



2 November 2023



Dear [REDACTED]

Thank you for your request made under the Official Information Act 1982 (OIA), transferred to Inland Revenue from the Minister of Revenue's office on 16 October 2023. You requested the following:

*( ... ) can you please send me all Documented Evidence/Information, Inland Revenue has on the leaked information regarding Tax Havens in the Pacific Islands under ex-Revenue Minister Peter Dunne. Specifically, what action Inland Revenue has taken in relation to shutting down Tax Havens and people prosecuted for avoiding/evading tax through these Tax Havens.*

I have interpreted your request to be for Inland Revenue's actions taken in relation to dealing with offshore 'tax havens'.

Inland Revenue has been progressively negotiating Tax Information Exchange Agreements (TIEAs) with offshore finance centres. At present, New Zealand has TIEAs in force with 19 jurisdictions, including many from the Pacific Islands who used to be considered 'tax havens'. Along with over 140 jurisdictions, New Zealand has also signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters which facilitates tax information exchange between jurisdictions.

Regarding the use of New Zealand shell companies for offshore arrangements, changes made in 2014 to the Companies Act 1993 and Limited Partnerships Act 2008 set the requirement that all New Zealand companies have at least one director who lives in New Zealand, or in an enforcement country, and is a director of a company in that country. The changes also clarified the power of the Registrar of Companies to require verification of information upon request, and the Companies Registrar was given more power to identify the true owner of a company. These measures were designed to shore up New Zealand's company registration process against criminal activity.

Further information regarding the above can be found in the following documents, attached as **Appendix A**, which are also available at Inland Revenue's website ([www.ird.govt.nz](http://www.ird.govt.nz)) and the Ministry of Business, Innovation & Employment's website ([www.mbie.govt.nz](http://www.mbie.govt.nz)).

- Offshore Tax Transparency
- Cabinet Paper: Misuse of Companies and Limited Partnerships
- Cabinet Paper: New Zealand Company Registration Process

### **Publishing of OIA response**

Please note that Inland Revenue regularly publishes responses to requests that may be of interest to the wider public on its website. We consider this response is of public interest so will publish this response in due course. Your personal details or any information that would identify you will be removed prior to it being published.

Thank you again for your request.

If you have any further requests for information under the OIA, you can email [oja@ird.govt.nz](mailto:oja@ird.govt.nz) or send your request via post to:

Information Requests  
Inland Revenue  
PO Box 2198  
Wellington 6140

Please note that any requests for information relating to specific taxpayer information may be considered sensitive revenue information and is confidential under section 18 of the Tax Administration Act 1994 (TAA) unless disclosure of this information falls within any of the exceptions to the confidentiality obligation listed in sections 18D to 18J of the TAA.

Yours sincerely



Angela Graham  
**Policy Lead, International Tax**



Inland Revenue  
Te Tari Taake

# Offshore Tax Transparency



RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

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# Introduction from the Deputy Commissioner

I am proud of the milestones we have achieved in the recent years as we have successfully transformed Inland Revenue into a world class tax administration that contributes to the economic and social wellbeing of New Zealand by collecting and distributing money.



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The recent years have been among the most important not just for Inland Revenue but also in the New Zealand Government's history as we have worked very hard to modernise our country's entire tax and social policy system. Designing and delivering services and systems that facilitate compliance in a customer-centric manner remains a priority for Inland Revenue.

New Zealanders have already experienced the benefits of our new system since 2020, as Inland Revenue designed and deployed several COVID-19 relief initiatives in exceptionally short timeframes.

Most individuals and businesses comply voluntarily, and we try and make it as easy as possible for them. At the same time, we need to identify and address those who do not comply. Increasingly, we are using intelligence-led, evidence-based techniques, and a broad range of internal and external datasets to make decisions on how to best facilitate compliance domestically and globally.

We continue to work hard to ensure all businesses and individuals conducting cross-border transactions and investing overseas pay their fair share of tax. To this end we are working actively with other jurisdictions bilaterally and multilaterally to promote tax transparency through greater exchange of information. We have already seen this through initiatives such as the exchange of financial account data under the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS).

With the increasing complexities of globalisation, we will continue to actively participate in international solutions to facilitate compliance.

