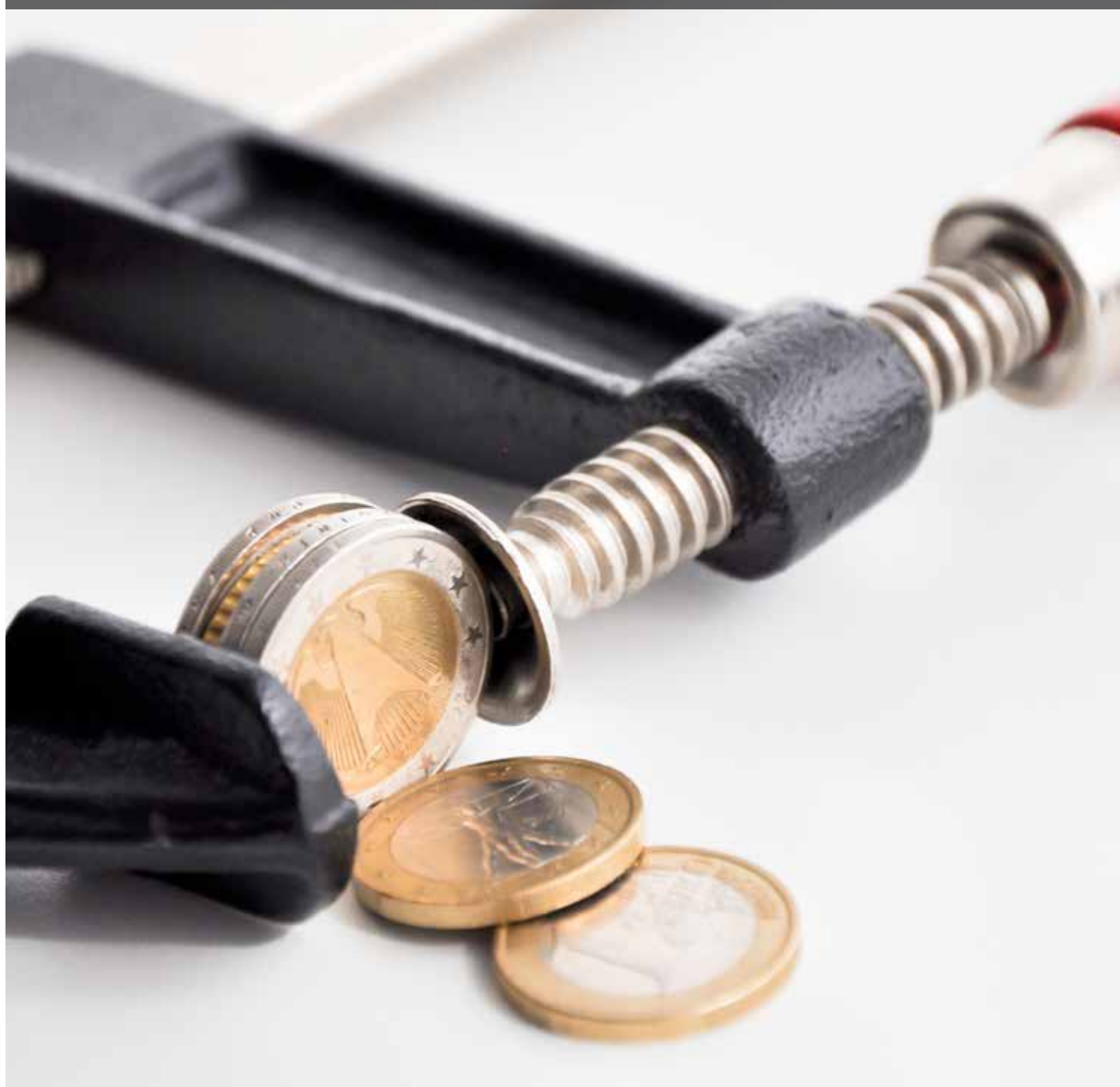



# UK Raises Tax Avoidance Stakes:

Considering the Impact on Tax Accountants and Advisers





The global fight by governments and their revenue authorities against tax avoidance is reaching heights many would not have thought possible several years ago.

