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BARRISTER-AT-LAW

Lessons from Wickenby: Paul Hogan, the ACC and the ATO

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Lessons from Wickenby

Introduction - What is Wickenby? (1)

- Two personalities: Project Wickenby ('PW') is led by the ATO. Operation Wickenby ('OW') is led by the ACC.
- OW is the criminal intelligence and investigative component of the broader PW.
- PW is a multi-agency Commonwealth taskforce established in February 2006 comprised of: ACC, ATO, ASIC, ATRAC, AFP, CDPP & AGD. PW also collaborates with AUSTRAC and other nations (TIEAs – Taxation Information Exchange Agreements).
- PW's purpose is 'to protect the integrity of Australian financial and regulatory systems by preventing people from promoting and participating in the abusive use of offshore secrecy havens' (www.ato.gov.au). Or, to protect the national revenue against tax crime (tax evasion and fraud) by promoters and taxpayers through the use of highly sophisticated and complex international schemes/transactions.
- Two broad forms of methods of tax evasion attract the operation of PW/OW:
 - concealment of income/gains and/or creation of false/fraudulent deductions; and
 - repatriating funds to Australia in a deceitful manner (ie. laundered money).

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Introduction - What is Wickenby? (2)



- Activities conducted by PW include:
 - civil investigations by ATO and ASIC;
 - criminal investigations by ACC, AFP, ATO and ASIC;
 - administrative actions by ASIC (including audits) relating to the regulation on those persons operating in the financial services industry (via ATRAC and AUSTRAC);
 - prosecutions and other related legal action undertaken by the AGD, AGS and CDPP; and
 - injunctive and confiscation proceedings conducted under the *Proceeds of Crime Act 2002*.
- The 'poster boys' of PW and OW are lawyer Michael Brereton, promoter Glenn Wheatley and actor Paul Hogan. So far, OW has failed against Hogan (and John Cornell and their accountant Tony Stewart) and PW has failed against Brereton. PW remains ongoing against Hogan et al.

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Pre-2006 History of Wickenby



- 1974: Richard Egglshaw purchases a Jersey accountancy practice, 'Strachans'. Partners to later include Philip Egglshaw and Philip de Figuereido. Practice later expanded to include 'offshore trust and company administration advice' and the marketing of international tax shelters.
- 2001: Strachans SA relocated to Geneva, Switzerland.
- 2002: ATO audit of lawyer Michael Brereton reveals numerous questionable schemes involving celebrity clients and the recurrence of Strachans involvement .
- 2003: ATO information re Strachans referred to ACC.
- 2004: ACC raid Philip Egglshaw's room at the Melbourne Sheraton and confiscate his laptop computer which contained the details of numerous tax schemes he operated for many of Australia's wealthiest individuals.
- 2005: Multiple raids (search warrants) on offices and homes throughout Australia conducted by ACC and ATO.

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The Principal Regulators - Roles



- ACC:

- Governed by the *Australian Crime Commission Act 2002*.
- An intelligence gathering and investigative agency operating to detect 'nationally significant' (serious) crime.



- ATO

- Principal legislation: *Income Tax Assessment Act 1936* (and the *ITAA 1997*) and *Taxation Administration Act 1953*.
- To administer tax legislation and regulation and manage the collection of Australia's public revenue.