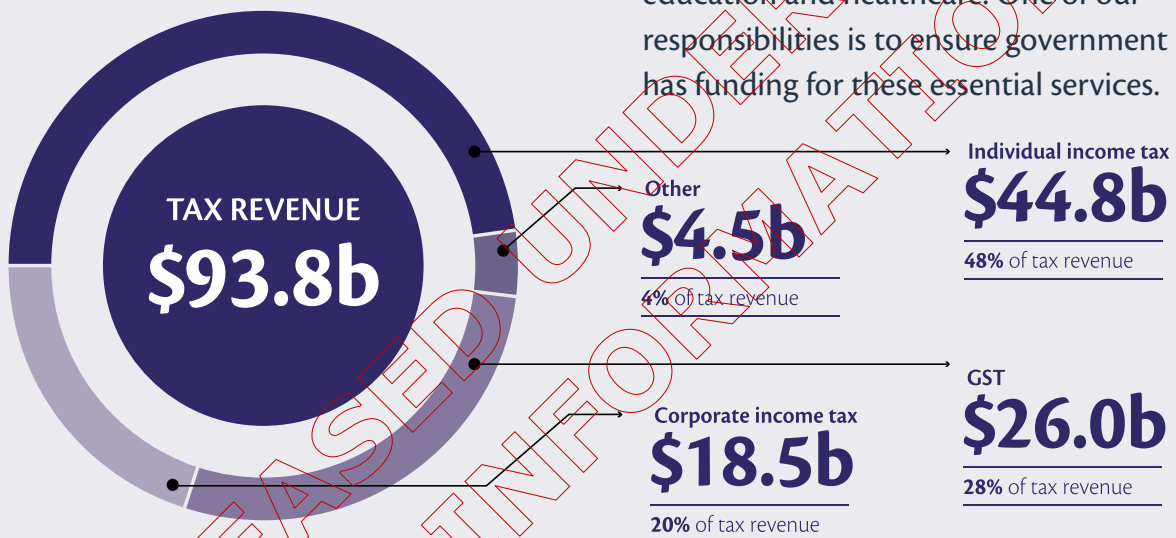
**Cath Atkins**

Deputy Commissioner of Inland Revenue  
Kaikōmihana Tuarua o Te Tari Taake

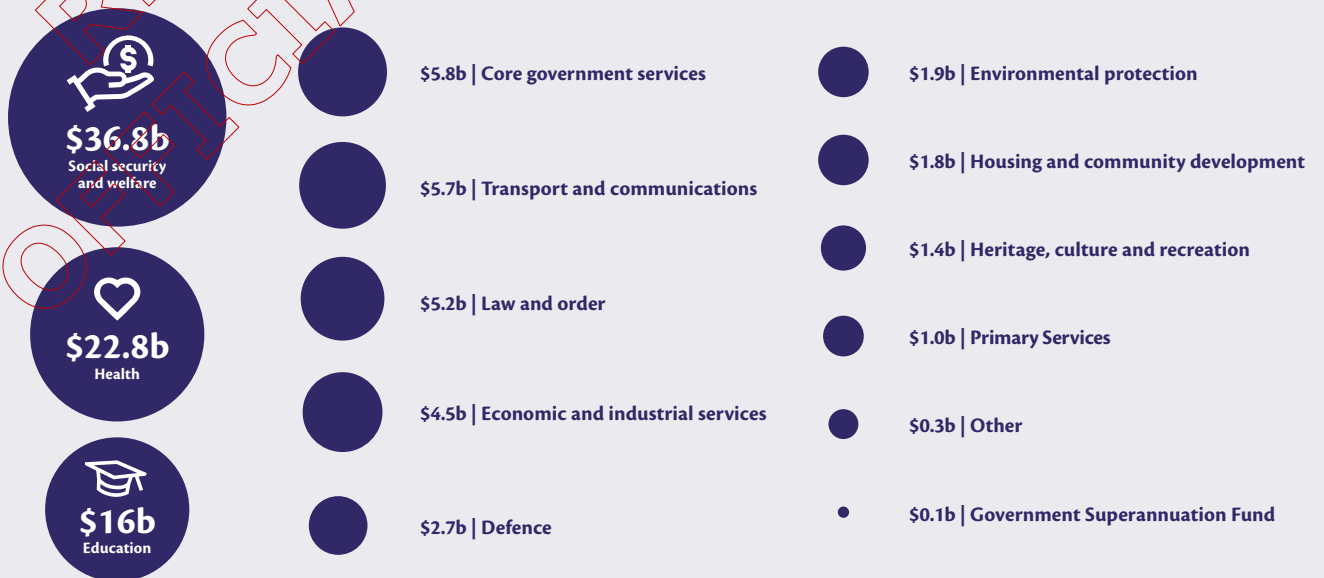
# What Your Taxes Pay For

All New Zealanders benefit from tax  
Ka whai hua ngā tāngata katoa o  
Aotearoa i ngā tāke

The money Inland Revenue collects helps pay for the public services that all New Zealanders benefit from, such as education and healthcare. One of our responsibilities is to ensure government has funding for these essential services.



