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## LEGAL BRIEF

# Sum of all tax fears

*The ATO view of the tax promoter law is the only one that matters unless a federal court judge rules otherwise, and there is potential for heavy-handed implementation.*

On April 6, 2006, an old insidious threat was given a fresh power: the Australian Taxation Office was empowered with the tax promoter laws.

Don't be fooled into believing that this new power only applies to the dastardly – it covers anyone who has had a substantial role in marketing, or otherwise encouraging the growth of a tax exploitation scheme and who receives consideration in respect of that marketing or encouragement. A single piece of advice can achieve this, as can a pro forma statement of advice about a taxation opportunity.

In other words, financial planners, paraplanners and technical compliance authors are now exposed to the vagaries of an empowered bureaucracy. How much is the exposure? The maximum amount of a penalty is no less than \$550,000 for individuals and \$2.75 million for a body corporate.

Protests from some eminent jurists such as former chief justice of the High Court of Australia Anthony Mason did not prevent the passage of the legislation. Consider yourself warned, again: the threat has become reality.

Promotion of a tax scheme to one person is enough for the ATO to invoke its new powers. Even employees are not immune. There are some protections, but these are limited to employees who do no more than distribute information prepared by their employer or where the ATO has already secured a civil penalty upon the employer.

What do you need to avoid? Promoting or causing someone else to be involved in a tax exploitation scheme. But what is that? It is an arrangement that someone enters with the sole or dominant purpose of securing a tax-related liability lower than it would have been without the scheme.

A simple recommendation of a super contribution satisfies this condition, so why isn't this caught? To fall foul of the ATO's new powers, it is necessary that it is not reasonably arguable that the scheme benefit is available at law.

Don't take too much comfort in this phrase. Experience has shown that the ATO has a very narrow view of what is reasonably arguable. If the ATO view in Taxation Ruling TR94/5 is anything to go by, the arrangement must have had at least a substantial chance of lawful success and must also have failed. Anything less than this will not invoke the reasonably arguable defence. The problem is that until a court expresses such a view, the opinion of the bureaucratic ATO is the only one that matters.

These issues are easily formed; all that is left for the ATO is to find that you are a promoter. Remember: all that is required is the receipt of consideration in respect of marketing or encouragement of the arrangement and you must have played a substantial role in respect of that marketing or encouragement.



Do you get paid a salary? If yes, that is receipt of consideration. Was the salary for your job included as encouragement of the arrangement? If yes, and you played a substantial role, perhaps as the principal author of the recommendation or the pro forma insert into the statement of advice, you are a promoter.

You are now in the firing line, so what can the ATO do? Without any guidance as to which applies first, the ATO can select from applying to the Federal Court to impose civil penalty (remember \$550,000) upon you or for an injunction to stop you. Alternatively, the ATO can accept a voluntary undertaking from you.

In my view, the ATO will swing its widest tax promoter axe with the voluntary undertaking, but you will hear very little of



heavy-handed manner. Just last year, the tax team here at the Argyle Partnership had to defend a client who was faced with an ATO-issued statutory demand under section 459E of the Corporations Act. This is the usual precursor to seeking liquidation for unpaid tax debts. The problem was that the section 459E notice had been issued contrary to the ATO's own receivables policy.

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What the ATO had said publicly was a weapon that should only be used as a last resort was the first one drawn from their armoury. The same client had only two months earlier received a letter of apology from the ATO for administrative errors. No wonder the fellow felt persecuted by the ATO.

The tax promoter laws are cast wide and, at least as far as a voluntary undertaking is concerned, these will be in the hands of an ATO bureaucrat acting as judge, jury and executioner. The majority of the ATO staff are reasonable, but there will be zealots with a new tax promoter power. A simple, poorly crafted or mistakenly drafted negative gearing plan will fail the new law and make its adviser a tax promoter.

When faced with a demanding ATO bureaucrat who is wielding the tax promoter laws, here are some simple dos and don'ts:

1. When asked to provide a statement, answer "no" before thinking "yes".
2. Individuals enjoy rights against self-incrimination. If in this situation, claim it liberally.
3. Care must be taken with offers of indemnity from actions if you help in the investigation of another. Offers of indemnity subject to the content of a statement is just another way of saying "tell us everything and we will assess whether or not we will use it against you".
4. Beware of the rock and the hard place. The rock is where the ATO will threaten to dash you if you do not agree to the voluntary undertaking. The hard place will be the need to deny this, otherwise you are likely to be in breach of a fiduciary duty to a client to whom you gave the offending (in the ATO's view) advice.

A new era has commenced in the administration of the Australian taxation system. No longer content with its assessment powers, the ATO can now play the role of judge, jury and executioner over any tax promoter that it believes it has found.

This could be you.

Asset

it. Undertakings are expected to be given and taken in private. Personally I do not see anything voluntary about facing any demand from the 22,000 plus ATO staff.

In his address to the 21st national convention of the Taxation Institute of Australia on April 6, commissioner of taxation Michael D'Ascenzo sought to reassure the tax profession that the tax promoter law will "not unduly impact in an unintended way". He said that it is necessary "to ensure that the new legislation is applied in a fair and proper manner".

The theory is sound. However, it is the practice that concerns me. D'Ascenzo cannot guarantee that there are no zealots among his large staff who might seek to use the tax promoter laws in a