]

53. The maximum penalty amounts available to the Court are considered sufficiently high to deter culpable behaviour by making any gains derived from scheme promotion not worth the price of the penalty.

54. It is not envisaged the maximum penalty would be imposed in all cases (see below).

#### ***Factors to be considered when setting the penalty***

55. The Court may consider a range of factors when determining the amount of penalty imposed. In accordance with Commonwealth penalty setting guidelines, some of the factors the Court may consider when determining the appropriate quantum of the civil penalty are:

- the financial gains from engaging in the unlawful conduct
- the deterrent effect of the penalty
- the loss or damage incurred by scheme participants

- the nature and extent of the contravention
- the circumstances in which the contravention took place, including the deliberateness of the conduct and the period over which it extended
- whether the individual took any steps to avoid the contravention
- whether the individual has previously been found by a court to have engaged in the same or similar conduct or
- the degree of cooperation with the ATO.

***What is consideration received directly or indirectly?***

56. Consideration refers to fees, reward for services rendered or profits derived by a promoter from a tax exploitation scheme. Direct consideration amongst other things, encompasses any fee, payment for services rendered, money, property, benefit, reward, compensation or recompense received or receivable and which is directly related to the scheme. *[schedule #, item #, paragraph 290-50(4)(b)]*

57. Indirect consideration includes in-kind payments, payments to third party associates and other payments received that are in effect related to the scheme promotion but are ‘dressed up’ as something else. *[schedule #, item #, paragraph 290-50(4)(b)]*

**Interaction of civil penalty provisions in this bill with other civil penalty provisions in the tax laws**

58. The present system of imposing penalties on investors of tax evasion and avoidance schemes set out in Part 4-25 of Schedule 1 to the TAA 1953 will not be affected by the introduction of these measures. As such, any liability for tax shortfall and penalties by investors to the ATO should not affect the calculation of the penalty on the promoter or scheme implementer. Additionally, civil penalty amounts paid under a Court order are not deductible for income tax purposes (section 26-5 of the ITAA 1997). *[schedule #, item #, section#]*

**Time limitations for the Commissioner to initiate proceedings**

59. In the case of promotion of a tax exploitation scheme, the Commissioner must begin civil penalty proceeding within four years of the scheme being last offered to entities. *[schedule #, item #, subsections 290-55(3)]*

60. In the case of implementation of a scheme that does not conform with its product ruling, or other ruling, the Commissioner must begin civil penalty proceedings within four years of the scheme being last implemented in Australia. *[schedule #, item #, subsections 290-55(4)]*

61. However, a scheme promoter or implementer remains liable for penalty under these provisions as long as they may be characterised as playing a substantial role in the scheme. A scheme promoter or implementer remains responsible for the scheme until it is shut down or the scheme has changed hands and the original promoter or implementer is no longer associated with the promotion or implementation of the scheme.

62. As explained above, tax exploitation schemes may involve either tax avoidance or evasion. Where a tax exploitation scheme involves avoidance, the four-year time limitation for the Commissioner to initiate proceedings apply (paragraphs 59 and 60). However, where a tax exploitation scheme involves fraud and evasion, there is no time limitation for the Commissioner to instigate Court proceedings against the promoter or implementer of such a scheme. The Commissioner has an unlimited period during which to review matters involving fraud or evasion (subsection 170(1) of the ITAA 1936). *[schedule #, item #, subsection 290-55(5)]*

63. The four year time limitation for the Commissioner to initiate the civil penalty proceedings is aligned with the standard time period taxpayers will be at risk of amended assessments under the general anti-avoidance provisions. The four year time limitation also achieves consistency with other tax provisions as it reflects the review and amendment period available where tax avoidance is involved (as recommended by the Treasury's *Report on Aspects of Income Tax Self Assessment*).

### **Recovery of the penalty**

64. The civil penalty payable under this measure for breach of the provisions is not a tax-related liability. As such, where the penalty is not paid to the Commonwealth within the time stated in the Court order, the Commissioner on behalf of the Commonwealth will initiate proceedings in the Court for its recovery. The Commissioner would institute such proceedings in the relevant jurisdiction and apply for orders including judgment interest. *[schedule #, item #, subsection 290-50(5)]*

## Exceptions to the civil penalty provisions

65. An individual is not liable for a civil penalty under the provisions if their conduct is:

- due to a reasonable mistake of fact or
- due to the act or failure to act of another entity, to an accident or to some other cause beyond the individual's control and the individual took reasonable precautions and exercised due diligence to avoid the conduct. *[schedule #, item #, subsection 290-55(1)]*

66. Often promoters and implementers obtain a professional opinion from leading law and/or accounting firms in relation to a scheme. Reliance on general opinions that do not take into account circumstances of individual investors would not exempt promoters or implementers from these civil proceedings. Investors should be encouraged to seek tax advice from their own accountants or tax professionals.