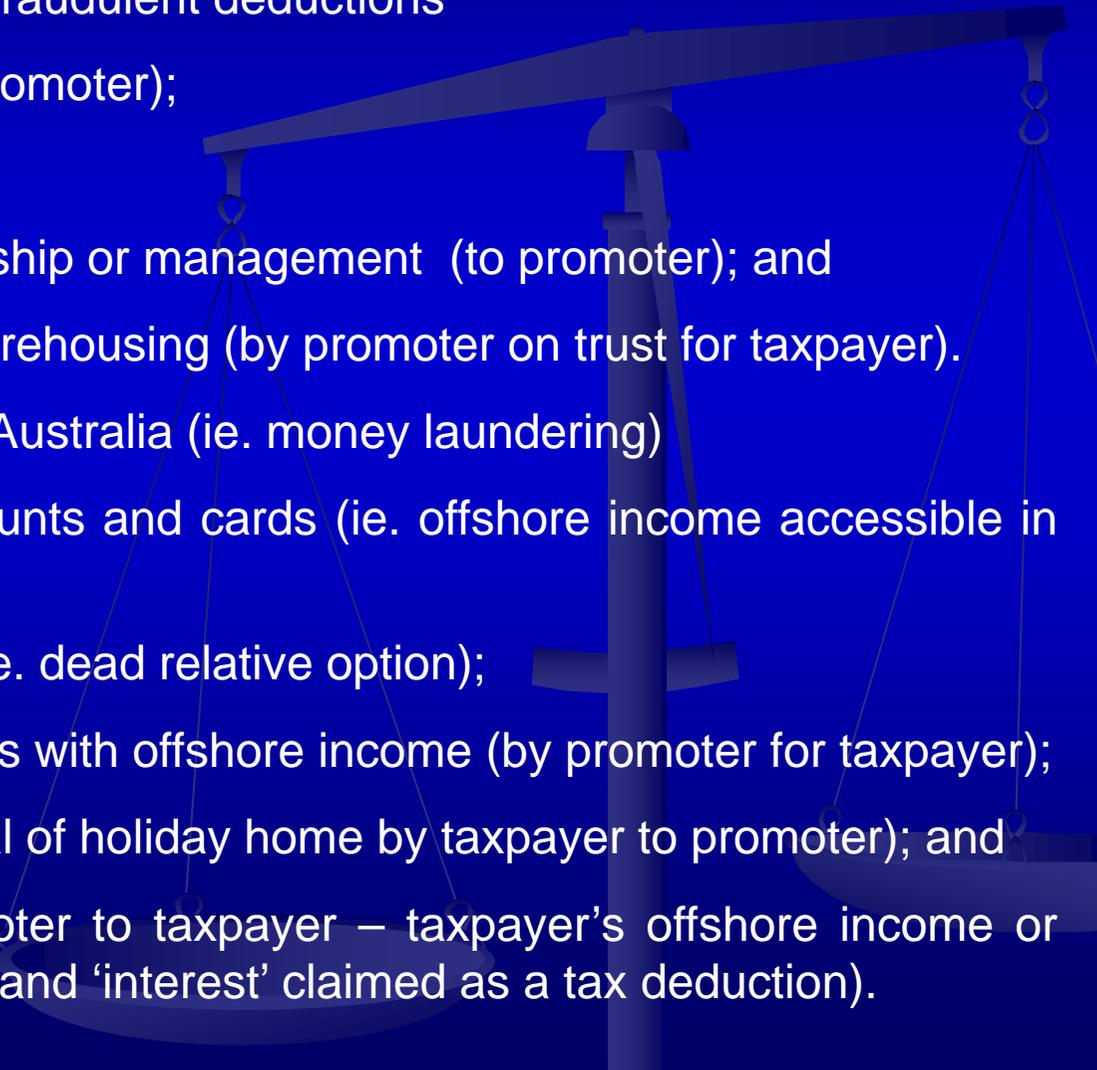


- ASIC

- Administers the *Australian Securities and Investment Commission Act 2001*.
- To regulate and oversee Australia's corporations, markets and financial services.

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Typical 'Wickenby Transactions'

- Concealment of income or false/fraudulent deductions
 - False or inflated invoices (by promoter);
 - Sham loans (by promoter);
 - Sham transfers of asset ownership or management (to promoter); and
 - Improper share acquisitions/warehousing (by promoter on trust for taxpayer).
 - Deceitful repatriation of funds to Australia (ie. money laundering)
 - Offshore debit and credit accounts and cards (ie. offshore income accessible in Australia);
 - Fraudulent gift or inheritance (ie. dead relative option);
 - Payment of Australian expenses with offshore income (by promoter for taxpayer);
 - False rental schemes (ie. rental of holiday home by taxpayer to promoter); and
 - Back to back loans (by promoter to taxpayer – taxpayer's offshore income or 'loan' used as 'working capital' and 'interest' claimed as a tax deduction).
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ITAA Part IVA Generally



