

TAX SNAPSHOT

The new Promoter Penalty Rules (PPR) Final Legislation
– Why every Tax Professional needs to understand the new rules from 1 July 2024 – November 2023

The existing Promoter Penalty Rules (PPR) already impose substantial civil penalties, albeit in relevantly limited circumstances. With a significant increase in commonplace advisory issues which may potentially trigger application of the new PPR from 1 July 2024 (in addition to significantly increased civil penalty and other consequences) recently introduced final legislation will result in the PPR becoming a far more important risk to be managed by anyone involved in tax (whether in a professional services, in-house advisory or even in a tax education/information capacity).

The [*Treasury Laws Amendment \(Tax Accountability and Fairness\) Bill 2023*](#) (final PPR Legislation) was introduced to Federal Parliament on 16 November 2023 and mirrors the Draft legislative provisions originally released by [Treasury](#) for Consultation on 20 September 2023.

It should be noted at the outset that many **existing features of the current PPR provisions** in Div 290 Sch 1 TAA 1953 (as outlined in the current ATO document '[Promoter Penalty Laws](#)'¹) will continue to apply including that:

- the PPR will continue to be **civil penalty provisions** regarding which the **ATO bears the onus of proof** and which will be viewed as a serious matter (i.e. not to be imposed lightly);
- the **PPR may apply to a single entity** as well as multiple entities; and
- various **exceptions/defences** may be available if all specified conditions are met including, but not limited to:
 - having a strong Reasonably Arguable Position (**RAP**);
 - provision of an objective third party opinion (e.g. most barristers' opinions and other second opinions without active involvement/encouragement of the 'scheme');
 - relying on advice from the Commissioner including via a statement in a written publication (e.g. evidence of following an ATO Ruling 'to the letter' is and will be a defence)

While a full analysis of all PPR issues is beyond the scope of this Tax Astute Training Snapshot, the diagram, online recording and commentary below provide an **overview of the proposed PPR changes from 1 July 2024, practical implications, new penalties and who may be impacted**. Tax Astute Training clients can also refer to their PPR Technical Guide and Recordings for more details.

¹ Note that as at release time this ATO document is limited to the existing PPR provisions and penalty amounts.