## Statutory injunctions

67. This measure empowers the Commissioner to apply to the Court for injunctive relief to stop the promotion of a tax exploitation scheme or implementation of a scheme that does not conform to its ruling (restraining injunction), or to require the entity to do something to remedy a perceived contravention of the law (performance injunction). *[schedule #, item #, section 290-125]*

68. Statutory injunctions can be used in addition to civil penalty proceedings, such as where the Court considers the circumstances of a case warrant both injunctive relief and a civil penalty order.

69. The Court may grant an injunction against an entity on such terms as it thinks appropriate. The Court may grant an injunction restraining an entity from engaging in, or continuing to engage in the promotion of tax exploitation schemes or implementation of schemes in a manner different to that described in the scheme's ruling. The Court may also grant an injunction requiring the entity to do something where the Court sees it as desirable to do so. *[schedule #, item #, section 290-125]*

70. The Court may grant an interim injunction against an entity to stop the promotion or implementation of a scheme where it has not yet fully considered the Commissioner's application for an injunction. *[schedule #, item #, subsection 290-130(1)]*

71. The power to seek injunctions and interim injunctions allows the Commissioner to take immediate action against scheme promoters, thus enhancing investor protection by limiting the period during which taxpayers are exposed to tax exploitation schemes.

***No undertaking as to damages***

72. The Court cannot require the Commonwealth to give any undertakings as to damages as a condition of granting an injunction under this Subdivision. *[schedule #, item #, subsection 290-130(2)]*

73. There are no undertakings as to damages available under this Subdivision as the Commissioner is acting in the public interest. In applying for an injunction against an entity, the Commissioner's intent is to protect the interests of taxpayers, the public revenue and the integrity of the tax system.

***Delay in making ruling***

74. A promoter or implementer may apply to the Commissioner for a product ruling in relation to the scheme (scheme participants may seek private binding rulings from the Commissioner). Where the promoter has applied for a ruling, and the Commissioner fails to make a ruling, or advise the promoter or implementer that he/she declines to make a ruling, the Commissioner cannot apply for an injunction under section 290-125 in relation to the activities undertaken by a scheme promoter or implementer. *[schedule #, item #, section 290-135]*

75. The Commissioner cannot take action under these provisions until he has given the promoter or implementer notice that the ruling has been denied. The Commissioner can only seek an injunction in relation to conduct that took place after he/she makes the ruling or notifies the applicant that the he/she declines to make a ruling. *[schedule #, item #, section 290-135]*

76. In the meantime, the scheme promoter or implementer may promote or implement a scheme noting that a ruling is pending. If, the Commissioner declines to make a ruling and notifies the promoter or implementer accordingly but the promoter or implementer continues to promote or implement the scheme, the Commissioner may then take action under these provisions.

77. These provisions serve to ensure that a promoter is not at risk of penalty merely as a result of delays in the ATO processing a request for a product ruling.

### ***Discharge of injunctions***

78. The Court may discharge or vary an injunction granted under this Subdivision at any time. *[schedule #, item #, section 290-140]*

### ***Certain limits on granting injunctions do not apply***

79. The Court may grant an injunction against an entity on such terms as it thinks appropriate. The Court may grant an injunction against an entity if it is satisfied that the entity has previously promoted a tax exploitation scheme or implemented a scheme in a manner that does not conform to its ruling. The injunction may be granted whether or not the entity intends to engage in, or continues to engage in, such activities. *[schedule #, item #, paragraph 290-145(1)(a)]*

80. The Court may also grant an injunction against an entity if it appears that if it does not, it is likely the entity will engage in the promotion or implementation of a tax exploitation scheme. The injunction may be granted whether or not the entity has previously engaged in the promotion or implementation of a scheme, and whether or not there is a risk of damage to anyone if the entity engages in such activities. *[schedule #, item #, paragraph 290-145(1)(b)]*

81. The Court may grant performance injunctions requiring the entity to do something if it is satisfied the entity has not done that thing and/or is likely not do the thing required. *[schedule #, item #, paragraph 290-145(2)]*

### **Other powers of the Court unaffected**

82. The powers conferred on the Court under this Part do not limit or replace any other powers of the Court. *[schedule #, item #, section 290-150]*

### **Enforceable voluntary undertakings**

83. A voluntary undertaking is a written undertaking given by a taxpayer to the Commissioner in connection with a matter for which the Commissioner has a function or power.