The advent of BEPS and all that it carries has only hastened the fight. Tax transparency is a new mantra commonly espoused. The exchange of tax information between revenue authorities is a looming reality. The release of tax information publicly is a hotly debated topic. The curtailment of global bank secrecy only adds another dramatic element to the picture.



The UK is proposing to levy sanctions on those who design, market or facilitate the use of tax avoidance arrangements.

### The UK has been at the forefront of many anti-avoidance measures.

On top of the substantial amendments in the Finance Act 2016, the UK is proposing to levy sanctions on those who design, market or facilitate the use of tax avoidance arrangements. It also proposes to change the way the existing penalty regime works for those whose tax returns are found to be inaccurate as a result of using such arrangements. In this regard, HMRC released a Discussion Document on 17 August 2016 - Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document. HMRC says a response document will be published later this year, and any legislative changes will be taken forward as part of a future finance bill.

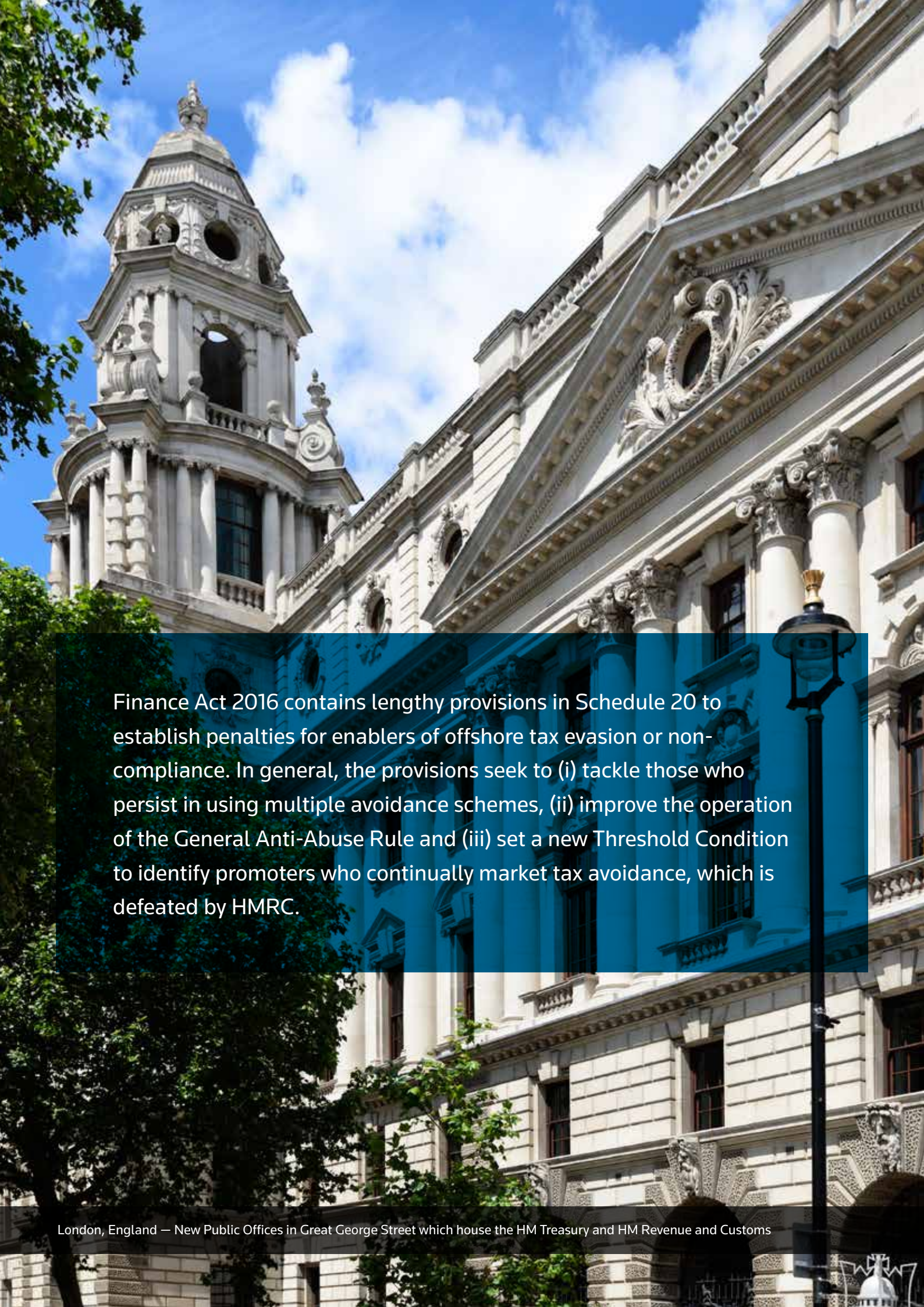
In its 2016 budget, the UK government announced it would be exploring further options to influence the behaviour of promoters and other intermediaries (agents, Independent Financial Advisers and others in the supply chain) who enable or facilitate the sale and use of tax avoidance. It also announced that it will consider the case for clarifying what constitutes failure to take reasonable care in relation to the application of the penalty legislation to avoidance cases which are later defeated.

