



1 November 2024

Director  
Tax Agent Regulation Unit  
Personal and Indirect Tax and Charities Division  
Treasury  
Langton Cres  
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Email: [taxintegrity@treasury.gov.au](mailto:taxintegrity@treasury.gov.au)

Dear Sir/Madam,

**SMSF ASSOCIATION SUBMISSION – REVIEW OF TAX PROMOTER PENALTY LAWS**

The SMSF Association welcomes the opportunity to provide this submission in response to the Government's proposed enhancements to the existing promoter penalties regime.

We acknowledge the important role played by the Australian Taxation Office in protecting the integrity of the taxation system and in protecting taxpayers' superannuation retirement savings from promoters of illegal early access schemes. Protection of our superannuation savings is vital to preserving the integrity of the superannuation system, retirement outcomes to individuals and the wider costs to Government and the community.

SISA<sup>1</sup> section 68B was enacted in 2014<sup>2</sup> and provides for both civil and criminal penalties<sup>3</sup> 'for promoters of schemes that have resulted, or are likely to result, in the illegal early release of superannuation benefits.'<sup>4</sup>

Despite its enactment some 10 years ago, ATO guidance on its application was introduced only three years ago with PS LA 2021/1.<sup>5</sup> It is unclear how SISA s 68B has been applied in practice prior to the PS LA, nor are any results or outcomes either before or after the publication of the PS LA.

The consultation paper does not present a case for change. It is unclear, what challenges the Commissioner maybe experiencing in practice or whether emerging behaviours or activities are falling outside the scope of the current legislation. Without these insights, it is difficult to provide any meaningful feedback in response to this consultation paper.

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<sup>1</sup> *Superannuation Industry (Supervision) Act 1993* (Cth).

<sup>2</sup> *Tax and Superannuation Laws Amendment (2014 Measures No. 1) Act 2014* (Cth), sch 1.

<sup>3</sup> *Ibid* n1, s 68B(2).

<sup>4</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2014, 872 (Steven Ciobo, Parliamentary Secretary to the Treasurer).

<sup>5</sup> Australian Taxation Office, *Application of the promoter penalty laws* (PS LA 2021/1, 8 April 2021): Updated statements issued on 14 April 2023 and 21 August 2024.

The current drafting of SISA s 68B would appear to be sufficiently broad as to capture wide ranging activities and behaviours and allow for any newly emerging or evolving ones. The use of the term “likely to result” provides regulators with very broad powers to act in response to activities that might lead to the illegal release of superannuation benefits, even if no withdrawal has been made. This means that merely setting the stage for a potential breach is enough for the Commissioner to act.

Amendments introduced by *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024* (Cth) expanded the scope of promoter penalties. This included a broader definition of what it means to be a “promoter” under Division 290 of the *Taxation Administration Act 1953* (TAA 1953).

Previously, the ATO had to prove that a promoter received some form of “consideration” for promoting a tax exploitation scheme. This requirement made it difficult for the ATO to act in cases where the financial benefits were indirect or non-monetary.

The definition has now been expanded to include any form of “benefit.” This change means that whether the reward is direct, indirect, monetary, or in-kind, if it encourages the growth or interest in a tax exploitation scheme, the promoter penalty laws can apply.

These amendments significantly lower the bar for what needs to be proven, making it easier for the Commissioner to act against those promoting illegal schemes, including illegal early release schemes targeting superannuation. Given these provisions only received Royal Assent on 31 May 2024, there has been insufficient time to review and assess their efficacy or deficiency.

Any further amendments must also be balanced against the provision of legitimate professional advice and the need to protect advisers who do the right thing. The existing legislation makes it clear that providing advice alone doesn’t result in a party being classed as a promoter.<sup>6</sup> However, the line between giving advice and promoting a scheme appears to be getting thinner. This in turn is presenting challenges, risks and exposure for professionals who seek to provide legitimate advice to clients, the vast majority of whom seek to do the right thing.

It is our recommendation that prior to the consideration of any further legislative amendments, a broader review must first be undertaken. Only once a case for change can be clearly articulated and evidenced, should further amendments be considered.

The review would include the current legislative frameworks but also needs to extend beyond the law. An examination of the types of activities undertaken by regulators, any resulting actions taken, identify impediments to regulator activities and actions including tools and resourcing, and any emerging issues that risk falling outside of the scope of current legislation and powers must be included.

We would encourage the proper funding and resourcing of regulators to enable a more pro-active approach be taken to survey, track and monitor a range of platforms and activities. In doing so, this presents real time opportunities to address illegal activities, such as those emerging through social media to minimise the risks to the community. While detection of matters through examination of

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<sup>6</sup> *Taxation Administration Act 1953* (Cth), s 290-60(2) of schedule 1: ‘an entity is not a promoter of a tax exploitation scheme merely because the entity provides advice about the scheme.’



individual taxpayers will remain an important activity, delaying investigations until this point allows for greater harm across a greater number of taxpayers.

Unregistered 'advisers' and promoters present significant risk to the tax and superannuation systems as well as the taxpayers who are targeted. Greater publicity of penalties and actions taken, including in the same platforms of those who seek to ply their trade, will go some ways to providing important warnings to potential victims and the perpetrators themselves.

We acknowledge that these are complex issues and would encourage a greater focus be placed on activities and actions. A future review can be undertaken that considers the elements discussed, noting it would be better informed by a stronger fact base.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

Peter Burgess  
Chief Executive Officer

#### **ABOUT THE SMSF ASSOCIATION**

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.