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PROJECT WICKENBY

Some Words for the Wise

MICHAEL INGLIS

Tax Barrister

Tel: (02) 9233 4861

E: mwinglis@aic.net.au

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Some Words for the Wise

The matters – where I have represented and advised many actual (and also potential) Project Wickenby, Operation Wickenby, and other Serious Non-Compliance, targets – have included dealings and negotiations with (and related civil and criminal proceedings involving) the Australian Taxation Office, the Australian Government Solicitor, the Australian Crime Commission, the Australian Federal Police, the Commonwealth Director of Public Prosecutions and the New South Wales Crime Commission.

Specifically, those matters have included:

- Prudential audits;
- Voluntary disclosures;
- Tax reviews;
- Tax audits;
- Negotiated settlements;
- Mediations;
- 264 examinations;
- Provision of open statements to the authorities;
- Roll-overs;
- Provision of strategic, tactical and operational intelligence to the authorities;
- Provision of induced statements, including statements with “family” inducements;
- Indemnities from prosecution;

- Records of interview;
- Charge bargaining;
- Asset freezing proceedings;
- Criminal assets recovery proceedings; and
- Tax crime and money laundering prosecutions, sentencing hearings and appeals.

That list provides just some indication of the potential seriousness of any matter involving Project Wickenby, Operation Wickenby or, more generally, the Serious Non-Compliance Business Line of the Australian Taxation Office ("ATO" or "Tax Office").

It is also an indication of the very real potential, especially where targets initially adopt a "sit tight, she'll be right" approach – and even with the seemingly most prosaic Project Wickenby ("Wickenby" or "Project Wickenby") matter – for things to escalate over time, sometimes quite unexpectedly, and sometimes with devastating results for the Wickenby target and members of their immediate family.

"HAVE THEY GOT YOUR ATTENTION YET?"

When someone seeks my help, say, well into the Wickenby cycle – e.g. following receipt of a 264 notice – I often ask them, gently: "Have they got your attention yet?" On examination, it commonly turns out that the Wickenby target has been interacting with the Tax Office – and even, on occasions, with other agencies as well – for some time, without ever realizing that things were already serious, and had the potential to get a great deal more serious, as well.

Project Wickenby, taken as a whole, is indeed a very serious matter: hundreds of millions of dollars to fund it, many Commonwealth, and even State, agencies (including a number of law enforcement agencies) working together onshore and also offshore (and with their partner agencies overseas), thousands of targets (or taxpayers), and billions of dollars of tax involved.

Project Wickenby is, to my knowledge, the biggest investigation into anything in the history of our Commonwealth (apart from time of war). It encompasses a number of dedicated criminal investigations, in addition to a much larger number of tax reviews, audits and other enquiries.

The taxpayers caught up in Wickenby occupy many different positions along the overall spectrum of seriousness.

Some have simply made a mistake, and are being dealt with in a civil, or tax, context only. Provided those targets meet the expectations of the Tax Office – e.g. in terms of being cooperative, and truthful and complete, in their dealings with the Tax Office – there is every reason to believe that their matter will remain in the civil arena.

Some are being looked at in a criminal context, and those taxpayers are at the most serious part of that spectrum.

THE RISK OF PROSECUTION

There are 3 main ways a Wickenby target can end up being prosecuted for, say, tax crime or associated money laundering.

First, the Wickenby target may have been identified and selected as part of a dedicated Project Wickenby criminal investigation (e.g. Operation Starlifter which has been, and is, focused on a particular alleged Vanuatu promoter and various alleged onshore intermediaries and participants, and associated money laundering).

Second, the Wickenby target may have been identified and selected as part of Operation Wickenby, the criminal intelligence gathering, and criminal investigation and prosecution exercise being principally conducted, in the Project Wickenby context, by the Australian Crime Commission ("ACC").

Third, the Wickenby target may have been identified and selected for a more discrete (that is, individual) criminal investigation, and prosecution action, as part of the normal course of Project Wickenby operations as a whole, e.g., where that target has been found out in fabricating documents, in the course of a tax review or audit, in seeking to hide from the Tax Office the deliberate omission of substantial amounts of assessable (offshore) income.

