



## Tax Laws Amendment (2007 Measures No. 1) Bill 2007

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## Tax Laws Amendment (2007 Measures No. 1) Bill 2007

**Date introduced:** 7 December 2006

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** On Royal Assent. The three respective Schedules of the Tax Laws Amendment (2007 Measures No. 1) Bill 2007 have different application dates.

### Purpose

The Tax Laws Amendment (2007 Measures No. 1) Bill 2007 (the Bill) proposes changes to tax legislation to implement:

- disclosure provisions for Project Wickenby and other future prescribed taskforces
- disclosure provisions which permit tax authorities to provide information about employers to employees who complained about the employer's non-compliance with superannuation obligations, and
- provision which extend certain employee share scheme (ESS) concessions and related capital gains tax (CGT) treatment to certain stapled securities.

### Background

The background to each Measure is set out as part of the discussion of the Main Provisions for each Schedule.

### Financial implications

The financial implications of each measure are provided as part of the discussion of the Main Provisions for each Schedule.

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## Main provisions

### Schedule 1 – Project Wickenby taskforce

#### Background to Schedule 1

The Bill introduces provisions into the Australian taxation legislation which will allow data-sharing between agencies. The primary rationale of this proposed measure is to facilitate data-sharing between those agencies that are part of Project Wickenby. However, the measure is also geared towards allowing data-sharing between other agencies in the future. There is no apparent limitation to the purposes for which such data may be shared. It is theoretically possible to set up a multi-agency taskforce which is able to access and share tax data on the basis of these proposed amendments. Areas that could be covered include organised crime, terrorism or corporate fraud.<sup>1</sup>

#### Project Wickenby

Project Wickenby (Project) is a multi-agency taskforce that was set up in 2004 to ‘investigate the internationally promoted tax arrangements that allegedly involve tax avoidance or evasion, and in some cases large-scale money-laundering.’<sup>2</sup> At the heart of this Project lies the activities of Strachans SA of Geneva, a company providing ‘specialist company and trust administration services together with international tax and financial consultancy’, and one of its directors, Philip J Egglisshaw.<sup>3</sup> Egglisshaw allegedly arranged schemes for a number of well-known Australian taxpayers to allegedly minimise or avoid their tax liability.<sup>4</sup>

In his press release *Project Wickenby arrests*, the Treasurer, the Hon P Costello, explains the particular characteristics of the Project as follows:

Project Wickenby is being managed at the cross-agency level, with the ATO being the lead agency. The five agencies involved are the ATO, the Australian Crime Commission (ACC), the Australian Federal Police (AFP), the Australian Securities and Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions (CDPP). This is the first time that these five agencies, supported by AUSTRAC, the Attorney-General’s Department and the Australian Government Solicitor, have brought their expertise and considerable powers together, to deal with tax avoidance and evasion.<sup>5</sup>

The Project is funded by \$305.1 million over seven years and is said to be ‘further evidence of the Government’s determination to protect the integrity of the Australian tax system.’<sup>6</sup> It is expected that the Project, in conjunction with Operation Wickenby (see comments below), will recover approximately the same amount of revenue. However, the Project has a further purpose as the Tax Commissioner Michael D’Asecenzo recently explained:

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The key to a project like Project Wickenby has been to try to send a signal to the community and to elements of the community that want to flout the law that the Commonwealth is prepared to work together across a number of agencies to get an outcome in accordance with the law that safeguards Australia's interests.<sup>7</sup>

### Project vs Operation Wickenby

The reader may note that parallel to Project Wickenby, conducted by the ATO, the Australian Crimes Commission (ACC) is engaged in Operation Wickenby. J Garnaut and N McKenzie note that:

Confusingly, the [ACC's] investigation has been called *Operation Wickenby* and the Tax Office probe, which involves mainly civil tax avoidance, is known as *Project Wickenby*. Both focus on avoidance schemes arranged by Strachans. [*emphasis added*]<sup>8</sup>

This confusion has been evident during the Senate Estimates hearings where the Commissioner explained that Project Wickenby covers a:

wider scope [including] many more than just [the ACC's] level of activity. One relates to a particular scope of the project for ACC purposes and the other one covers the wider work of all of those agencies in relation to a much wider brief. There is some distinction [between the Project and the Operation]. The distinction is mainly, under that referral for the ACC, a smaller subset of the wider analysis that we are doing as part of a whole-of-government approach.<sup>9</sup>

The wide scope is reflected in **item 4**, new **subsection 3G(5)** of the Bill which legislates the purposes of Project Wickenby (see discussion below).

