

PROPOSAL GUIDELINES

The purpose of these guidelines is to ensure that designated local regulatory authorities and other stakeholders include all key information and analysis in one comprehensive proposal for change. The Legal Services Council (LSC) Proposal Guidelines consist of the Cover Sheet, Outline and Checklist as set out below.

COVER SHEET

This cover sheet should provide a summary of your proposal.

Date	25 June 2019
Title of proposal	Deterring promoter conduct by legal practitioners
Recommendation to the LSC or CULSR	That consideration is given to amending the Uniform Law and /or the General Rules to include civil penalty proceedings under the tax law as a notifiable event, or a matter relevant to the grant or renewal of a practising certificate.
Identified issue under the Uniform Law scheme <i>Please state the perceived problem with the Legal Profession Uniform Law (Uniform Law) scheme.</i>	<p>The Promoter Penalty Laws were introduced in 2006 to address the supply side of aggressive tax arrangements. There was empirical evidence linking investment by taxpayers in tax exploitation schemes to the activities of promoters but whereas the taxpayers could be subject to penalties for their participation, the promoters could obtain significant profits. The new laws imposed a direct financial risk of civil penalties on promoters and implementers of schemes to deter their proliferation in the community.</p> <p>The Uniform Law scheme appears not to oblige a practitioner to notify the relevant designated local regulatory authority (DLRA) in circumstances where the practitioner is under investigation for the promotion of a tax exploitation scheme (in Division 290 of Schedule 1 to the <i>Taxation Administration Act 1953</i> (TAA)).</p> <p>Practitioners appear not to have to notify any of the possible outcomes of promoter proceedings in the Federal Court of Australia – civil penalty, statutory injunction or voluntary undertaking.</p> <p>Furthermore, the events above may not fall within the range of matters to which a DLRA may have regard when granting or renewing a practising certificate.</p>
Desired policy outcome <i>Please identify what results you are trying to achieve by addressing the issue.</i>	<p>Tax exploitation schemes tend to be devised and sold into the market for them by populations the ATO refers to as “Intermediaries”, including tax and legal practitioners. The Commissioner of Taxation (Commissioner) is aware of instances of promoter behaviour by tax and legal practitioners in boutique firms, multidisciplinary practices, through to large firms. Litigation is expensive and requires resources.</p> <p>The proposal looks to a cooperative measure with the regulatory authorities which:</p> <ul style="list-style-type: none"> • puts the legal practitioner on clear notice of a risk to their right to continue to practise law should they engage in promoter behaviour, and • puts the risk of engaging in promoter behaviour squarely on the governance framework for firms. <p>A voluntary undertaking may be provided to the Commissioner in a variety of circumstances. We do not contemplate all of these should necessarily result in the refusal to grant or renew, or the suspension or loss of, a practising certificate. What this proposal would do is require</p>

	the firm and the legal practitioner to properly notify the DLRA of the relevant circumstances and the DLRA may then, through its own processes, properly consider the conduct of the legal practitioner and/or their firm and any relevant sanctions or implications for their ability to continue to practise.
<p>Possible options for reform Please outline at least two options you have considered and indicate your preferred course of action.</p>	<p>Amendment to the Show Cause Events for applicants for, and holders of, practising certificates (preferred course) and/or Amendment to the matters referred to in rule 13(1) of the Uniform Rules to which the DLRA may have regard when granting or renewing a practising certificate.</p> <p>We propose that each of the three measures in Division 290 would become notifiable events: commencement of civil penalty proceedings, injunction and voluntary undertaking.</p>
<p>Alignment with Uniform Law objectives Please state the objective/s of the Uniform Law that this proposal seeks to achieve.</p>	The proposal aligns with the consumer protection objective of the Uniform Law and works to ensure practitioners maintain high ethical and professional standards.
<p>Priority Please provide a reason for the rating, taking into account the urgency for change, the impact of the proposal and the likely reactions of the legal profession and consumers.</p>	<p>High / Medium / Low <i>Please circle</i></p> <p>The proposal is expected to have an important deterrent effect, encouraging practitioners to look closely at their advice to clients for elements of a tax exploitation scheme.</p>
<p>Is legislative change needed? If Yes, please specify the provision/s of the Uniform Law and/or Uniform Rules that need change. If No, please specify if a LSC or Commissioner Guideline or Direction would be helpful.</p>	<p>Yes / No <i>Please circle</i></p> <p>Sections 51, 66, and 86 of the Uniform Law Rule 13(1) of the Uniform Rules</p> <p>In our view, the requirement in the provisions for an applicant or holder to notify they have been charged or convicted of a serious offence, or a tax offence, does not extend to an obligation to report civil penalties in Division 290 – the promoter penalty law. If advised otherwise, by the Council, we would offer our assistance to the DLRA's to support them to monitor compliance by practitioners.</p>
<p>Consultation Please list the stakeholders you have consulted with about this proposal.</p>	The promoter risk affects all our segments – from individuals, small business, wealthy groups and the large client market. The area within the ATO with responsibility for the promoter risk is Aggressive Tax Planning (ATP), a part of our Integrated Compliance business line. ATP has oversight of the risk for all areas and is the source of this proposal. ATP consults with external firms and external counsel in preparing promoter matters for hearing.
<p>Attachments Please list all submission attachments including statistics, research or other supporting evidence.</p>	<p>Tax agents are obliged to notify the Tax Practitioners Board of a change in circumstances (section 30-35 of the <i>Tax Agent Services Act 2009</i>, including an event (section 20-45) affecting continued registration, Section 20-45 lists two promoter penalty events;</p> <ul style="list-style-type: none"> • [they] are penalised for being a promoter of a tax exploitation scheme • [they] are penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling. <p>There are provisions requiring disclosure of voluntary undertakings in the membership of:</p> <ul style="list-style-type: none"> • Chartered Accountants Australia & New Zealand CA ANZ (see by-

