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<b>EXPOSURE DRAFT</b>
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**Schedule ??—Promotion and implementation of schemes**

**Part 1—Main amendments**

*Taxation Administration Act 1953*

**1 After Division 288 in Schedule 1**

Insert:

**Division 290—Promotion and implementation of schemes**

**Table of Subdivisions**

- 290-A Objects of this Division
- 290-B Civil penalties
- 290-C Injunctions
- 290-D Voluntary undertakings

**Subdivision 290-A—Objects of this Division**

**Table of sections**

- 290-5 Objects of this Division

**290-5 Objects of this Division**

The objects of this Division are:

- (a) to deter the promotion of \*tax exploitation schemes; and
- (b) to deter the implementation of \*schemes that have 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.

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1        **Subdivision 290-B—Civil penalties**

2        **Table of sections**

3                    290-50    Civil penalties  
4                    290-55    Exceptions  
5                    290-60    Meaning of *promoter*  
6                    290-65    Meaning of *tax exploitation scheme*

7        **290-50 Civil penalties**

8                    *Promoter of tax exploitation scheme*

- 9                    (1) An individual must not engage in conduct (whether in his or her  
10                    capacity as an individual or in some other capacity, for example, as  
11                    an officer of a company or a partner in a partnership) that results in  
12                    the individual being a \*promoter of a \*tax exploitation scheme.

13                    *Implementing scheme otherwise than in accordance with ruling*

- 14                    (2) An individual must not implement (whether in his or her capacity  
15                    as an individual or in some other capacity, for example, as an  
16                    officer of a company or a partner in a partnership) a \*scheme that  
17                    has been promoted on the basis of conformity with a \*product  
18                    ruling in a way that is materially different to that described in the  
19                    product ruling.

20                    *Civil penalty*

- 21                    (3) If the Federal Court of Australia is satisfied, on application by the  
22                    Commissioner, that an individual has contravened subsection (1) or  
23                    (2), the Court may order the individual to pay a civil penalty to the  
24                    Commonwealth.

25                    *Amount of penalty*

- 26                    (4) The maximum amount of the penalty is the greater of:  
27                    (a) 5,000 penalty units; and  
28                    (b) twice the consideration received or receivable (directly or  
29                    indirectly) by the individual and \*associates of the individual  
30                    in respect of the \*scheme.

31                    Note:        See section 4AA of the *Crimes Act 1914* for the current value of a  
32                    penalty unit.



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- (a) the individual promotes the scheme by implementing it, advancing it or encouraging its growth or interest in it; and
  - (b) the individual or an \*associate of the individual receives (directly or indirectly) consideration in respect of the scheme; and
  - (c) having regard to all relevant matters, including the extent of the individual's participation in the management of the scheme, it is reasonable to conclude that the individual has had a substantial role in promoting the scheme.

(2) However, an individual is not a *promoter* of a \*tax exploitation scheme merely because the individual provides advice about the consequences of entering into a \*scheme (as opposed to encouraging or helping entities to enter into the scheme).

**290-65 Meaning of tax exploitation scheme**

A \*scheme is a *tax exploitation scheme* if:

- (a) it is reasonable to conclude that an entity that (alone or with others) entered into or carried out the scheme, or part of it, did so with the sole or dominant purpose of that entity or another entity getting a \*scheme benefit from the scheme; and
- (b) the scheme benefit is not available at law.

Note: The condition in paragraph (b) would not be satisfied if the implementation of the scheme for all participants were in accordance with binding advice from the Australian Taxation Office.

For example, if that implementation were in accordance with a public ruling under the *Taxation Administration Act 1953*, or all participants had private rulings under that Act and that implementation were in accordance with those rulings.

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1 **Subdivision 290-C—Injunctions**

2 **Table of sections**

3	290-120	Conduct to which this Subdivision applies
4	290-125	Injunctions
5	290-130	Interim injunctions
6	290-135	Delay in making ruling
7	290-140	Discharge etc. of injunctions
8	290-145	Certain limits on granting injunctions not to apply
9	290-150	Other powers of the Federal Court unaffected

10 **290-120 Conduct to which this Subdivision applies**

11 This Subdivision applies to conduct of the kind referred to in  
12 subsection 290-50(1) or (2).

13 **290-125 Injunctions**

14 If an entity has engaged, is engaging or is proposing to engage in  
15 conduct to which this Subdivision applies, the Federal Court of  
16 Australia may, on the application of the Commissioner, grant an  
17 injunction:

- 18 (a) restraining the entity from engaging in the conduct; and  
19 (b) if, in the Court’s opinion, it is desirable to do so—requiring  
20 the entity to do something.