In 2020–21, Government spend was as follows:



For full details see: <https://www.treasury.govt.nz/publications/efu/budget-economic-and-fiscal-update-2022>

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# New Zealand context

According to Statistics New Zealand census data, there are over 5 million New Zealand residents. Several thousand New Zealanders have also been coming back to New Zealand since March 2020, as the seriousness of the COVID-19 pandemic became apparent.

New Zealand individuals and businesses have become increasingly involved in international trade and investment. New Zealanders also have strong ties to other countries, including overseas family members, properties located offshore, overseas investment income and even overseas employment relations.

Although the vast majority of taxpayers voluntarily fulfill their tax obligations, some look for ways to evade or avoid paying their fair share. In doing so, they place an unfair burden on others and erode Government programmes from which all New Zealanders benefit.

The New Zealand Government wants a productive and inclusive economy, and needs a sustainable revenue base to fund improvements to the wellbeing of New Zealanders and their families. This means it is important for everyone to pay their fair share of tax in New Zealand.

New Zealand tax residents are generally required to pay tax on their worldwide income, even if they do not bring it into New Zealand and/or the other country or territory has deducted tax at source.

New Zealand taxes individuals on their worldwide income. This includes rental income from a property overseas; interest from an offshore bank account; and, dividends or deemed foreign investment income from a portfolio of overseas shares.

New Zealand has a self-assessment tax system, which is based on people voluntarily complying with their tax obligations. Taxpayers are best placed to assess their tax liabilities, and specific obligations are set out in law.

The integrity of the system is maintained because the majority of New Zealanders pay taxes and claim social support payments appropriately. They are confident in Inland Revenue's ability to take appropriate action against those who do not.

A significant portion of individual taxpayers (predominately salary and wage earners) are not required to submit an annual return and rely on the accuracy of pay-as-you-earn (PAYE) deductions made by their employer in respect of New Zealand-sourced income.

Income derived across an international border can potentially be subject to double taxation as a result of two countries taxing the same income. New Zealand relieves double taxation by unilaterally granting its residents credits for foreign tax paid on income that is also subject to New Zealand tax up to the amount of New Zealand tax liability on that income.

New Zealand has a network of 40 double tax agreements (DTAs) with its main trading and investment partners which refine and supplement the unilateral tax credit relief mechanism. The focus of DTAs is wider than the elimination of double taxation. They also reduce tax impediments to cross-border trade and investment and assist tax administration.

New Zealand has Tax Information Exchange Agreements (TIEAs) in force with 19 jurisdictions. These TIEAs allow the exchange of information for tax purposes between two jurisdictions.

New Zealand (along with over 140 jurisdictions) is also a signatory to the Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention). The Multilateral Convention facilitates tax information exchange between jurisdictions. It is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance - a top priority for all jurisdictions.

# Inland Revenue's role

Inland Revenue aims to be a world-class revenue organisation recognised for service and excellence.

Inland Revenue works with customers and other organisations to make compliance easy and to give New Zealanders confidence that everyone pays and receives the right amount.

Inland Revenue's role is to contribute to the economic and social wellbeing of New Zealand by collecting and distributing money.

We advise the Government on tax policy and the social policies we administer, together with other agencies where appropriate. This includes advising the Government on international tax issues and developing New Zealand's international tax legislation.

We have responsibility for, or a major role in:



Collecting revenue (most of the revenue we collect comes from income tax and GST)



Administering Working for Families Tax Credits, child support, KiwiSaver, student loans, paid parental leave, and unclaimed money



Sharing information with other agencies



Administering COVID-19 response packages - including the small business cashflow (loan) scheme and the resurgence support payment. We also support the Ministry of Social Development (MSD) to administer the wage subsidy scheme

Together with other government agencies we have a role to play in delivering inter-generational wellbeing and positive outcomes over time for all New Zealanders. This includes meeting our obligations under Te Tiriti o Waitangi and delivering on our role as part of the Māori Crown relationship.

Inland Revenue has been on a long Business Transformation journey to deliver a tax system fit for the future.

## The characteristics of that system are:

- > Greater speed and certainty through efficient self-management options for customers
- > Broader approach to compliance based on smarter use of information
- > A range of working relationships with other organisations
- > Excellence in technical work.