### The broader picture—the Treasury's *Review of Taxation Secrecy and Disclosure Provisions*

The proposed amendments must be viewed in light of the recently completed consultation process in relation to the Treasury's [Review of Taxation Secrecy and Disclosure Provisions](#) (Review).<sup>10</sup> The Discussion Paper, released by the Treasury on 17 August 2006, stated that the Review:

... examines the application of the various secrecy and disclosure provisions in Australia's tax laws. The objective of the Review is to develop proposals to improve the application of these provisions, thereby increasing certainty for taxpayers and for users of tax information.<sup>11</sup>

The Review was also announced as another initiative by the Government to 'reduce the complexity and volume of Australia's tax laws'.<sup>12</sup>

A number of the submissions that were received in response to the Discussion Paper supported the announcement,<sup>13</sup> accepting, for example, that they may bring about a

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streamlining of the provisions, thus potentially enhancing the applicability of the provision and, as a consequence, improve the taxpayers' confidence in the regime.<sup>14</sup>

However, the announcement to make changes to the disclosure regime has also been met with some reservation. Michael Dirkis, Senior Tax Counsel at the Tax Institute of Australia, raised:

... concerns about whether there would be enough safeguards if the secrecy provisions were relaxed.<sup>15</sup>

And the Office of the Privacy Commissioner warns that:

... the Office is concerned that any proposal to reduce privacy safeguards currently offered by the secrecy provisions could risk a lessening in that community confidence, therefore any proposal to amend the protections should be approached with great care.<sup>16</sup>

The Australian Financial Review noted that overall:

Tax professionals and lawyers fear that a combination of government initiatives will erode rules that prevent tax office information being used as evidence in prosecutions for non-tax offences.<sup>17</sup>

Despite supporting data-sharing arrangements in exceptional cases such as Operation Wickenby, Jeff Dunlevy, President of the Law Society of New South Wales (NSW Law Society), has expressed concern that a general 'carte blanche' between government agencies allowing the sharing of information would not be welcomed by the NSW Law Society.<sup>18</sup> Further, Mr Dunlevy noted that the current legal regime, in place since 1936, is designed to encourage taxpayers to disclose their tax affairs fully by ensuring that this information can only be used by the ATO. The NSW Law Society fears that widening the tax laws could 'discourage some taxpayers from disclosing their tax affairs'.<sup>19</sup> Similar observations were advanced by the Tax Institute of Australia as part of its [submission](#)<sup>20</sup> to the Treasury's [Review](#).<sup>21</sup>

## Main provisions

Schedule 1, item 4 proposes to introduce new **sections 3G** and **3 H** into Part IA of the *Tax Administration Act 1953* (TAA).

### Information sharing in relation to Project Wickenby

New **section 3G** will stipulate the information sharing regime in relation to Project Wickenby. Under new **subsection 3G(1)**, the Commissioner will be enabled to disclose certain information to certain person under certain circumstances. In particular, the Commissioner may disclose:

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- information relevant to the *purpose* of Project Wickenby (the *purpose* of Project Wickenby is encapsulated in new **subsection 3G(5)**; see discussion below)
- to a *Project Wickenby officer* (for a definition of the term *Project Wickenby officer*, see the discussion in relation to new **subsection 3G(2)** below)
- before 1 July 2012 or a later date as prescribed by regulation (the sunset clause, new **paragraph 3G(1)(b)**).

In addition, the provision provides that the information must have been *acquired* by the Commissioner under a *taxation law* as defined in subsection 2(1) of the TAA. The term *acquired* is intended to have a broad meaning to include a large range of information, including information that ‘comes to the Commissioner without his taking any action.’<sup>22</sup>

New **subsection 3G(2)** provides the definition of a *Project Wickenby officer*. A person is a *Project Wickenby officer* if the person is employed by, or provides services to, one of the:

- *Project Wickenby taskforce agencies* (as defined in new **subsection 3G(3)**), or
- agencies supporting the Project Wickenby taskforces (as defined in new **subsection 3G(4)**)

and whose duties relate to the *purpose* of Project Wickenby (the *purpose* of Project Wickenby is encapsulated in new **subsection 3G(5)**; see discussion below).

New **subsection 3G(3)** specifies the agencies that make up the Project Wickenby taskforce, including, for example, the ATO, the ACC, the Director of Public Prosecutions and the Australian Securities and Investments Commission. The list set forth in this provision, however, is not limited; under new **paragraph 3G(3)(f)**, further agencies can be added as a prescribed agency through regulations.

New **subsection 3G(4)** sets forth those agencies that support the Project Wickenby taskforce agencies, including the Attorney-General’s Department, the Australian Government Solicitors and the Australian Transaction Reports and Analysis Centre (AUSTRAC). Again, under new **paragraph 3G(4)(d)**, further prescribed agencies may be added.