21 **290-130 Interim injunctions**

22 *Grant of interim injunction*

- 23 (1) The Federal Court of Australia may, before considering an  
24 application for an injunction under section 290-125, grant an  
25 interim injunction restraining an entity from engaging in conduct to  
26 which this Subdivision applies.

27 *No undertakings as to damages*

- 28 (2) The Federal Court of Australia is not to require the  
29 Commonwealth, as a condition of granting an interim injunction, to  
30 give any undertakings as to damages.

31 **290-135 Delay in making ruling**

32 If:

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- (a) an entity applied in writing to the Commissioner for a \*product ruling in relation to a \*scheme; and
  - (b) the Commissioner has neither made the ruling nor told the entity in writing that the Commissioner has declined to make the ruling;
- the Commissioner must not make an application under section 290-125 in relation to conduct or proposed conduct by an individual in relation to the scheme until the Commissioner makes the ruling or tells the entity in writing that the Commissioner has declined to make the ruling.

**290-140 Discharge etc. of injunctions**

The Federal Court of Australia may discharge or vary an injunction granted under this Subdivision.

**290-145 Certain limits on granting injunctions not to apply**

*Restraining injunctions*

- (1) The power of the Federal Court of Australia under this Subdivision to grant an injunction restraining an entity from engaging in conduct of a particular kind may be exercised:
  - (a) if the Court is satisfied that the entity has engaged in conduct of that kind—whether or not it appears to the Court that the entity intends to engage again, or to continue to engage, in conduct of that kind; or
  - (b) if it appears to the Court that, if an injunction is not granted, it is likely that the entity will engage in conduct of that kind—whether or not the entity has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to anyone if the entity engages in conduct of that kind.

*Performance injunctions*

- (2) The power of the Federal Court of Australia under this Subdivision to grant an injunction requiring an entity to do something may be exercised:
  - (a) if the Court is satisfied that the entity has refused or failed to do that thing—whether or not it appears to the Court that the entity intends to refuse or fail again, or to continue to refuse or fail, to do that thing; or

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(b) if it appears to the Court that, if an injunction is not granted, it is likely that the entity will refuse or fail to do that thing—whether or not the entity has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to anyone if the entity refuses or fails to do that act or thing.

**290-150 Other powers of the Federal Court unaffected**

The powers conferred on the Federal Court of Australia under this Subdivision are in addition to, and not instead of, any other powers of the Court, however conferred.

**Subdivision 290-D—Voluntary undertakings**

**Table of sections**

290-200 Voluntary undertakings

**290-200 Voluntary undertakings**

- (1) The Commissioner may accept a written undertaking given by an entity for the purposes of this section in connection with furthering the objects of this Division.
- (2) The entity may withdraw or vary the undertaking at any time, but only with the consent of the Commissioner.
- (3) If the Commissioner considers that the entity who gave the undertaking has breached any of its terms, the Commissioner may apply to the Federal Court of Australia for an order under subsection (4).
- (4) If the Court is satisfied that the entity has breached a term of the undertaking, the Court may make one or both of the following orders:
  - (a) an order directing the entity to comply with that term of the undertaking;
  - (b) any other order that the Court considers appropriate.

**2 At the end of Division 298 in Schedule 1**

Add:

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1 **Subdivision 298-B—Civil penalties**

2 **Table of sections**

3	298-80	Application of Subdivision
4	298-85	Civil evidence and procedure rules for civil penalty orders
5	298-90	Civil proceedings after criminal proceedings
6	298-95	Criminal proceedings during civil proceedings
7	298-100	Criminal proceedings after civil proceedings
8	298-105	Evidence given in proceedings for penalty not admissible in criminal proceedings
9		
10	298-110	Civil double jeopardy

11 **Subdivision 298-B—Civil penalties**

12 **298-80 Application of Subdivision**

13 This Subdivision applies for the purposes of the provisions (the  
14 *civil penalty provisions*) set out in this table.  
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**Application of Subdivision**

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<b>Item</b>	<b>Provision</b>	<b>Brief description</b>
1	Division 290	Civil penalties for the promotion and implementation of schemes

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16 **298-85 Civil evidence and procedure rules for civil penalty orders**

17 The Federal Court of Australia must apply the rules of evidence  
18 and procedure for civil matters when hearing proceedings for a  
19 civil penalty order under the civil penalty provisions.