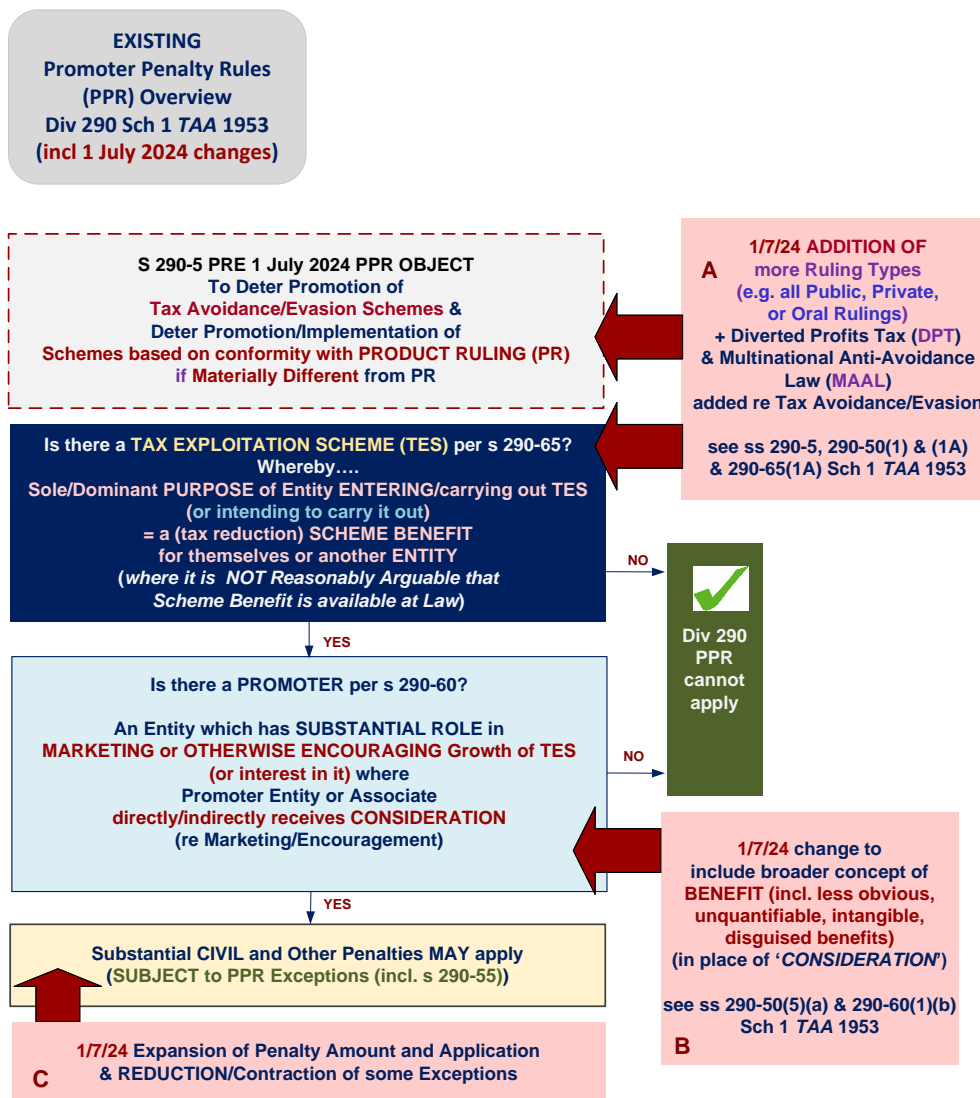
TAX SNAPSHOT

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How will the PPR change from 1 July 2024?

The following diagram illustrates both the current operation of the PPR and its effect from 1 July 2024. See also further commentary below the diagram.

To watch Tax Astute Training’s online explanation of the below diagram, please use this link:
<http://taxastute.adobeconnect.com/pbe7p2n3gww/>
 This link connects with the Adobe Connect website.
(Adobe are a trusted software developer and are the makers of PDF).



As summarised above, subject to all Div 290 Sch 1 TAA 1953 PPR conditions being met (and no PPR exceptions applying):

TAX SNAPSHOT

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- The PPR may currently (i.e. pre-1 July 2024) be potentially triggered by either:
 - **promoting/encouraging a tax avoidance/evasion scheme** (e.g. the focus of a current, well publicised Federal Court case against a former Big 4 Partner); or
 - **promoting/encouraging and implementing application of a Product Ruling in a way materially different** to that described in the Product Ruling (the *'materially different'* rule – see the Note below for further explanation of this rule for current and future purposes).

Given that most tax professionals (of any variety) do not commonly breach tax avoidance/evasion provisions and, in many cases, do not provide Product Ruling advice then even the initial PPR triggers are currently unlikely to be present in most cases prior to 1 July 2024.

- **From 1 July 2024:**
 - the less commonly encountered avoidance/evasion PPR trigger will largely continue to apply in its current form (albeit with the specific addition of the *'principal purpose'*-based Diverted Profits Tax (DPT) and Multinational Anti-Avoidance Law (MAAL)); and
 - significantly, the **expanded application of the *'materially different'* rule to any type of ATO Ruling** (i.e. any Public, Private or Oral Ruling) at A above means that commonplace tax advisory issues affecting most or all tax professionals could become potential triggers for PPR (subject to all other conditions being in place and no defence/exception applying). The PPR may also apply from 1 July 2024 even to planned *'materially different'* applications of a ruling even if not implemented. **See item A** above the Note below for further *'materially different'* details.
 - existing *'promoter'* requirements for the ATO to prove that *'consideration'* was received per existing s 290-60 Sch 1 TAA 1953 will be replaced by a far **broader *'benefit'* concept** – **see item B** above;
 - **entity civil penalty maximum amounts and their application will significantly increase from 1 July 2024.** For example, under new ss 290-50(4A) and (4B), the maximum PPR civil penalty for even the smallest of companies with \leq 156.5 Million Aggregated Turnover (AT) (largely per existing Div 328 ITAA 1997 rules) would generally be 50,000 penalty units (currently \$15.65 Million) with the largest organisations (\geq \$7.825 Billion AT) subject to a maximum 2.5 Million penalty units (currently \$782.5 Million). Affected entities with AT between these amounts generally being subject to a maximum penalty based on 10% of their AT. Entity exposure to PPR Civil Penalties would also expand to include Significant Global Entity (SGE) Partnerships, Trusts and their Partners/Trustees. While expected to be a secondary rule in practice, three times the scheme benefit might be used if higher than the above amounts.