Although the final decision on any serious tax crime prosecution rests with the Commonwealth Director of Public Prosecutions ("CDPP"), a key point is that, if a matter is never referred to the CDPP, by the Tax Office or other Wickenby agency, there never will be a relevant decision to prosecute taken by the CDPP.

However, and despite that key point, there are very real limits to the ability of any detected serious tax evader to avoid prosecution action, particularly in matters involving serious criminality, and defiant behaviour on the part of the serious tax evader until very late in the day.

Further, if a serious tax evader (including a serious Wickenby tax evader), once detected, agrees to give the Tax Office what the Tax Office wants, namely, cooperation and reparation, there can be no turning back or deviation.

In my experience, the people who end up being prosecuted for serious tax crime have often compounded their original or underlying tax fraud or tax evasion by also doing one or more of the following during their dealings, **once detected**, with the Tax Office or other agency:

- Telling lies or being evasive, in person, in response to written questions, or otherwise;
- Secreting documents (e.g. by sending them offshore) or destroying documents;
- Fabricating documents;
- Hiding or stripping assets, onshore or offshore;
- Offering a bribe to a Commonwealth officer; or
- Threatening a Commonwealth officer.

COVERT OPS

The words "**once detected**" are pregnant with meaning, and I need to expand upon them at this stage.

The essence of any criminal investigation, as part of Project Wickenby, or Operation Wickenby, is that a covert phase (covert ops) precedes the overt phase (overt ops).

So, the relevant target – of either a (much larger) dedicated criminal investigation, or a more discrete (individual) criminal investigation – may

have, in fact, been detected (or found out) by the Wickenby agencies as, say, a serious tax evader, long before, say, the execution of any search warrant by the Australian Federal Police ("AFP").

In addition, the target's phones may have been "on" before he or she learns that he or she has been detected.

These days, it is common practice for law enforcement agencies to leave the target of a criminal investigation "out there" for a substantial period, and blissfully unaware, until such time as it suits the agencies – under the overall criminal investigation plan – to put the balloon up (with the phones "on"), by means of an appropriate "event" such as the execution of a search warrant, and then see, and hear and record, precisely what happens.

NOT EVERY WICKENBY TARGET WILL PROVE TO BE A TAX CHEAT

Naturally, not all taxpayers caught in the Wickenby net will prove to be tax cheats, or to have been involved in other nefarious activities such as the commonly associated securities fraud or money laundering, it being remembered, of course, that tax havens are not just about tax evasion.

As I have said, there are those taxpayers who have simply made a mistake, rather than having been involved in deliberate, intentional wrongdoing.

Also, on occasions, there are complex personal or business circumstances giving rise to commercial drivers that necessitate the use of OFCs and secrecy jurisdictions.

In some situations, the tax implications may never have been a primary consideration for the relevant offshore arrangements, especially where driven by suppliers or customers.

However, the Project Wickenby agencies (including the Tax Office) won't necessarily, and unilaterally, appreciate or be able to identify these situations, particularly prior to first (open) contact being made with the target or taxpayer.

Where the sensitive nature of an offshore arrangement does not lend itself to an easy, open explanation to the Tax Office or other agency, a strategy is clearly required that is fully informed of the Wickenby machine, and its workings.

For those who have been simply hoping that the secrecy of their offshore arrangements will not be compromised, and that the best approach is to "sit tight, she'll be right!", their strategy may well need to be re-evaluated in light of the many lessons Wickenby has now taught us, and in light of the inroads being made into and through the walls of offshore secrecy.

Especially for those who have (big dollar) offshore arrangements that may possibly be caught in the Wickenby net, but who are yet to hear from any of the agencies, now is the time to re-evaluate their strategy.

Those individuals are often those most at risk of detection, and they still have a rare opportunity to avoid, say, being dragged before an inquisitor (and, should it prove necessary, before the courts), so long as they are prepared to acknowledge their exposure and move to rectify it now.