- Part IVA of the *ITAA 1936* (ss. 177A to 177G) was enacted (and became operable on 27/05/81) to replace section 260 as the anti-avoidance of taxation provision (re cancellation of tax benefit by Commissioner).
- Second reading speech (Treasurer) to the *Income Tax Laws Amendment Bill (No 2) 1981*: The purpose of Part IVA is 'to give effect to a policy to strike down blatant, artificial or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their affairs'. (Cf. *FCT v Newton* (1958) 98 CLR 1). Subjective evaluation necessary.
- *FCT v Spotless Services Ltd* (1996) 186 CLR 404 at 408 (Brennan J): 'the scheme is so attended with elements of artificiality or contrivance primarily directed to the obtaining of the tax benefit that any commerciality of the scheme is overshadowed'. (Cf. *FCT v Peabody* (1994) 181 CLR 359).

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ATO Voluntary Disclosure

- Between 30/11/09 and 30/06/10, the ATO operated the 'Offshore Voluntary Disclosure Initiative' ('OVDI'), which offered favourable treatment (ie. possible moratorium on criminal prosecution, reduced penalties, time to pay, etc) to taxpayers who had not declared taxable income held offshore.
- The OVDI applied to:
 - undeclared foreign income or capital gains from the sale of assets offshore; and
 - over or improperly claimed deductions.
- There still remains the possibility of general voluntary disclosure in all cases where taxpayers wish to regularise their tax affairs if they are in error. Such a disclosure should be approached with caution and be negotiated via a reputable lawyer or accountant. Much better for taxpayer to approach the ATO than have the ATO come to him/her/it.
- Full candour is required.
- Voluntary disclosure must be made in the appropriate form required by the ATO (<http://www.ato.gov.au/corporate/content.asp?doc=/content/00131776.htm>).

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The Regulators – Coercive Powers (1)



- ACC

- Similar powers to a Royal Commission. Examiner may:
 - . Summons any witness to appear before him/her; and
 - . Require any witness to give evidence (ie. answer questions) or produce documents. Limited information in Summons. Privilege against self-incrimination inapplicable. Set aside Summons? (See: ACC v Brereton & Anor [2007] VSC 297). Interview Method: "Privilege"?
- Powers can only be used for the subject of the investigation and are subject to ACC Board approval.
- Examination may be conducted in private (to protect the integrity of the investigation or the reputation of the person being investigated). (See: C v ACC [2005] FCA 1736).
- The ACC's coercive powers as applied in OW have survived constitutional challenge (See: S v ACC (2006) 149 FCR 361).

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The Regulators – Coercive Powers (2)

- ATO

- Commissioner has a right of ‘full and free’ access to premises without notice for the purpose of gathering information relating to taxation and superannuation (s263 *ITAA* 1936 and s353-15 *TAA* 1953. See also: ATO Access and Information Gathering Manual at www.ato.gov.au) and may remove material from premises.
- ATO on arrival on premises must allow subject of search to obtain legal advice (re: search and legal professional privilege of documents (‘LPP’) and uphold the accountants concession (‘AC’) with respect to those documents over which it is claimed by the taxpayer – ie. confidential tax advice).

- ASIC

- Use of search warrants (ss. 28, 35 & 36 *ASIC Act* 2001). Valid Warrant/Scope/Privilege?
- Similar powers to ACC re compulsory interviews and production of documents where investigation relates to possible contravention of *Corporations Act* 2001 (ss. 13 to 34 *ASIC Act* 2001).
- RoLIA: Important. Established in 2009 with a view to ensuring the rule of law is upheld in Australia upon enactment of new legislation (www.ruleoflawaustralia.com.au).

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Prosecution of Commonwealth Offences (OW)

- CDPP operates independently in deciding whether or not to prosecute OW offences and in determining 'plea bargaining' according to the *Prosecution Policy of the Commonwealth* (usually under the *Commonwealth Criminal Code 1995*) (<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>).
- Material factors in consideration of prosecution:
 - there must be 'sufficient evidence' to prosecute the case (ie. prima facie evidence to prove all elements of the offence and a reasonable prospect of obtaining a conviction, determined by an evaluation of the availability, competence, credibility of witnesses and weight of all admissible evidence); and
 - it must be evident from the facts of the case and the surrounding circumstances that the prosecution is in the 'public interest'.
- CDPP has a general obligation to disclose to the Defendant all relevant evidence in it's possession, (subject to statutory, public immunity and privilege exceptions) irrespective of whether or not the CDPP leads such evidence at committal/trial.
- The Commonwealth is overall obliged to act fairly in litigation in accordance with its *Model Litigant Policy* (s.55ZF *Judiciary Act 1903* and *Legal Services Directions 2005*).

