The Treasury

Foreign Trust Inquiry Information Release

Release Document July 2016

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.

April 2016

Background to 2006 foreign trust information disclosure reform

Australia

On **Thursday 6 November 2003** at the Budget Estimates Supplementary Hearings at the Senate Economics Legislation Committee, a number of comments were made by Senator Nick Sherry about money flows through New Zealand and then onto tax havens. The Australian Transaction Reports and Analysis Centre (AUSTRAC) monitors money flows in and out of Australia. However, the hearing revealed that AUSTRAC is only able to see the primary transaction point and would not know what happens to the funds once it is in New Zealand. Michael Carmody (the ATO Commissioner at the time) acknowledged that while they are unable to get the full picture from AUSTRAC, Australia does have a comprehensive DTA in place with NZ which provides for exchange of information.

In **February 2004**, the ATO released a tax alert stating that it was examining trusts structures using New Zealand trustees (TA 2004/4). The tax alert can be found here.

In **July 2005**, the ATO released a tax ruling detailing the tax implications of Australian residents using New Zealand trust structures (TR 2005/14). The conclusion of the ruling is that foreign trusts would not be accorded treaty benefits under the Australia-New Zealand treaty. This is because a New Zealand trustee of the foreign trust would only be taxed on New Zealand sourced income in their capacity of trustee, and would not be considered resident in New Zealand under Article 4. The ATO stated that this interpretation is consistent with the OECD Commentary. The tax ruling can be found here.

Policy development

In **June 2004**, we reported to Ministers on foreign trusts (PAD2004/092) on the issue and the report states the following:

> *"As legislation does not require foreign trusts to keep and regularly provide information, there is a risk that New Zealand may be unable to supply foreign tax authorities with information relating to some foreign trusts if requested. If foreign trusts vest, move off-shore or the trustee(s) changes, there may be no way of obtaining information pertaining to their earlier activities. Without an effective mechanism to obtain information on such trusts, New Zealand may be unable to comply with its exchange of information agreements with its DTA partners.*
>
> *This has been identified as an area of considerable concern by Australian authorities, and the issue has also been raised by other countries during DTA negotiations.* ***In particular, the issue has been raised in Australian senate hearings, and the Australian Taxation Office (ATO) has specifically raised these concerns with Inland Revenue. Inland Revenue responded that, to date, the department has always been able to answer specific requests for information, but Inland Revenue would consider making available to them (following a law change) a list of Australian settlors and beneficiaries. ATO indicated that this should address Australia's concerns."***

This June 2004 report proposed that a New Zealand resident trustee would have to apply for an IRD number and provide a copy of the trust deed. In addition, the New Zealand resident trustee would be

required to complete an annual disclosure consisting of a full set of financial statements, details of distributions and settlements made during the year, and names and contact details for settlors, trustees, and beneficiaries. This information would be exchanged with Australia on an annual basis and with other treaty partners on request. Officials proposed to consult with NZICA, TCANS, NZLS, and other interested parties.

Submissions for this first round of consultation closed in August 2004.

In **August 2004**, a phone call was held with the ATO which revealed that Australia was most concerned about situations where there is an Australian beneficiary, but also interested in situations where there is an Australia settlor. Discretionary trusts posed the greatest concern, not unit trusts. They reiterated their concerns with aggressive tax planning and the use of conduits to get funds through to offshore countries like Vanuatu.

A possible solution was put together for discussion with Robin Oliver in August 2004 - that the New Zealand resident trustee would be required to provide the names and addresses of settlors and beneficiaries initially, and then update the list as necessary.

Throughout August 2004, Inland Revenue also spoke with submitters. One common concern raised by submitters (and articulated in a file note detailing a phone call held in August 2004 with one particular submitter) related to foreign jurisdictions using information for inappropriate purposes (e.g. torture and kidnapping), particularly if New Zealand were to embark on a programme to negotiate DTAs with Middle East and Latin American countries.