TAX SNAPSHOT

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NOTE

'Materially different' is an existing taxation concept which can be important for a variety of reasons (including when following a Private Ruling to ensure it provides the planned protection against tax shortfalls/penalties). An example of a **'materially different'** application of a Product Ruling is provided in Example 2 of [TD 2010/7](#) regarding additional management fees charged (in comparison to the stated management fee amount in a Product Ruling application). The additional fees resulted in additional losses and loss years such that a less favourable Div 35 ITAA 1997 Bon-commercial loss discretion outcome would likely have arisen for investors had these circumstances been disclosed in the Product Ruling application. TD 2010/7 Example 2 has likely relevance to (applied for) Product and Private Rulings and highlights the increasing importance of advising the ATO of any subsequent changed circumstances to any initial Private (or Product) Ruling application. Such prompt communication with the ATO is likely to be essential for forthcoming PPR risk management as well as existing penalty/shortfall risk management purposes

From a Public Ruling perspective, additional examples will likely be required. However, existing penalty/shortfall protection measures requiring justification that a Public Ruling (or any Ruling) has been correctly applied to given facts will likely take on increased importance from 1 July 2024 for PPR risk management purposes.

As a consequence of the serious financial, reputational and other PPR penalties at stake, coupled with the following expected changes from 1 July 2024 (as proposed in the Final PPR Legislation):

- expanded potential application of the PPR (see items A and B in the above diagram);
- expanded PPR civil penalty amounts and application (see item C in the above diagram); and
- some contractions to specified existing defences/exceptions (particularly those which currently allow *'lack of knowledge'* type PPR defences to the actions of a co-director or similar),

The majority of individuals and organisations which are in any way involved in taxation advice or information will need to understand the above changes (and relevant PPR defences/exceptions) in order to ensure appropriate PPR risk management practices are in place.

TAX SNAPSHOT

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Who might be potentially affected by the PPR from 1 July 2024?

Recent PPR mainstream press coverage has focussed on application to Big 4 practices. There is no question that this cohort of professional firms (and other large national/international legal and accounting practices) will undoubtedly be a target for both the existing and new PPR. However, under the expanded PPR explained above, a far broader range of individuals and organisations involved in tax could (subject to relevant exceptions/defences) also be potentially subject to significant PPR risks needing to be managed from 1 July 2024.

- Professional services firms of all varieties (and/or their co-owners and staff as individuals) - given the expanded potential PPR application to a wide range of commonplace advisory issues (i.e. any ATO Ruling) and a range of proposed PPR entity penalties encompassing large through to small organisations or individuals within those organisations.
- Individual in-house advisers to corporate and other organisations who encourage/promote a materially different application of an ATO Ruling to their employer organisation (see specific new Example 1.3 from the Final PPR Legislation Explanatory Memorandum (**EM**) for an illustration).

In addition, given that the maximum new PPR Civil Penalty from 1 July 2024 will generally be \$782.5 Million (if grouped Aggregated Turnover is \geq \$782.5 Billion) it is expected that these significant civil penalty amounts may be driven, at least in part, by potential planned application of PPR to large corporates undertaking tax avoidance/evasion or materially different application of any ATO Ruling from 1 July 2024.

- The expanded PPR might also, subject to available exceptions, even give rise to possible risks to providers of technical tax information. For example, if a particularly expansive approach to applying an ATO Ruling was '*encouraged*' in a conference presentation, article, Masters of Tax Lecture etc. this might technically involve '*encouragement*' of a PPR scheme. While it is hoped that this type of PPR scenario would be particularly rare in practice, the broad nature of the new PPR (including the broad definition of '*benefit*', the fact that '*encouragement*' of materially different application of an ATO Ruling need not be implemented) raises the possibility of this type of application.

TIP

A thorough understanding and documentation of PPR risks and available exceptions will be essential to managing the expanded PPR from 1 July 2024. Tax Astute Training Clients can find further details in their PPR Technical Guide. Details are also available in the Final PPR Legislation combined with existing Div 290 of Sch 1 TAA 1953 and in Tax Astute Training's forthcoming [Specialist Group Training Events](#).

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