New **subsection 3G(5)** legislates the broad purposes of Project Wickenby. In brief, these are to detect, deter, investigate and enforce the law relating to arrangements of an international character or purported international character relating to things such as tax avoidance or evasion, breaches of laws regulating financial markets and corporations, certain types of criminal activities, concealing income or assets and money laundering.

New **subsection 3G(6)** will make it an offence for current or former Project Wickenby officers to:

- record information about the affairs of a second person, or

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- disclose information to a third powers person about the affairs of a second person where the information was disclosed to the officer was disclosed under new **section 3G**.

New **subsections 3G(7)** and **(8)** stipulate exemptions to this offence provision. New **subsection 3G(7)** provides that a Project Wickenby officer will not commit an offence where:

- the record of information was made for a purpose of the Project Wickenby taskforce (se above, new **subsection 3G(5)**), or
- the officer discloses information to another Project Wickenby officer for the purpose of the Project Wickenby taskforce.

New **paragraph 3G(8)(a)** will exempt from the application of the offence provision Project Wickenby officers who record or disclose information for the purposes of:

- actual, proposed all possible criminal, civil or administrative proceedings, or
- the exercise of an administrative power or the performance of an administrative function.

Again, the record must be made, or the information is to be disclosed, for the purposes of the Project Wickenby taskforce. The [Explanatory Memorandum](#) notes that this provision will allow the disclosure of information:

- as briefings to legal counsel
- to banks in order to obtain information in relation to proceedings as set forth in this proposed new provision, or
- to a delegate, empowered to make decisions such as:
  - disqualifying a person from managing corporations, or
  - banning a person from providing financial services.<sup>23</sup>

New **subsection 3G(9)** makes it an offence for a person, to whom information was disclosed under new **paragraph 3G(8)(a)**, to make a record of such information or on-disclose the information so obtain to a third person. To allow, for example, legal teams to ‘consult internally in relation to a particular proceeding relating to a purpose of the Project Wickenby taskforce’, new **subsection 3G(10)** will allow a limited on-disclosure of such information.<sup>24</sup>

Project Wickenby officers may voluntarily disclose information to courts or tribunals in the course of actual, proposed or possible criminal, civil or administrative proceedings, but they can not be compelled to do so unless the information is to be disclosed for the purposes of a tax law (new **paragraph 3G(8)(b)** and **subsection 3G(11)**).

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## Information sharing in relation to other prescribed taskforces

New **section 3H** sets out the information sharing rules for so-called future prescribed taskforces.

New **section 3H(1)** will allow the Commissioner to disclose certain information to *taskforce officers* of a *prescribed taskforce*. The Commissioner must have acquired the information under a *taxation law*. In addition, the Commissioner must be satisfied that the information to be disclosed is relevant to a purpose of the prescribed taskforce.

New **subsection 3H(2)** defines the term *taskforce officer* for the purposes of this section.

Under new **subsection 3H(3)**, regulations can prescribe taskforces for the purposes of this section. Importantly, it will be mandatory that *a major purpose* of such prescribed taskforces is the protection of Australia's public finances.

New **subsection 3H(4)** prescribes certain matters with which the regulations made under this section may deal.

New **subsection 3H(5)** is an offence provision which will make it illegal for a taskforce officer to make records, or disclose information, about the affairs of another person. The offence is punishable by imprisonment of up to two years, but can be commuted to a financial penalty.

This offence provision is subject to two exceptions, which are, in substance, similar to the exceptions that apply in relation to Project Wickenby (new **subsections 3H(6)** and **(7)**). These exemptions have been discussed above. Further, new **subsections 3H(8)** to **(11)** are, in substance, similar to new **sections 3G(9)** to **(12)**; these provisions have been discussed above.

## Financial implications

According to the [Explanatory Memorandum](#), the financial impact and the compliance costs generated by this measure are expected to be nil.

## Application

The measure will apply from the day the proposed legislation receives Royal Assent.

## Comment

In relation to new **section 3H**, Parliament may notice that this provision:

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- stipulates that information disclosed to other agencies must be merely relevant to a purpose, not to *the* purpose of the prescribed taskforce. In addition, there is no quantitative qualification such as, for example, that information must be relevant to the *major* purpose of the prescribed taskforce. Thus, a literal reading of this provision suggests that a broad range of information can be disclosed under this provision.
- requires the protection of Australia's public finances to be a *major* purpose of the taskforce. Thus, it will be possible to disclose information to taskforces that primarily pursue quite different purposes – such a combating terrorism or investigating social security fraud – as long as it is possible to argue that public finance protection is *also* a major purpose. As it is likely that views as to whether the protection of public finances is indeed a major purpose of a taskforce may differ considerably, this potential ambiguity may cause a lot of uncertainty amongst taxpayers as to whether their data was lawfully passed on to other agencies.