20 **298-90 Civil proceedings after criminal proceedings**

21 The Court must not make a civil penalty order under the civil  
22 penalty provisions against an individual if the individual has been  
23 convicted of an offence constituted by conduct that is substantially  
24 the same as the conduct in relation to which the civil penalty order  
25 would be made.

26 **298-95 Criminal proceedings during civil proceedings**

27 (1) Proceedings for a civil penalty order under the civil penalty  
28 provisions against an individual are stayed if:

- 
- 1 (a) criminal proceedings are started or have already been started  
2 against the individual for an offence; and  
3 (b) the offence is constituted by conduct that is substantially the  
4 same as the conduct in relation to which the civil penalty  
5 order would be made.
- 6 (2) The proceedings for the order may be resumed if the individual is  
7 not convicted of the offence. Otherwise, the proceedings for the  
8 order are dismissed.

9 **298-100 Criminal proceedings after civil proceedings**

10 Criminal proceedings may be started against an individual for  
11 conduct that is substantially the same as conduct in relation to  
12 which a civil penalty order under the civil penalty provisions could  
13 be made regardless of whether a civil penalty order has been made  
14 against the individual.

15 **298-105 Evidence given in proceedings for penalty not admissible in**  
16 **criminal proceedings**

17 Evidence of information given or evidence of production of  
18 documents by an individual is not admissible in criminal  
19 proceedings against the individual if:

- 20 (a) the individual previously gave the evidence or produced the  
21 documents in proceedings for a civil penalty order under the  
22 civil penalty provisions against the individual (whether or not  
23 the order was made); and  
24 (b) the conduct alleged to constitute the offence is substantially  
25 the same as the conduct in relation to which the civil penalty  
26 order was sought.

27 However, this does not apply to a criminal proceeding in respect of  
28 the falsity of the evidence given by the individual in the  
29 proceedings for the civil penalty order.

30 **298-110 Civil double jeopardy**

31 If an individual is ordered to pay a civil penalty under the civil  
32 penalty provisions in respect of particular conduct, the individual is  
33 not liable to a civil penalty under some other provision of a  
34 \*Commonwealth law in respect of that conduct.

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## Part 2—Consequential amendments

### *Income Tax Assessment Act 1997*

#### 3 Subsection 995-1(1)

Insert:

*product ruling* means a public ruling under the *Taxation Administration Act 1953* that states that it is a product ruling.

#### 4 Subsection 995-1(1)

Insert:

*promoter* has the meaning given by section 290-60 in Schedule 1 to the *Taxation Administration Act 1953*.

#### 5 Subsection 995-1(1)

Insert:

*tax exploitation scheme* has the meaning given by section 290-65 in Schedule 1 to the *Taxation Administration Act 1953*.

### *Taxation Administration Act 1953*

#### 6 Section 255-1 in Schedule 1

Before “A *tax-related liability*”, insert “(1)”.

#### 7 At the end of section 255-1 in Schedule 1

Add:

(2) A civil penalty under Division 290 is not a *tax-related liability*.

#### 8 Part 4-25 in Schedule 1 (heading)

Repeal the heading, substitute:

## Part 4-25—Charges and penalties

#### 9 Division 298 in Schedule 1 (heading)

Repeal the heading, substitute:

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1 **Division 298—Machinery provisions for penalties**

2 **Subdivision 298-A—Administrative penalties**

3 **10 Section 298-5 in Schedule 1**

4 Repeal the section, substitute:

5 **298-5 Scope of Subdivision**

6 This Subdivision applies if:

7 (a) an administrative penalty is imposed on an entity by another  
8 Division in this Part; or

9 (b) a penalty is imposed on an entity by Subdivision 162-D of  
10 the \*GST Act.

