

# The Treasury

## Foreign Trust Inquiry Information Release

### Release Document July 2016

[www.treasury.govt.nz/publications/reviews-consultation/foreign-trust-disclosure-rules](http://www.treasury.govt.nz/publications/reviews-consultation/foreign-trust-disclosure-rules)

Key to sections of the Official Information Act 1982 under which information has been withheld.

Certain information in this document has been withheld under one or more of the following sections of the Official Information Act, as applicable:

[1]	to prevent prejudice to the security or defence of New Zealand or the international relations of the government	6(a)
[2]	to protect the privacy of natural persons, including deceased people	9(2)(a)
[3]	to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials	9(2)(f)(iv)
[4]	to maintain the effective conduct of public affairs through the free and frank expression of opinions	9(2)(g)(i)
[5]	that the making available of the information requested would be contrary to the provisions of a specified enactment [the Tax Administration Act 1994]	18(c)(i)

Where information has been withheld, a numbered reference to the applicable section of the Official Information Act has been made, as listed above. For example, a [2] appearing where information has been withheld in a release document refers to section 9(2)(a).

In preparing this Information Release, the Treasury has considered the public interest considerations in section 9 and section 18 of the Official Information Act.

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20 May 2016

Mr John Shewan  
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The Treasury  
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Dear Mr Shewan

Thank you for your invitation to make a written submission to the Government Inquiry into Foreign Trust Disclosure.

I am a senior lecturer in taxation at Massey University. I hold a BCom with Honours in Accounting and Finance, and a PhD in Philosophy. I have lectured in taxation, business management, political theory, ethics, applied ethics and business ethics, as well as working in accounting and taxation in both the private and public sectors.

I am making this submission in my own name, not as a representative of Massey University. The opinions expressed in this submission are entirely my own.

**1. The taxation rules for foreign trusts in New Zealand came about by chance.**

New Zealand foreign trusts are not taxed in New Zealand. This situation arises as a consequence of our rules for which income we tax, and rules for taxing trusts. As a matter of principle, we tax only income earned by New Zealand tax residents, and income earned in New Zealand. We do not attempt to tax income earned offshore by people who are not New Zealand tax residents.

At the same time, we base our taxation of trusts on where the settlor lives. The consequence of this is that a foreign settlor can settle off-shore assets into a trust administered by a New Zealand trustee, and because both the settlor and the income earning assets are offshore, New Zealand does not attempt to tax the trust itself. The tax jurisdiction where the assets are located may attempt to tax any income earned, if they have enough information to trace the assets.

Other tax jurisdictions tax trusts based on where the trustee lives. If the trustee does not live in their jurisdiction, then no tax arises on the trust in that jurisdiction.

This creates a situation where a foreign jurisdiction imposes no taxation on a trust because the trustee is offshore to them, and New Zealand imposes no taxation on a trust because the settlor and assets are offshore to New Zealand.

No one set out to create this situation. It simply arises as a consequence of the interaction of our tax laws. Thus it is not correct for people in New Zealand offering foreign trustee services to claim that their industry has been encouraged by government as a deliberate policy. They are taking advantage of a loophole, not responding to government policy.

## **2. We may be enabling foreigners to hide assets and income from the proper authorities in other tax jurisdictions.**

Because New Zealand gains no tax revenue from New Zealand foreign trusts, Inland Revenue Department (IRD) does not attempt to collect much information about them, other than the bare fact of their existence. An exception to this operates with respect to Australia, where IRD collects the names of settlors and proactively discloses them to the Australian Taxation Office (ATO).

In theory, settlors in other countries ought to be disclosing the existence of assets and income earned in that country to the relevant taxation authorities. However it is not clear that this is actually happening. The taxation authorities in other countries may have no information with which to pursue people who ought to be paying tax, and because in practice IRD does not collect information or disclose information itself, there is little or no way for overseas authorities to gather enough information to be able to assess any tax owing correctly.

This lack of information is a problem for overseas taxation authorities. It means that their tax bases may be eroded because assets and income are being hidden in New Zealand foreign trusts.

Aside from the recent revelations in the Panama Papers, the best evidence that this is genuinely a problem for overseas authorities is the rules for Australian settlors. If there was no problem with some Australians being able to put assets into New Zealand foreign trusts, because they always honestly disclosed the existence of the trusts and the existence of the assets to the ATO, then there would be no need for New Zealand's Inland Revenue Department to collect the names of Australian settlors and disclose them to the ATO. The fact that the Australian government negotiated a special deal with New Zealand suggests that Australians were using New Zealand foreign trusts inappropriately.

## **3. Enabling tax avoidance or tax evasion is harmful to New Zealand, and it is harmful to other countries.**

Although we don't know the scale of the problem, New Zealand's reputation is tarnished by the way that our foreign trusts operate. Our tax system is generally

very highly regarded, as is our ethical approach to taxation. In general, New Zealand is not a tax haven in general, but in respect of these foreign trusts, it operates as a tax haven. New Zealand does not appear in the Panama Papers by misfortune: the operation of our foreign trusts places us there.