84. This bill amends the tax laws to allow the Commissioner to enforce in Court a voluntary undertaking from an entity in furtherance of the objects of this bill if the terms of the undertaking are not adhered to by the entity. *[schedule #, item #, subsection 290-200(3)]*

85. The amendments only apply to voluntary undertakings given in furtherance of the objects of this bill – that is, to deter the promotion of tax exploitation schemes and the implementation of schemes that do not conform with its product ruling or other ruling, resulting in a materially different tax outcome to the investor. *[schedule #, item #, section 290-200(1)]*

86. The Commissioner may accept an enforceable undertaking from an entity where there is evidence of a breach that may otherwise justify litigation. The Commissioner may also consider other factors when accepting an undertaking from an entity, including whether:

- it is an appropriate outcome in the circumstances
- it is likely to be complied with
- it is likely to be an efficient resolution of the matter
- there is an acknowledgment of a breach or cause for concern.

87. Examples of where the Commissioner might accept an enforceable undertaking in furtherance of this policy include an undertaking in relation to the financing arrangements of a scheme, requiring a promoter or scheme implementer to change incorrect statements and/or to include statements such as ‘the Tax Office has advised that it does *not* endorse this view’. Voluntary undertakings may also be used as a preliminary step to prevent an individual from implementing an arrangement in a way that is materially different to the terms of its product, or other binding ruling.

88. An undertaking may provide for a timeframe in which compliance with the undertaking is required. Undertakings may be varied or withdrawn at any time, but only with the consent of both parties. *[schedule #, item #, section 290-200(2)]*

89. The Commissioner cannot compel an individual to give an undertaking. Equally, the Commissioner cannot be compelled to accept an undertaking.

90. An entity’s voluntary undertaking is given without prejudice. However, an entity’s willingness to make a voluntary undertaking may be considered by the Court as evidence of good faith if enforcement action is taken.

91. Voluntary undertakings do not operate as a mechanism to give the Commissioner’s view on the application of tax law. If a promoter or implementer wants to be sure of the application of the tax law to their affairs, they should apply for a ruling.

92. If an entity breaches its undertaking given for the purposes of furthering the objectives of this Division, the Commissioner can apply to the Court for appropriate action to be taken. The Court may issue a Court order directing the entity to comply with the terms of the undertaking, or it may issue any other order that it considers appropriate, including a statutory injunction or civil penalty. *[schedule #, item #, subsections 290-200(3) and (4)]*

93. This form of voluntary undertaking allows the Commissioner to tailor enforcement responses to individual circumstances. In turn, relative to the other measures provided for in this bill, it also assists in reaching outcomes that are more flexible, timely and cost-effective than would normally be achievable by Court order.

## **Other civil procedure rules**

94. Currently, the tax law has no standard civil procedure or evidence provisions that apply across the tax acts to civil penalties. These amendments, provide standard provisions in the TAA 1953 that may apply to any future civil penalties inserted into the tax laws.

95. The Court must apply the rules of evidence and procedure for civil matters when hearing civil penalty proceedings under these provisions. *[schedule #, item #, section 298-85]*

96. The Court cannot make a civil penalty order against a scheme promoter or implementer if they have been found guilty of a criminal offence as a result of the same conduct that the civil penalty order would be made. *[schedule #, item #, section 298-90]*

97. Civil penalty proceedings against a promoter or implementer must be stopped if criminal proceedings for an offence constituted by the same conduct as the civil penalty order would be made, are or have already been started. If the promoter or implementer is not convicted of the offence, the civil penalty proceedings may be resumed. If the promoter or implementer is convicted of the criminal offence, the civil penalty proceedings will be dismissed. *[schedule #, item #, section 298-95]*

98. Criminal proceedings may be started against a scheme promoter or implementer for the same conduct that a civil penalty order could be, or has been made. *[schedule #, item#, section 298-100]*

99. Evidence that is given by a scheme promoter or implementer in civil penalty proceedings is not admissible in criminal proceedings against that individual for an offence if the offence is in relation to the same

conduct as that of the civil penalty proceedings. *[schedule #, item#, section 298-105]*

***Civil double jeopardy***

100. An individual who is ordered by the Court to pay a civil penalty for a breach of these provisions is not liable to a civil penalty under some other provision of a Commonwealth law in respect of the same conduct. For example, if an individual is found to be a promoter and an implementer, that individual would only be subject to these measures once and not penalised for being both a promoter and an implementer. *[schedule #, item #, section 298-110]*

101. However, where a corporation is penalised under a Commonwealth law, such as the *Trade Practices Act 1974* or the *Australian Securities and Investment Commission Act 2001* for misrepresentation (by promoting a tax exploitation scheme or implementing a scheme inconsistently with its product ruling), the individual (promoter or scheme implementer) responsible is still liable for a civil penalty under these provisions. Civil double jeopardy will not apply.