The UK currently has a Disclosure of Tax Avoidance Schemes (DOTAS) regime. It has also introduced the Promoters of Tax Avoidance Schemes (POTAS) legislation to change the behaviour of a “small and persistent minority of promoters who exhibit certain behaviours”.

Following its 2016 budget, the government introduced legislation to (i) provide for sanctions against those who engage in multiple avoidance schemes which are defeated by HMRC, (ii) a new POTAS threshold condition to ensure that those who market such arrangements are subject to the sanctions provided by that regime and (iii) a penalty in relation to arrangements which are counteracted by the General Anti-Abuse Rule (GAAR).

Finance Act 2016 contains lengthy provisions in Schedule 20 to establish penalties for enablers of offshore tax evasion or non-compliance. In general, the provisions seek to (i) tackle those who persist in using multiple avoidance schemes, (ii) improve the operation of the General Anti-Abuse Rule and (iii) set a new Threshold Condition to identify promoters who continually market tax avoidance, which is defeated by HMRC.

Financial Secretary to the Treasury, Jane Ellison, said the consultation document sets out plans and proposals to bear down on the “shrinking but persistent minority” who seek an unfair advantage, or who provide the services that enable it, and who then frustrate HMRC’s efforts to identify, investigate and resolve these cases. She said they should bear the risks and costs for their choices.



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## The Discussion Document

The discussion document is structured as follows:

