

The Treasury

Foreign Trust Inquiry Information Release

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

Foreign Trust Disclosure Inquiry:

submission by Simon Boyce, PhD candidate, AUT University, May 2016

Introduction

I am a PhD student in Communications at AUT, and my thesis examines tax havens and the role of the media, particularly with regard to the 'Winebox Inquiry', and the recent ICIJ leaks. My Masters thesis was on public finance in the 1930s, and I have written about public debt management and housing policy based on archival Treasury records. My submission will involve a commentary on the foreign trust regime based on Treasury records, and briefly from the Winebox archives, I will then indicate issues from the Panama Papers database.

Treasury Policy

From the media coverage of the Foreign Trust regime one would never know that it was largely based on Treasury views in 1987, in consultation with some legal professors, and the IRD. In fact, the Income Tax Amendment Act (#6) 1988, in which the current trust laws were enacted, resulted from a review of international taxation, and as part of a consultation process. This also introduced a new Controlled Foreign Company (CFC) regime, and the creation of the Foreign Investment Fund (FIF) regime, though the latter appears to have been delayed. It seems that the CFC and FIF regimes were the bigger ticket items, and the foreign trust change went under the radar, and has been revised less often since. The key point is that the review of international taxation was explicitly focussed on anti-avoidance measures, and preventing the use of tax havens by New Zealand residents. But this appears to have utterly failed as anti-avoidance, and a tax haven for non-resident trusts was created.

Treasury records make it clear that the change to the status of non-resident settlors with a New Zealand trust would create a tax haven. In early September 1987, the then Director of Tax Policy in Treasury, Greg Dwyer, wrote to the finance minister concerning the 'Brash Committee' and International Tax. On page 6 of the memoranda, in referring to far reaching changes to trust law, Dwyer writes:

“New Zealand has no reason to tax foreign source trustee income of a trust which has a resident trustee but which was set up by non-residents and whose beneficiaries cannot include New Zealand residents. This may result in New Zealand becoming, in effect, a **tax haven** for such trusts. [3/9/87, T76/2/109]

Dwyer went on to explain why a NZ resident settlor, with a trust located in a tax haven, would be required to pay tax instead of the actual trustee. There are other papers on the relevant Treasury file [T76/2/56], which explain why trusts which have been set up by a non-resident settlor, but with a New Zealand trustee, should not be taxed on principle. This has been justified by the role of economic substance, as opposed to the primacy of legal form, and on the basis of the trustee in any trust being an 'agent' of the settlor. One of the Treasury's advisors, Eric Toder, referred to this scheme as a "first principles, go it alone" regime. But it certainly caught the attention of financiers in Europe, who approached the London High Commissioner in New Zealand. Treasury's reply was that an 'offshore banking centre' was not being created, though the trust law did "provide a tax planning opportunity for non-residents" [31/3/89, T76/2/109]. But the Winebox documents indicate how this was exploited. In May 1988, Mark Jones wrote a paper for a European Pacific Banking seminar. This was a proposal for the takeover of an existing trustee company, or the creation of a new branch of European Pacific. Jones noted the 'arbitrage opportunity' created by the new trust law, given that no other country had removed tax on the income of the trustee. He went on:

“where a New Zealand trustee administers a non-resident trust, then the ownership by that trust of 'vehicles' in other jurisdictions would not be subject to the proposed New Zealand CFC legislation.”

Rather than remove the possibility for what Treasury officials called the ‘Cook Islands run-around’, the new trust laws provided another opportunity to European Pacific and its clients.

Panama Papers

It could be speculated that the EP trust business was sold to the trust company now known as Trustnet, whose records came to light in 2013. This proved to be a good rehearsal for the current Mossack Fonseca leak, now known as the Panama Papers. Apparently there is not much to see in the documents, if they became widely available, and New Zealand is just a footnote to the larger scale operations in other tax havens. It is true that there have been some uncomfortable moments for a few specialist trust firms in Auckland and their clients.