But the clock is ticking

TEN THINGS FOR YOUR CONSIDERATION

Against that general background, these are the 10 aspects of actual, and potential, Project Wickenby matters that I will briefly discuss in these notes:

1. Offshore arrangements;
2. The ATO's Serious Non-Compliance ("SNC") Business Line;
3. The Wickenby cycle and the benefits of getting in early;
4. The need for speed, especially in the case of mature Wickenby matters;
5. On being SPARTAN;
6. Reluctance to reveal;
7. Mitigating tax (and tax crime) risks;
8. Vulnerabilities of offshore arrangements;
9. Disentangling from offshore arrangements; and
10. Moving party advantage.

I turn to the first of those 10 aspects of actual, and potential, Project Wickenby matters.

1. OFFSHORE ARRANGEMENTS

Tax havens are about a lot more than just tax evasion.

But whether the purpose is tax evasion, securities fraud, defeating creditors or an estranged spouse, hiding and laundering the proceeds of hard crimes such as drug dealing, hiding bribes or stolen monies, or simply money laundering, many offshore arrangements, including the more serious offshore arrangements commonly targeted by Wickenby, share a common theme.

That theme is the creation of the appearance of independent (or third party) offshore ownership and control of offshore assets or structures, onshore assets or structures, or a mixture of the two.

A simple example would be the creation of an apparently independent (or third party) offshore trust “arrangement” in, say, the Isle of Man where the relevant “trust” assets are monies on deposit with (or through) a bank in, say, Singapore or the Cayman Islands.

However, the caffeine in this particular offshore “trust” arrangement would be that the relevant (potential) Wickenby target – an Australian resident individual – is treated, by the relevant parties in the Isle of Man, Singapore, Cayman Islands or elsewhere, who have apparent control of the corporate trustee (and so the trust assets), **as if** the “trust” assets are in fact the personal property of that Australian resident individual.

All this might be supported in a practical sense by, for example, that Australian resident individual being, in fact, the only person authorised to operate the relevant bank accounts where (or through which) the ”trust” assets are on deposit.

I mention, in passing, the offshore bogus invoice arrangements, so often covered in the media, where there are no services ever provided to the onshore private company claiming substantial deductions for “consultancy fees” year by year. I also mention, in passing, the onshore individual who simply has an undisclosed offshore bank account, big or small.

The offshore bogus invoice arrangements are always serious matters, and the undisclosed offshore bank account can obviously be serious, depending

on all the circumstances, including, of course, the amount of interest not disclosed.

Returning to the representative offshore "trust" arrangement in the Isle of Man, and elsewhere, one final point needs to be made.

The efficacy of the offshore "trust" arrangement depends on secrecy, to be sure.

More than that, however, the efficacy of the relevant arrangement depends on deception, that is, deception agreed and maintained by a number of parties, including our Australian resident individual, pursuant to an ongoing conspiratorial agreement.

As such, the all essential side agreement or arrangement – whereby the relevant offshore parties treat the Australian individual as if the "trust" assets are the personal property of that individual – is unenforceable in any court of law, it not being any part of the functions of the courts to aid or assist criminal activities.

This is but one of the significant inherent vulnerabilities of so many of these offshore arrangements, as targeted by Wickenby.

2. THE ATO's SERIOUS NON-COMPLIANCE ("SNC") BUSINESS LINE

In the Compliance Program 2010-2011, we are told that in 2009-2010, the officers in SNC raised approximately $500 million in liabilities "of which 90% was derived from Project Wickenby."

That's a big fact, and it speaks to the importance of Project Wickenby to SNC as a whole and the importance of SNC to Project Wickenby as a whole.

The ATO's SNC Business Line was established in July 2003, and its primary focus was, and remains, the extremes of tax evasion and fraud.

The (Wickenby) SNC officers are currently, and relevantly, involved in giving effect to, amongst other things, the Offshore Compliance Program, the International Promoter Strategy and the Offshore Bank Strategy.