	<p>law 40 paragraphs 2.1(f), 3.1 and 3.2)</p> <ul style="list-style-type: none"> • CPA Australia Ltd (see by-law 5.1(f)9(ii) in relation to Art 39 of the Constitution) <p>The issued professional standards of CPA Australia, CA ANZ and the Institute of Public Accountants (IPA) – the Accounting Professional and Ethical Standards – prohibit the promotion of tax schemes where the dominant purpose is to derive a tax benefit (see 5.4 APES 220 Taxation Services)</p>
<p>Contact officer <i>Provide name, title, organisation, email and telephone details.</i></p>	<p>Timothy Fraser, Senior Director Integrated Compliance – Aggressive Tax Planning ATO tim.fraser@ato.gov.au 02 9354 6426</p>

OUTLINE

This outline should be followed when preparing your proposal to the LSC.

Area of focus	Key question	Sub-questions
Problem	What is the problem to be addressed?	<p>Investigations or sanctions under the civil penalty regime are not included in notifiable events under the Uniform Law.</p> <p>For every promoter who is marketing a tax exploitation scheme there is a group of scheme participants who bear the consequences in terms of our investigatory actions and ultimately often interest and penalty on the tax shortfall. The taxpayer participants' reactions range from disbelief to despair. We encounter participants who experience family breakdown as a consequence of the fallout from having followed the advice of promoters.</p> <p>We can be dealing with tax exploitation schemes with 80 to 100 participants. On some occasions a Taxpayer Alert may have issued and a Widely-Based Settlement Offer approved by an expert panel is extended to participants. In one current scheme, we have settled with 65 of 100 participants while the legal practitioners involved continue to maintain that the scheme they devised and implemented – sometimes at great cost (in the order of \$100,000) to their clients – is correct at law.</p> <p>It is not uncommon for a participant to change their legal representative as the ATO investigation progresses. The impact for consumers who retain the same legal representation is that the practitioner may be acting in a position of conflict of interest. Participants have sometimes said to us that our correspondence or settlement offers were not communicated to them by their lawyers. We encounter behaviours from some practitioners who have marketed schemes that tend to obstruct our efforts to interact directly with the participants where resolution of the disputed issues is not progressing.</p> <p>Promotion of tax exploitation schemes by lawyers brings the profession into disrepute. This is apparent from the comments of some participants who want the ATO to take action to punish the promoters. We see the significant number of disaffected clients changing legal representation away from the scheme adviser. We submit this dissatisfaction may not otherwise be on the radar of a DLRA.</p> <p>Commonly, the participant is also represented by an accountant or in some cases the promoter is a dual practitioner, an accountant/lawyer. We see evidence of accountants creating or maintaining records for businesses or entities that are based on dubious structures devised by the legal practitioners. We are aware of an instance where the business from a key client of a regional accountant was jeopardised as that client came to terms with the consequences of his participation in a scheme.</p>
Context	How did this issue arise?	<p>The promoter penalty regime dates from 2006. We estimate about 10% of the voluntary undertakings we have accepted to date are with lawyers.</p> <p>The ATO is currently seeking civil penalties in the Federal Court in relation to advice to clients given by a lawyer/accountant pair. It is on the public record that the subject lawyer signed a voluntary undertaking with the Commissioner in 2011.</p>