We are rightly proud of our reputation for not being corrupt, and for being highly transparent. However, we should be working to maintain this high reputation, and to ensure that our reputation is based in reality. Our reputation is what enables us to participate in world forums, and to be trusted there as an honest and ethical participant.

We also have an on-going commitment to working with OECD nations and other nations to maintain our tax bases. Enabling people offshore to hide assets and income in New Zealand foreign trusts erodes other countries' tax bases. As a good faith commitment, we should not enable this to happen.

#### **4. Collecting and disclosing more information would reduce the risk that we are enabling tax avoidance or tax evasion**

New Zealand foreign trusts are legal, and properly taxed from New Zealand's point of view. The problems associated with them are caused by lack of information.

I think that the best solution is to collect and disclose more information. At a minimum, we should apply the rules we currently apply to foreign trusts with Australian settlors to all foreign trusts. That is, we should collect the names of settlors and disclose them to the relevant overseas tax authorities under our existing information sharing protocols.

However, I think that in addition to collecting the names of the settlors, we should also collect the names of the beneficiaries, and standard financial data, such as income earned, assets held and distributions made. This information should be shared with overseas jurisdictions using our existing information sharing protocols.

There would be no need to make any special rules with respect to penalties and filing dates and so on. These would all be covered by existing legislation.

If there are people who are using New Zealand foreign trusts for the purpose of avoiding or evading tax, then the prospect of having information disclosed to the relevant authorities in their own countries should be sufficient to encourage them to take their business elsewhere. Anyone who has a legitimate reason for using a foreign trust should still be able to do so, because they will already have been disclosing all the relevant information to authorities in their own countries.

## **5. Possible objections to collecting and disclosing more information**

I see four possible objections to this proposal: (1) it will impose more costs on IRD without any additional tax revenue being collected; (2) some people who hold assets in New Zealand foreign trusts due to safety concerns could be endangered; (3) in some cases, it may be the authorities in other countries themselves who are using New Zealand foreign trusts for illegal or immoral purposes; and (4) people who offer foreign trust services may lose some of their fee base.

(1) My proposal will impose more costs on IRD. This will be necessary in order to protect New Zealand's reputation. It is simply an expense that we will need to bear.

(2) There could be some people who use New Zealand foreign trusts because they are endangered in their own countries. However this is one of the matters we already take into account when we sign double tax agreements and data sharing agreements with other tax jurisdictions. Consideration could be given to enabling trustees to approach IRD to put a block on sharing information for particular trusts if necessary. IRD would still collect the information, but it would hold it without disclosing it. In these cases, the onus would be on the trustee to prove that the exemption is merited.

(3) In some cases, it may be the authorities in other countries are themselves using New Zealand foreign trusts to defraud their own countries. In that case, collecting more information and disclosing it will not have any effect, and New Zealand would still be complicit in enabling immoral activity. However, consideration could be given to requiring trustees to vouch for the settlors and beneficiaries of trusts, with appropriate penalties for the New Zealand trustee if the people associated with a trust are found to have used that trust for illegal purposes.

(4) There may well be a negative impact on income for people who offer New Zealand foreign trust services. This will depend on the extent to which their clients are engaged in illegitimate activities or tax avoidance or evasion. However, I do not think that we should be enabling New Zealanders to earn income by assisting illegal or immoral behaviour by foreigners, and it is to be hoped that as people of integrity, there will be very little such behaviour going on anyway. In addition, people who are offering these services are usually tertiary educated and highly able, so it is reasonable to assume that they will be able to find other sources of income.

## **6. Alternative suggestions**

A suggestion has been made by the foreign trusts industry that a register of trusts would alleviate the problem. However it is not clear that another layer of bureaucracy is needed. There are currently no rules about how this register would be operated, nor to whom information would be disclosed. Asking IRD to

collect and disclose more information will add to IRD's workload, but the actual collection and disclosure could be accomplished using existing mechanisms and existing rules for sharing information, rather than creating a whole new system.

Another suggestion is that the trusts should be taxed themselves. However this is inconsistent with our other laws for taxing income, and taxing trusts. Introducing inconsistency into the Income Tax Act 2007 will complicate the Act, and undermine its coherence and integrity. In any case, it is not clear that it would be possible for IRD to actually collect any tax from the trustees, because the assets and income are not held in New Zealand. Further, as discussed above, there can be legitimate reasons for having a New Zealand foreign trust, so introducing a new tax on trustees would simply penalise people who are doing nothing wrong.

Thank you for the opportunity to make a submission to the review.

Yours sincerely

A handwritten signature in purple ink that reads "Deborah J Russell". The signature is written in a cursive, flowing style.

Dr Deborah Russell