Although most Wickenby targets, especially participants as opposed to intermediaries or promoters, who are wise, and well advised and represented, will manage to keep things in the civil, or tax, arena alone, there is the ever-present risk of things lurching into the criminal investigation area.

A major reason for that is the fact that it is the officers in SNC who have been directly tasked with Project Wickenby matters, and those SNC officers (together with their colleagues in other Wickenby agencies) are the very ones with all the necessary and relevant intelligence, auditing and criminal investigation skills and resources to deal – "firmly and fairly", as they are given to saying – with a target who seriously blots their copybook in, say, the course of a Project Wickenby tax review arising from information provided to the Tax Office under the Offshore Bank Strategy.

3. THE WICKENBY CYCLE AND THE BENEFITS OF GETTING IN EARLY

Wickenby matters certainly have a life cycle, more so than in Tax Office compliance activities generally.

Framed as it is, by the SNC Business Line, every Wickenby matter is potentially a serious matter for the target (or taxpayer) concerned.

For those (potential) Wickenby targets – e.g. the taxpayers, with undisclosed offshore bank or broking accounts, that are progressively being identified by the Offshore Bank Strategy, the (above) taxpayer with the offshore "trust" arrangement in the Isle of Man, and the (above) taxpayer involved in the offshore bogus invoice arrangement – who are wise, much can be gained by cleaning things up with the Tax Office **before** the Wickenby officers ever have occasion to make that crucial first compliance contact.

"You came to us, we didn't come to you, and that makes a difference", is how it might be put. The difference can be reflected in much-reduced penalties and interest, and, in the result, no referral to the CDPP.

Of course, once the first Wickenby compliance contact is made (e.g. the notification of commencement of a "review of your tax affairs"), and because things have then changed dramatically, with the latent tax risk transformed into a revealed and very salient tax risk, there is a pressing need to establish which class of Wickenby matter the target's tax affairs fall into.

Generally stated, if the Wickenby target really has something to argue about with the Commissioner – that is, if he or she has some real tax "merits" – then more conventional tax dispute approaches may well be appropriate.

However, if (as is commonly the case) the Wickenby target in fact has something serious to hide from the Tax Office (e.g. an offshore "trust" arrangement of the kind already considered), then the target has a real problem, the target is very much at risk, and the question becomes one of

how best to manage – even better, how to mitigate – that now revealed risk, for the benefit of the client.

In my experience, the earlier any such **at risk** Wickenby target gets real, and climbs off the lies and deception inherent in such an offshore "trust" arrangement, the better it is for the relevant Wickenby target, in terms of (amongst other things):

- Minimising penalties and interests; and
- Minimising the risk of prosecution.

The barriers to this include the fact that the **at risk** Wickenby target may feel they are trapped by the lie, and that they have no option other than to ride the lie to the end of the road.

Obviously, when the balloon goes up, on receipt of the notification of the Wickenby tax review, the **at risk** Wickenby target will contact those involved in setting up the relevant offshore "trust" arrangement – including, in all probability, their local intermediary – and a compliance activity response will be workshopped and agreed upon.

The relevant target may well be told that "it's only a fishing expedition" and that the best approach for that target to adopt is to "sit tight, she'll be right".

Also, the target may be terrified that – if they reply truthfully to the initial Tax Office questions, let alone front the Tax Office and make a clean breast of their sins – they will be dealt with harshly, perhaps by the Tax Office, other Wickenby agencies and, also, by their fellow co-conspirators, both onshore and offshore.

What such a target needs is a realistic appraisal of their position, given the big facts that **their** number has now come up, **they** are the person who lives onshore (within the jurisdiction), **they** are the party now directly and immediately in the line of sight of the Tax Office and perhaps other agencies as well, **their** livelihood and even liberty are now very much at risk, the Wickenby agencies are now on **their** case, and to "sit tight, she'll be right" is simply the worst possible available strategy for them to adopt, it being, in simple terms, a road to nowhere.