		The ATO is committing significant resources to tackling scheme promoters.
Proposal	How should the issue be addressed?	<p>That a legal practitioner is compelled to notify their DLRA if they are notified by the Commissioner of the commencement of a civil investigation into their conduct, or of outcomes of a civil penalty or statutory injunction ordered by the Federal Court, or a voluntary undertaking accepted by the Commissioner.</p> <p>The objective is for the proposal to have a deterrent effect on promoter behaviour. The Commissioner's media releases about promoter cases send a strong message to would-be promoters, particularly as they are re-published to industry message bulletins. We envisage that the proposal will send a strong message to legal practitioners and to tax practitioners who engage with them to beware of promoter conduct.</p> <p>The proposed reforms are:</p> <ul style="list-style-type: none"> • to expand the range of show cause events to include the event of a practitioner being notified by the Commissioner of a civil investigation, or a sanction under the promoter penalty law. • to include an investigation or sanction in relation to Division 290 in the rule 13(1) list of matters for the fit and proper person considerations for issue of a certificate. <p>The proposal sends a strong message to legal practitioners that neither the profession nor the community will tolerate promoter conduct. Professionals value their right to practise, their professional standing in their firm, their reputations and livelihood. We are aware from instances with promoter conduct by tax practitioners that professionals worry about having to make a disclosure to their professional organisations. We are aware from engagements with tax practitioners in top tier firms that principals will alter their tolerance for outlier behaviour.</p> <p>The ATO submits the proposal is in the community interest and in the interests of regulation of the legal profession.</p> <p>Amendment to the tax secrecy provisions to permit the ATO to disclose the commencement of a civil investigation to a DLRA. The ATO's disclosure is presently limited to publicly available information. (We consider that amendment to our confidentiality provisions to permit greater disclosure to the DLRA's of ATO information about practitioners' non-compliance is a meritorious objective in any case.)</p> <p>The proposal is about leveraging the standing of the DLRA's in the eyes of the practitioners to achieve a community purpose. The practitioner wants neither to jeopardise their right to practise, nor be obliged to report they are under an ATO investigation.</p> <p>If the proposal is not taken forward, the ATO will continue its work to disable promoters as far as its resources permit.</p>
Risks	What are the key risks and challenges to implementing this proposal?	<p>The ATO cannot foresee any negative consequences in the community. There could be a rise in complaints to the DLRA's from informed clients.</p> <p>We are not well-placed to assess the impact for the DLRA's in administering the law change, however, we anticipate the numbers to be minimal in terms of notifications. We foresee instead a wider regulatory effect through promulgation of the message about prohibited promoter conduct to lawyers and their potential clients and allied professionals.</p>

		<p>The ATO is willing to offer support to any DLRA in terms of answering their queries about the proposal, before or after legislative change. We would also be willing to offer assistance to the DLRA in respect of de-identified queries from their members.</p>
Consultation	<p>What are the views of relevant stakeholders?</p>	<p>The ATO has not consulted externally, however, we anticipate that practitioners who do the right thing will have no objection to the proposal.</p> <p>Few lawyers would have cause to oppose the proposal. Those practitioners already involved in aggressive schemes may express opposition.</p> <p>We recognise there will be an administrative impost for the DLRA's, however, we consider we share with them the same objective of positively influencing practitioner behaviour.</p>

CHECKLIST

This checklist should be used to confirm that all relevant information is provided in your proposal.

Area of focus	Questions	Please circle
Problem	Does the proposal clearly outline what the problem is?	<input checked="" type="radio"/> Yes / No
	Is there evidence of the problem?	<input checked="" type="radio"/> Yes / No
	Have you included the evidence as an attachment?	Yes / <input checked="" type="radio"/> No
	Does the proposal include how the problem is currently dealt with under the Uniform Law?	<input checked="" type="radio"/> Yes / No
Context	Does the proposal include a history of the problem?	<input checked="" type="radio"/> Yes / No
	Does the proposal consider relevant previous decisions of the Legal Services Council?	Yes / <input checked="" type="radio"/> No
Proposal	Do you have at least two possible options for change?	<input checked="" type="radio"/> Yes / No
	Do the proposals directly address the problem?	<input checked="" type="radio"/> Yes / No
	Are recommendations for the LSC clearly set out?	<input checked="" type="radio"/> Yes / No
	Is there sufficient evidence to support the recommendations?	<input checked="" type="radio"/> Yes / No
	Have you included supporting research and analysis as an attachment?	Yes / <input checked="" type="radio"/> No
Risks	Have key risks and challenges been identified?	<input checked="" type="radio"/> Yes / No
	Are there appropriate mitigation strategies?	<input checked="" type="radio"/> Yes / No
Consultation	Does the proposal address stakeholder comments?	<input checked="" type="radio"/> Yes / No