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Wickenby Case Studies (1)



- Glenn Wheatley (2007)

- Initial voluntary disclosure re avoidance of payment of \$318,092 in tax on income earned from a John Farnham tour and a Kostya Tzu boxing event in the 1990s.
- Full co-operation with ACC and agreed to give evidence against Philip Egglshaw (Strachans) over the related scheme. Pleaded guilty on a 'plea deal' (suspended sentence) with the CDPP which was subsequently reneged upon by the CDPP (custodial sentence).
- Sentenced to 2½ years imprisonment, 15 month minimum.



- Michael Brereton (2008)

- Accused of tax fraud by ACC and ATO but never charged. OW investigation apparently ongoing. Disqualified by ASIC from acting as a company director for 3 years (appeal).
- Settlement with ATO (PW) in 2008 resulting in \$1M payment by ATO.



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Wickenby Case Studies (2)

- Paul Gregory (2010)
 - Solicitor dishonestly assisted taxpayer to evade tax (approx \$320K) by remitting income overseas, by conspiring with Glenn Wheatley and Philip Egglshaw/Philip de Figueriedo (Strachans) to do so. Sentenced to 2 years imprisonment, 12 month minimum. (Cf. 2010. Perth Accountant, Trevor Thompson, assisted a \$27M tax fraud by client detected by OW. Sentenced to 3 years and 3 months imprisonment).
- Adam Hargraves and Daniel Stoten (2010)
 - \$2.2M tax fraud procured by sham invoices and use of overseas tax havens by which they understated their company's income and their personal income (via Strachans). Sentenced to 6½ years imprisonment, reduced on appeal to 5 ½ years imprisonment, with a 2½ years minimum.
- Philip de Figueriedo (Strachans) (2011)
 - Extradited to Australia from Jersey on 23/12/10. Has arrived in Australia and has been charged with conspiracy to defraud the ATO and money laundering. Facing up to 10 years imprisonment.

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Wickenby Case Studies (3)

- Paul Hogan, John Cornell and Tony Stewart (2011)
 - 2006: Hogan et al, investigated by ACC (and ATO) over an allegation that they had not properly declared all income earned on the film 'Crocodile Dundee' and had illegally diverted this income into offshore tax havens (via Strachans). Hogan alleged to owe ATO a multi-million dollar debt based on what is contended to be \$37.5M of undeclared income.
 - 2008: Hogan wins interim court battle for ATO to return seized personal documents (LPP). ATO agrees to pay Hogan's legal costs to date: \$5M.
 - 2010: Hogan loses battle with ATO for offshore account details to remain secret.
 - 2010 (Sep): ATO issues Hogan (who had returned to Australia) to attend mother's funeral with a 'Departure Prohibition Order' preventing Hogan from departing Australia until tax affairs finalised. Order lifted by ATO a fortnight later.
 - 2010 (Nov): ACC drops OW investigation: "insufficient prospect of conviction". Charges were never laid against Hogan et al.
 - 2011: ATO PW investigation/civil case continues.

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Conclusion – The Lessons



- An effective operation? The statistics to date (30/09/10):
 - \$420.9M in Commonwealth funding from 2006-2013.
 - \$767M in tax liabilities raised. \$186M collected. \$299.33M in improved voluntary compliance. \$75.7M in assets frozen.
 - 26 criminal investigations, 59 people charged, 8 convicted.
 - 1,224 audits and reviews completed, 693 underway.
- The vast coercive powers of the Commonwealth (as applied in PW/OW) highlight a worrying erosion of the rule of law.
- Professional advisors are now culpable for tax fraud (for facilitating transactions) as well as promoters and taxpayers.
- Hogan and Brereton have indicated that they will commence legal proceedings against the ACC and the ATO (ie. malicious prosecution, misfeasance in public office and defamation). Overzealous enforcement = consequences.
- The Wickenby saga continues...