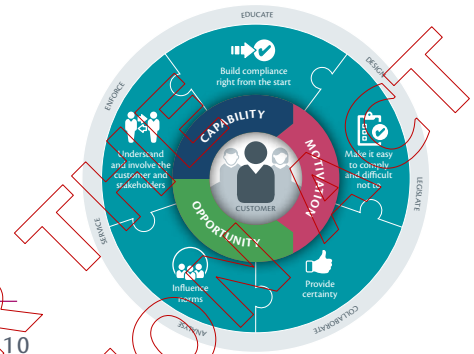
Over the last five years we have made huge leaps and bounds in terms of adopting a Right from the Start (RftS) approach. Our Business Transformation programme is based on the RftS principles, especially focusing on tax compliance by design.

Inland Revenue now has a modern, digital tax system that is serving the needs of New Zealanders and fits seamlessly into their lives. Inland Revenue has been able to play a key role since 2020 to support all New Zealanders through the COVID-19 pandemic.

Inland Revenue has designed and deployed several tax and non-tax initiatives at speed. Our new systems enabled Inland Revenue to design initiatives based on a high-trust model whilst having appropriate system checks in place to protect the integrity of each initiative and the overall tax base.

# Inland Revenue's international tax strategy

Inland Revenue's international tax strategy aligns well with Inland Revenue's Compliance Model which outlines the principles of how we interact with our customers.



SEE INLAND REVENUE'S FULL COMPLIANCE MODEL ON PAGE 10



International taxation matters can generally be divided into the following two categories:

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The taxation of cross-border flows of income
- 

International co-operation on both a multilateral and bilateral basis

Through the integration of this strategy, we expect to achieve a future state with the following characteristics:

- > A New Zealand economy made more competitive and productive by ensuring there is a level playing field for all tax-compliant customers, fewer competitive distortions and the lowest possible compliance costs
- > Increased assurance to the community that Inland Revenue is tackling abuse of our tax system, especially through our targeting of offshore arrangements involving low or no tax jurisdictions
- > Continued active collaboration across the globe with the aim to deliver the best outcomes right from the start for New Zealand.

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# Our international obligations/ standards

New Zealand is a member of the Organisation for Economic Co-operation and Development (OECD). The OECD has over many years promoted international co-operation in tax matters through exchange of information and has established the standard for what is effective exchange of information. This standard encourages transparency and information sharing in the global marketplace while facilitating tax compliance.

New Zealand fully endorses the OECD standard. In taxing residents generally on their worldwide incomes, transparency and information sharing are essential to facilitating compliance in New Zealand.

Exchange of information in New Zealand is governed by the relevant Exchange of Information Article of our DTAs or by TIEAs or through our far-reaching network enabled by the Multilateral Convention.

Through the DTAs, TIEAs and the Multilateral Convention New Zealand agrees with other countries to the following types of exchanges of information:

- > Automatic or routine exchanges of datasets
- > Specific exchanges on request
- > Spontaneous exchanges.

In recent years New Zealand has also expanded its exchange of information programme as it has implemented key transparency initiatives such as FATCA with the United States, the Common Reporting Standard and the minimum standards resulting from Actions 5 (exchanges of summaries of tax rulings) and 13 (country-by-country reporting) of the Base Erosion and Profit Shifting (BEPS) Action Plan.

Inland Revenue regularly collaborates with other tax authorities in exchanging intelligence and matching data. Liaising closely with these jurisdictions provides greater transparency of cross-border transactions. As a consequence, Inland Revenue has been able to take compliance action against New Zealand residents who are not returning their worldwide income or are involved in aggressive tax planning arrangements.

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## The Competent Authority

The role of the Competent Authority (CA) is defined in our tax treaties and generally involves serving as the primary point of contact for both domestic taxpayers with offshore links and competent authorities in other jurisdictions.

The CA function facilitates the exchange of information and intelligence with tax treaty partners, both individual requests for information and automatic exchanges of information (such as FATCA and CRS). Mutual agreement procedure cases to eliminate double taxation or resolve double taxation disputes are also handled by the CA function.

New Zealand's CA function sits within Inland Revenue's International Revenue Strategy (IRS) team. As New Zealand's competent authority office, IRS administers New Zealand's international tax agreements. The relevant contact details for the CA are listed on page 23 and our website - Who we are ([ird.govt.nz](http://ird.govt.nz)).

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# New Zealand's exchange of information programme

New Zealand has an extensive exchange of information programme and encourages international collaboration to the widest possible extent. New Zealand has signed up to several types of bilateral and multilateral exchanges.