As noted above, commentators and legal experts fear that the erosion of secrecy provisions in the tax law may cause some taxpayers to be less inclined to disclose fully their tax affairs.<sup>25</sup>

## Schedule 2 – Disclosure of information relating to superannuation guarantee complaints

### Background to Schedule 2

This measure has not been the subject of commentary in the media.

### Main Provisions

**Item 1 of Schedule 2** will add new **section 45A** to Part 5 of the *Superannuation Guarantee (Administration) Act 1992*. Under new **subsection 45A(3)**, the Commissioner may divulge or communicate certain information to an employee if the employee has made a complaint to the Commissioner that the employee's employer did not comply in with certain obligations under the *Superannuation Guarantee (Administration) Act 1992*. New **subsection 45A(4)** sets out the kind of information that is covered under this provision. New **subsection 45A(5)** stipulates that information relating to the general financial affairs of the employer can not be disclosed in by the Commissioner.

### Financial implications

According to the [Explanatory Memorandum](#), the financial impact of this measure will be \$19.2 million over four years, with compliance costs estimated as nil.<sup>26</sup>

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## Application

The amendments will apply to records made, or information divulged or communicated, from 1 July 2007 onwards.

## Schedule 3 – Employee share schemes and stapled securities

### Background to Schedule 3

Stapled securities can be created contractually, binding together two or more different things so that they cannot be sold separately. As the ATO explains: '[m]any different types of securities can be stapled together. For example, many property trusts have their units stapled to the shares of companies with which they are closely associated.'<sup>27</sup>

The respective terms of the stapling contract will govern the effect the stapling will have; however, in 'general the effect of stapling is that each individual security retains its legal character and there is no variation to the rights or obligations attaching to the individual securities.'<sup>28</sup>

A problem arises in relation to stapled securities that were created under employee share schemes, because 'the individual securities that are stapled are separate assets'.<sup>29</sup> Thus, the [Explanatory Memorandum](#) notes:

When a company does not have any unstapled ordinary shares on issue [...] it is difficult to provide employees with access to the [employee share scheme] concessions because the components of the stapled security will need to be treated separately — the ordinary share under Division 13A of the ITAA 1936, and the other securities subject to fringe benefits tax (FBT).<sup>30</sup>

This measure aims at extending the employee share scheme (ESS) concessions and related capital gains tax (CGT) treatment to stapled securities that 'include an ordinary share, and that are listed for quotation on the official list of the Australian securities exchange.'<sup>31</sup>

### Main Provisions

**Part 1 of Schedule 3** contains the main amendments in relation to stapled securities in the context of ESS, introducing new **Subdivision DB** into **Division 13A** of **Part III** of the ITAA 1936. This new subdivision will provide the legislative underpinnings that ensure that certain securities receive essentially the same tax treatment as other qualifying shares and rights.

**Item 6, new section 139GCD** provides definitions for the terms *stapled security* and *stapled entity*. In order to be subject to this subdivision, stapled securities must meet certain basic requirements; these requirements, together with an example, are set out

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comprehensively in the [Explanatory Memorandum](#).<sup>32</sup> New **subsection 139DSD(2)** and **section 139DSC** stipulate the consequences for failing to meet these requirements.

Further, the new subdivision will set forth certain qualifying conditions or modifications, including:

- **item 2, new section 139DSE**—modifications relating to the proportion of permanent employees of an employer
- **item 2, new section 139DSF**—modifications relating to legal and beneficial interests in a company or trust, and
- **item 2, new section 139DSG**—modifications relating to the taxpayer's voting rights.

New **section 139DSH** stipulates cessation times for stapled securities or rights to acquire such securities. The available deductions, to be worked out under section 139DC(2) of the ITAA 1936, are to be apportioned according to **item 2, new subsection 139DSI(2)**.

**Part 2 of Schedule 3** sets forth a number of necessary consequential amendments, including to the *A New Tax System (Goods and Services Tax) Act 1999*, the *Fringe Benefits Tax Assessment Act 1986*, the ITAA 1936 and 1997, and the *Tax Administration Act 1953*.

## Financial implications

According to the [Explanatory Memorandum](#), the measure will cost a total of \$70 million over the next four financial years (\$10 million for the income year 2006-07; and \$20 million for the following next three income years). The measure is expected to reduce complexity and thus compliance costs for taxpayers.