I want to show how the ICIJ’s database does indicate some issues both with the scale of the New Zealand operations, in terms of the number of firms involved, and the number of possible non-resident settlors with New Zealand trusts. Rather than refer to the firms that have already been highlighted in the media, I want to focus on some international trust firms that appear to have local branch operations in New Zealand. In the Panama Papers database I came across one such firm, Turnstone Trustees, which is based in the Isle of Man, but emerged in Mauritius and has a South African operation. The Turnstone Group website refers to a New Zealand branch, operating from Swan Law, and based in Whangarei. It turns out that Swan Law’s principal, George Swanepoel, sold his practice to Regent Law, but he remains the New Zealand contact for Turnstone. There are certainly non-resident trusts by the look of it, such as Turnstone Trustees (NZ) Limited as Trustee of the Bencca Trust, which has a beneficiary in Bencca Holdings, as an example. More concerning on the Turnstone website was a ‘news’ item about the so-called ‘look through’ companies, which apparently have the potential to bring ‘unexpected benefit’ to non-residents investors. Thus:

“For non-New Zealand investors, it isn’t the look through aspect that is of greatest significance, as they can already invest through the trustees of a New Zealand foreign trust and not pay New Zealand tax. However, by inserting a LTC company between the trust and a transaction...the company’s eligibility for concessional rates under double taxation treaties is less likely to be challenged...” [www.turnstone-group.com/2011/04/new-zealand]

So here the LTC companies and foreign trusts allow for what is known as ‘treaty shopping’.

There are a number of other foreign firms that have close links to local players. Another major firm in the Channel Islands, Minerva, has a New Zealander, John Wood, as chairman, and its website suggests that there is a New Zealand operation (possibly Minerva Holdings). Another Channel Islander, Thomas T K Tyrrell, claims to have set up a New Zealand trust company which, according to the database, is called Aeterus Trust. One of its clients is Christian de Berdouare of Miami, Florida, known for setting up the Chicken Kitchen franchise business, and buying Pablo Escobar’s former house (media reports state that he left some unopened safes there). There are other New Zealand trust firms linked with continental Europe, such as Arc Trustees, with ownership in Switzerland. There seems to be a firm in Thorndon, Wellington known as FIDCO, and it has links with a trust company in Monaco named Acces Ltd. The principal, Anthony Janse van Vuuren, also appears many times in connection with New Zealand addresses in the database, and so does his colleague, a Lance Peter Luigi Lawson. However, the kingpin for the international firms appears to Markom Management, based in London. The Principal, Mark Omelnitski had been associated with Mr Tyrrell in a company know as Wellington Shields, but his own firm Markom Trustees (New Zealand) Ltd comes up with over 1300 entities, and hundreds of officers and addresses. Even when the entry is filtered by country, there are still over 200 addresses in New Zealand, and even more if the name is varied to be just ‘NZ’ in the brackets. Markom appears to be linked

with all the other trust companies operating here, not just the local incarnation of Mossack Fonseca. But if one looks in the database for Omelnitski's European operation it soon becomes clear that he also manages trusts for Arkady and Boris Rotenberg¹, based in the Marshall Islands. The Rotenbergs are known to be very close friends of Vladimir Putin.

Conclusion

I have briefly tried to indicate concerns with the foreign trust regime, firstly by putting the time into seeing why it was set up by Treasury in 1988, and the obvious flaws in it. A policy that was meant to curb tax evasion through tax havens both failed in itself, and created many future opportunities for trust firms that have been 'in the know'. It appears that the system of international taxation is fundamentally flawed, apart from the fact that New Zealand foreign trusts are used for purposes which we cannot know; and we aren't even sure of how many there are. Mr John Shewan, as chairman of the Taxation Committee, for the New Zealand Society of Accountants, made a critical submission to a consultative committee in 1990. In it he referred to the capture of the process by the officials, and the failure of the international tax regime to stand up to the reality of 'business experience'. He stated that:

“...we believe that there is a point where we must recognise that an incorrectly configured hanger will always mean that the fabric will remain permanently creased. The policy planks on which New Zealand's International Regime hang are overdue for that 're-configuration'.” [30/8/90, copy on T76/2/109]

In other words the 'fabric' of the legislation has to be changed, and it is long overdue.

Simon Boyce, [2] 18/5/2016

¹ The Rtoenbergs are also known as Rotenberg in the ICIJ database.