They and their advisers need to aggressively explore – and intelligently speculate, in the light of all available data, as to – where **their** matter might now go, including what information the Tax Office (and other agencies) might already have or might reasonably be expected to obtain (especially from third party sources, onshore and offshore) if **their** matter is allowed to run its course, and what further compliance "treatments" the Tax Office might choose to apply to **them** if **their** matter is allowed to run its course.

Keeping to the agreed script (that is, riding the lie) and maintaining the ring of silence – and, probably, moving to secrete or destroy all relevant documents (or, at least, the available, onshore paper versions of same) – is the risk mitigation strategy that will commonly be pressed on the unsuspecting **at risk** Wickenby target, by the offshore parties (and, probably, the local intermediary as well), garnished with statements to the effect of "the Tax Office are a bunch of dopes, they never stick it out, and you're a fool if you give them anything without a fight" or "Glenn Wheatley co-operated and look what happened to him – they took his money and he went to gaol as well".

The truth is very different to all that, and it is a truth I have lived with a number of **at risk** Wickenby targets.

Once the balloon goes up, any **at risk** Wickenby target would be well advised to look to their own welfare, and that of their immediate family, above all things.

I can't put it any more directly than this: with any **at risk** Wickenby target who has something serious to hide, the earlier in the Wickenby cycle that the relevant target gets real (and gets off the lie) – and cooperates with, and provides reparation to, the Tax Office – the better will be the ultimate result for that target and their family, particularly in terms of minimising penalties and interest, and also the risk of prosecution, not to mention avoiding the trauma, loss of reputation and financial and personal loss and distress that can, and normally will, flow from possible further "treatments" such as proceeds of crime actions, compulsory examinations, and so on.

4. THE NEED FOR SPEED, ESPECIALLY IN THE CASE OF MATURE WICKENBY MATTERS

These days, there's always a reason behind a Tax Office query, however apparently benign or non-threatening.

That is especially so in the case of any Wickenby query.

Certainly, there's always a very substantial reason behind the issue of a tax review notification letter, the issue of any list of questions, the issue of a 264 notice, the issue of an audit notification letter, the issue of a substantial amended assessment, the service of an ACC summons to appear before an Examiner, the execution of a search warrant by the AFP or the issuing of an "invitation" to attend on the AFP for the purpose of being interviewed.

Strangely, many people, in my experience, don't bother to read these clear signs, and all they imply.

Often, when a mature Wickenby or other SNC matter comes to me, the risk assessment can be carried out immediately, and, to help the client, the question then becomes one of acting decisively and without delay.

Instead of becoming very educated as to the full nature and extent of the problem, and its history, the far more important priority is often to sharply reposition the client, in the eyes of the Tax Office (and other agencies, if relevant), as soon as may be, in order that the repositioned target can be "treated" with understanding, by the Tax Office and other agencies, if relevant, rather than as a continuing and seriously non-compliant taxpayer, from that point forward.

When presented with mature Wickenby matters, my experience has been that the presenting malady is often very severe, the time is often five minutes before midnight, and the need for speed is very great if anything of substantial benefit to the client is to be achieved.

5. ON BEING SPARTAN

Wickenby matters (like SNC matters generally) are often dynamic and, to a degree, unpredictable.

The more serious Wickenby matters are always highly dynamic and, potentially, quite unpredictable as well.

On occasions, this is due, in part, to covert ops being part of the mix.

In that often-challenging environment, I have developed a short list of things to keep in mind at all times:

- Be **S**trategic;
- Be **P**roactive;
- Be **A**ccurate;
- Be **R**ealistic;
- Be **T**imely;
- Be **A**symmetrical; and
- Be **N**onconformist.

These pointers have proved helpful to clients as well.

6. RELUCTANCE TO REVEAL

In all Wickenby matters, the best outcomes are achieved where clients are encouraged to, and assisted to, reveal to their advisers what actually happened, say, in relation to the setting up and conduct, over the years, of the offshore “trust” arrangement referred to earlier.