## Application

The measure will operate retrospectively, taking effect on 1 July 2006.

## Concluding comments

Where necessary, concluding comments have been provided in relation to the individual measures above.

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## Endnotes

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1. The Hon P Dutton, Assistant Treasurer and Minister for Revenue, referred to these areas as potentially relevant. Mr Dutton was cited in J Kerr, Tax office to share records with law, *The Australia*, 15 January 2007, p. 2. See also, for example, N Khadem, Privacy fears over bid to share taxpayers' details, *The Age*, 16 January 2007, p. 3.
2. The Hon P Costello, Treasurer, Project Wickenby Arrests, *media release*, No. 72, Canberra, 2006.
3. This information is taken from LexisNexis, Martindale-Hubbel, *Experts & Services*, Entry for Strachans SA, Geneva. This entry is available at: <http://resources.martindale.com/mhes/listing.jsp?R=884461500010012>.
4. J Garnaut and N McKenzie, Tax man closes in on 'safe' schemes, *The Age*, 12 February 2007, p. 1. S Moran, Hogan linked to tax cases in court, *The Australian*, 13 February 2007, p. 3. See also L Dubecki, The national sport that is not very sporting, *The Age*, 9 February 2007, p. 17.
5. The Hon P Costello, Treasurer, Project Wickenby Arrests, *media release*, No. 72, Canberra, 2006
6. The Hon P Costello, Treasurer, Project Wickenby Arrests, *media release*, No. 72, Canberra, 2006
7. Senate Standing Committee on Economics, *Estimates*, 14 February 2007, p.E50.
8. J Garnaut and N McKenzie, Tax man closes in on 'safe' schemes, *The Age*, 12 February 2007, p. 1.
9. Senate Standing Committee on Economics, *Estimates*, 14 February 2007, p.E55.
10. The Treasury, *Review of Taxation Secrecy and Disclosure Provisions*, Review, 17 August 2006.
11. *ibid.*, p. v.
12. The Hon P Costello, Treasurer, Project Wickenby arrests, *media release*, No. 91, Canberra, 17 August 2006.
13. See, for example, Department of Immigration and Multicultural Affairs, Submission to the Discussion Paper, Canberra, 5 October 2006, p. 1. Department of Families, Community Services and Indigenous Affairs, Canberra, 4 October 2006, p. 1. Law Society of New South Wales, Submission to the Discussion Paper, Sydney, 29 September 2006, p. 1. CPA Australia, Submission to the Discussion Paper, Melbourne, 2 October 2006, p. 2.
14. Office of the Privacy Commissioner, *Review of Taxation Secrecy and Disclosure Provisions*, Discussion Paper, Submission by the Office of the Privacy Commissioner, September 2006, p. 2.
15. D Crowe, Pleas for safeguards in tax data sharing, *Australian Financial Review*, 10 January 2007, p. 3.

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16. Office of the Privacy Commissioner, [Review of Taxation Secrecy and Disclosure Provisions](#), Discussion Paper, Submission by the Office of the Privacy Commissioner, September 2006, p. 2.
17. D Crowe, Pleas for safeguards in tax data sharing, *Australian Financial Review*, 10 January 2007, p. 3.
18. D Crowe, Pleas for safeguards in tax data sharing, *Australian Financial Review*, 10 January 2007, p. 3.
19. J Kerr, Tax office to share records with law, *The Australian*, 15 January 2007, p. 2.
20. Tax Institute of Australia, Submission to the [Review of Taxation Secrecy and Disclosure Provisions](#), Sydney, 29 September 2006.
21. The Treasury, [Review of Taxation Secrecy and Disclosure Provisions](#), The Submissions.
22. [Explanatory Memorandum](#) to the Tax Laws Amendment (2007 Measures No. 1) Bill 2007, p. 8.
23. [Explanatory Memorandum](#), p. 13.
24. [Explanatory Memorandum](#), p. 13.
25. J Kerr, Tax office to share records with law, *The Australian*, 15 January 2007, p. 2.
26. [Explanatory Memorandum](#), p. 4.
27. ATO, Capital Gains Tax Essentials: Stapled securities and capital gains tax, available at: <http://www.ato.gov.au/individuals/content.asp?doc=/content/48455.htm>, accessed 27 February 2007.
28. *ibid.*
29. P Robertson et al., *Australian Master Tax Guide*, 38th ed., CCH Australia Limited, Sydney, 2006, page 657.
30. [Explanatory Memorandum](#), p. 23.
31. *ibid.*
32. [Explanatory Memorandum](#), pp. 25-6.

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