A September 2004 file note states that submitters were concerned that requiring a New Zealand resident trustee to provide the name and contact details for the settlor would destroy the trust industry, due to privacy concerns. Such a proposal would be likely to target compliant trusts and cause them to move offshore, while trusts that are currently of concern are unlikely to comply anyway. Trusts would simply relocate to jurisdictions with no reporting requirements. Foreign trusts would be more likely to comply with a requirement to provide certain information upon request.

In **September 2004**, we reported to Ministers on submissions (PAD2004/192). 17 submissions were received - with all opposing the current proposal at the time, on privacy grounds. It would likely result in highly mobile foreign investors going to other countries with similar regimes, but no reporting requirements.

In that report, officials stated that specific reporting and record keeping requirements should still be introduced, but there would be merit in developing an approach that allows for the continuation of the industry while ensuring operators that may harm New Zealand's reputation do not use New Zealand based trustees. Officials proposed to continue to consult to develop an alternative proposal to achieve this and to continue to work with Australian officials in developing the alternative proposal to ensure that New Zealand would be able to meet any reasonably request for information from Australia.

In **November 2004**, a second round of consultation was launched. The consultation memo notes that the updated proposal would require the New Zealand resident trustee to provide the name and IRD number of the trust, along with the name and contact details of the trustee(s), and the country of residence of settlor(s) if the country is specified in law or by way of regulation. Paragraph 33 in that consultation memo states that IRD will not entertain "fishing expeditions" for information from treaty partners.

In **February 2005,** we reported to Ministers on the second round of consultation. 20 submissions on the alternative were received. The revised proposal put forward to Ministers was for the trustee to provide limited information to IRD upon appointment as trustee or upon enactment of the proposed amendment, to keep financial records and provide these on request, to satisfy a requirement for membership of a professional body acceptable to IRD (this was intended to provide some assurance to New Zealand that a trustee has the necessary expertise to maintain records). If the trustee failed to become a member of an acceptable professional body, the Commissioner would provide notice of non-compliance and the worldwide income of the trust would be taxed at 33%). IRD would automatically provide information to the ATO of foreign trusts with a New Zealand resident trustee and an Australian resident settlor, and to other countries on a case-by-case basis.

In **March 2005,** Cabinet agreed to the proposal.

In **April 2005,** we reported to Ministers on issues identified in the legislative drafting process. These were fairly technical in nature - that the information provision and retention requirements should apply to all NZ resident trustees, not just those who are members of acceptable professional bodies and that the Commissioner should have the ability to make an income tax assessment for an income year for which a foreign trust has no qualifying NZ resident trustee.

OIA requests during this policy development phase

- **September 2004 -** [2] all correspondence on foreign trusts. Only released June 2004 report and July 2004 memo asking for feedback. A number of other items were withheld in full, and I don't think we told [2] what they were.
- **October 2004 -** [2] submissions on first consultation paper. Only 8 submissions were identified as relevant to the request. These were all released with only taxpayer-specific details removed.
- **February 2005 -** [2] **of Carey Olson:** submissions on second consultation paper. All 20 submissions were released.
- **May 2005 -** [2] **NZTA:** request for policy reports which contain advice on the foreign trust proposal. June 2004, September 2004, February 2005, April 2005 reports were identified as relevant. Released in full.

Recommendations by officials at Select Committee

- No longer required to have at least one trustee who is a "qualifying" trustee (i.e. a member of an acceptable professional body)
- Sanctions were softened by:
    - removing the criminal penalty that applies to New Zealand-resident trustees for failure to be a "qualifying New Zealand-resident trustee";
    - restricting the sanctions for non-compliance to the knowledge offence in section 143A of the Tax Administration Act, which would apply if a New Zealand resident trustee "knowingly" fails to disclose information or keep or provide records, as required by law; and
    - limiting the taxing penalty in new section HH 4(3BB) to serious recalcitrant trustees who are not qualifying New Zealand-resident trustees and who do not provide the information requested.

- Sanctions would only apply if a New Zealand resident trustee knowingly fails to comply with the new requirements
- Worldwide tax would not be imposed on the trust's income if there is at least one "qualifying" trustee.