With serious Wickenby matters – and, most especially, serious and mature Wickenby matters, when all seems lost – I often tell clients that only the truth shall set them free, and the truth shall be their protection.

Easier said than done, of course, and yet this is one of the great keys to saving seriously non-compliant clients from what can easily be, in the Wickenby context, the shocking civil and criminal consequences of their prior, now detected, serious misconduct, both for themselves and close members of their family.

In cases of very serious non-compliance, when clients have been caught red-handed, and even very late in the day, the keys – to minimising penalties and interest, and the risk of prosecution - are to be cooperative, transparent, and truthful and complete with the Tax Office.

None of that is possible without the client being cooperative, transparent, and truthful and complete with their advisers in the first instance.

Further, even where the Wickenby target is caught up in one of the larger, dedicated (or smaller, discrete) criminal investigations, being cooperative, transparent, and truthful and complete with the Tax Office is a key strategy, to minimise penalties and interest, and the risk or consequences of prosecution.

Again, none of that is possible without the client being cooperative, transparent, and truthful and complete with their advisers in the first instance.

7. MITIGATING TAX (AND TAX CRIME) RISKS

If the Wickenby target is lucky enough to have something to really argue with the Tax Office about, apply normal tax dispute methods.

If the Wickenby target has something serious to hide from the Tax Office (or other Wickenby agency), mitigate the relevant risks without delay.

If the Wickenby target is heading for trouble with the Tax Office (or other Wickenby agency) already, mitigate the relevant risks aggressively.

If the Wickenby target is already in serious trouble with the Tax Office (or other Wickenby agency), mitigate the relevant risks very aggressively.

8. VULNERABILITIES OF OFFSHORE ARRANGEMENTS

As the offshore walls of secrecy start to be breached, offshore arrangements – **which so often depend totally, for their efficacy, on the Tax Office never finding out the true facts** – are becoming more vulnerable.

As onshore and offshore patriarchs and matriarchs die, their heirs and successors are finding, in a material number of cases, that the side arrangements (see earlier, under 1. OFFSHORE ARRANGEMENTS) – which meant, over the years, that their parent was treated as if they were the owner of relevant "hidden" assets and structures, both onshore and offshore – are not being honoured by those very offshore players who previously followed so diligently, year by year, the directions of the now deceased patriarch or matriarch.

As local and overseas revenue and law enforcement agencies, including the Tax Office and its fellow Wickenby agencies, make their enquiries, a significant number of other patriarchs and matriarchs (still alive) are finding that those very offshore players – whose cooperation is so vital to their supposed control of their supposed assets or structures, both onshore and offshore – are inclined, once that heat comes on, to dishonour the relevant side arrangements and act as if the apparent (independent, third party) ownership of the relevant assets and structures was, in fact, real.

9. DISENTANGLING FROM OFFSHORE ARRANGEMENTS

The growing vulnerabilities of offshore arrangements provide some powerful reasons why any disentangling exercise should be effected before, rather than after, the Tax Office or other (local or overseas) agency gets on the front foot and starts making enquiries, especially overt enquiries.

Moving to obtain and confirm legal and indisputable ownership and control of the “hidden” assets or structures is the key, followed by actually getting the relevant monies or assets safely onshore, where required.

This is all best attempted, of course, as an adjunct to squaring things up, as required, with the Tax Office.

The catastrophe to be avoided, at all costs, is being detected by the Tax Office (or other local or overseas agency), losing the benefit of the “hidden” assets or structures, and then being left stranded with substantial liabilities for tax, penalties and interest, with insufficient available funds to call on.

10. MOVING PARTY ADVANTAGE

That’s a good note to end on.

The risk is with the moving party, but so is the power.

This is true of voluntary disclosures, in Wickenby and other SNC matters, as it is in the normal run of tax affairs.

Successfully disentangling from offshore arrangements, before the balloon goes up, is a very potent illustration of moving party advantage and also of aggressive risk mitigation, in this unique Wickenby context.