- Chapter 2 sets out proposals for penalties for enablers of tax avoidance which is defeated. In the words of the document itself, it “proposes raising the stakes for those who design, market or facilitate the use of avoidance by introducing sanctions, in line with HMRC’s penalty principles”. Enablers include (i) those who develop or advise/assist those developing such arrangements and schemes and (ii) accountants, advisers and others who earn fees in connection with marketing tax avoidance arrangements.
  - Finance Act 2016 provides for a penalty of the higher of 100% of the tax evaded (or “potential lost revenue” as the Finance Act 2016 calls it) or £3,000 for those who know their actions will, or are likely to, enable a person to carry out offshore evasion or non-compliance (where the evader is charged with a penalty or is criminally prosecuted). The government says its favoured approach is similar to this but designed specifically to deal with tax avoidance, which HMRC defeats. The government has the option of naming enablers who are subject to this new penalty. This option is available where, in consequence of an investigation, the person has been found to have incurred one or more penalties under the new provisions (and has been assessed or is the subject of a contract settlement) and the potential lost revenue in relation to the penalty exceeds £25,000.
  - The government does not propose linking the new avoidance enabler penalty to a penalty being charged on the user of avoidance which is defeated. Instead, the government proposes to use the defeat of the tax avoidance arrangements as the trigger for enabler penalties. This would mean that each enabler of that avoidance arrangement would be subject to penalties in their own right, irrespective of the final penalty position of the user of the arrangements.
  - The size of the penalty needs to be proportionate to the services provided by the enabler and the financial reward they obtained. One approach could be to base the penalty on the financial or other benefit enjoyed by the enabler in providing their services as an enabler. The HMRC document says a starting point could be 100% of that benefit, mitigated using criteria similar to those used to determine the level of penalty under Schedule 24 to the Finance Act 2007. An alternative would be to base a penalty on the amount of tax understated by the user to whom the enabler has provided those services, whether directly or indirectly, as a result of the avoidance being defeated.
  - The government considers it will be necessary to exclude from the wide definition of enabler those who are unwittingly party to enabling the avoidance in question.
- Chapter 3 sets out proposals in relation to penalties for those who use tax avoidance which is defeated. The government is seeking views on whether a tax-geared penalty is an appropriate approach.
- Chapter 4 describes the types of arrangements to which the proposals apply.
- Chapter 5 discusses other ways to discourage avoidance eg “real time” interventions.
- Chapter 6 is a summary of the consultation questions.



The DOTAS rules form an important detection tool supporting HMRC’s anti-avoidance strategy.

The DOTAS rules form an integral part of HMRC’s anti-avoidance strategy. BEPS Action 12 seeks to introduce mandatory disclosure rules in the fight against international tax avoidance/evasion. Action 12 contains recommendations regarding the design of mandatory disclosure rules for aggressive tax planning schemes, taking into consideration the administrative costs for tax administrations and business and drawing on experiences of the increasing number of countries that have such rules. The Action 12 report provides a framework of guidance for use by countries without mandatory disclosure rules which seeks to design a regime that fits those countries’ need to obtain early information on aggressive or abusive tax planning schemes and their users. The framework is also intended as a reference for countries that already have mandatory disclosure regimes (like the UK) in order to enhance the effectiveness of those regimes.



While the HMRC discussion document on imposing sanctions or penalties on accountants, etc., who enable or use tax avoidance arrangements does not mention the BEPS project, the proposals seem to fall within the broad ambit of BEPS in terms of anti-avoidance strategies.

### Could the UK approach be seen as complimenting BEPS?

In its Business Tax Road Map document of 16 March 2016, HM Treasury said the UK's activity in response to BEPS Action 12 was as follows:

"The UK's mandatory disclosure regime was introduced in 2004. The DOTAS rules form an important detection tool supporting HMRC's anti-avoidance strategy. Further international work will follow including monitoring the implementation of new disclosure regimes, considering how they can apply to cross border avoidance arrangements and the sharing of information between jurisdictions who do so. This work will be taken forward through the OECD Forum on Tax Administration."

While the HMRC discussion document on imposing sanctions or penalties on accountants, etc. who enable or use tax avoidance arrangements does not mention the BEPS project, the proposals seem to fall within the broad ambit of BEPS in terms of anti-avoidance strategies. The UK's approach could even be seen as complementing BEPS in its overall aim.

The tax landscape, both for taxpayers and their advisers, is changing dramatically ... and more change is in store. Will you be ready?

## About the Author

Terry Hayes BBus FCPA CTA is a Senior Tax Writer at Thomson Reuters who has worked in the tax profession for 40 years.

A qualified accountant and tax agent, Terry worked in the Australian Taxation Office for 12 years, the last six in Canberra drafting tax legislation and explanatory materials. He then worked at PricewaterhouseCoopers as a Tax Manager in Sydney before moving into tax publishing as a tax writer. He has written across the spectrum of Australian tax laws and for many years has been in charge of producing the Thomson Reuters Australia tax news services.

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