## Exchange of Information on Request

These are exchanges where information is requested from or by a treaty partner in respect of specific taxpayers or transactions. As one of their duties, the competent authorities must satisfy themselves that the information in question can appropriately pass between the two jurisdictions under the terms of the relevant tax treaty, including satisfying the limitations placed on such exchanges on the grounds of trade secrecy, public policy, or inconsistency with domestic laws or practices.



## Exchange of Land Data

We annually exchange land data with many of our treaty partners. The data we exchange is a combination of information obtained from the land transfer tax statements received by Land Information New Zealand and our own internal tax data. We also receive similar information from some of our treaty partners which serves as good initial intelligence with an option to follow-up with further exchange of information requests during the course of more in-depth compliance work.



## Spontaneous Exchange of Information

These are exchanges where information is proactively provided from or by a treaty partner in respect of specific taxpayers or transactions. We endeavour to be as proactive as possible in initiating spontaneous exchanges of information where we consider our treaty partners may be adversely impacted by arrangements that we have come across through our local compliance work.

Information of this kind may relate to situations in which there is some reasonable suspicion that items shown in a New Zealand tax return may not be dealt with in a symmetrical fashion in a corresponding overseas return or may not have been disclosed abroad at all. More generally, there may be an indication that taxes are being avoided or evaded on transactions with an international dimension. The actual exchanges to treaty partners must still be made by the Competent Authority.



## Foreign Account Tax Compliance Act (FATCA)

New Zealand signed an Intergovernmental Agreement with the United States which resulted in changes to New Zealand's domestic legislation, and require financial institutions to send their annual FATCA disclosures directly to Inland Revenue to exchange subsequently with the US Internal Revenue Service.

New Zealand has been successfully exchanging this financial account information with the United States since September 2015, with US financial account data being provided in return.



## Automatic Exchange of Information – Common Reporting Standard (CRS)

The CRS requires jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions required to report, the types of accounts covered, as well as the due diligence procedures to be followed by financial institutions.

Currently there are well over 100 jurisdictions who have committed to this initiative on international tax transparency. New Zealand has been successfully exchanging CRS information around the world since September 2018 including with over 70 jurisdictions in 2021.

The increased transparency is a major step change which has altered the international tax landscape. This increased sharing of information on a regular basis creates the platform to deter, detect, and address tax evasion at an international level like never before. Access to this increased financial account information has further helped Inland Revenue realise its goal to be customer-centric and intelligence-led. We have been able to use this extensive information to further facilitate tax compliance in New Zealand.



## Collection Assistance Arrangements under DTAs/ Multilateral Convention

We have a robust infrastructure in place to support efforts to collect tax debt internationally. We continue to work on extending and enhancing international mechanisms for collecting tax debt from defaulters who have left our jurisdiction. Such mechanisms enable us to request our treaty partners to collect tax debt on our behalf and vice versa. In this regard, we have five Competent Authority Arrangements with countries where we have considerable traffic – Australia, Canada, Japan, the Netherlands and the United Kingdom.



## New Zealand Foreign Trusts (NZFTs)

A foreign trust is a trust set up in New Zealand with a New Zealand resident trustee, which has never had a New Zealand resident settlor. NZFTs are required to register with Inland Revenue and submit annual returns within six months of their balance date. NZFTs do not pay tax in New Zealand on their foreign-sourced income.

All the information collected during the registration and annual return process of an NZFT is shared with the Department of Internal Affairs (DIA) as the supervisor of trust and company service providers and the Financial Intelligence Unit (FIU) of the New Zealand Police. Both the DIA and FIU analyse and use the information provided as intelligence to feed into their inquiries and respective compliance programmes addressing money laundering and the financing of terrorism.

Where the trustee of an NZFT does not cooperate and the income tax exemption is revoked, we send the details of the settlor to the relevant tax treaty partner. This proactive exchange allows the other tax authority to also commence further inquiries into the settlor and the trust.

You can find more information on how to comply with the NZFT regime on our website - Foreign trusts with New Zealand resident trustees ([ird.govt.nz](http://ird.govt.nz)).

# Our compliance approach

Our compliance model underpins our customer-centric compliance approach.

Our compliance approach is based on the 'Right from the Start' approach that supports compliant behaviour, drives out error and at the same time reduces the possibilities of non-compliant behaviour. The intent is not just to reduce

unintentional mistakes but also to reduce the opportunities and occurrences of intentional evasion and to strengthen overall willingness to comply. We make proportionate responses to the risks identified and the behaviours exhibited.

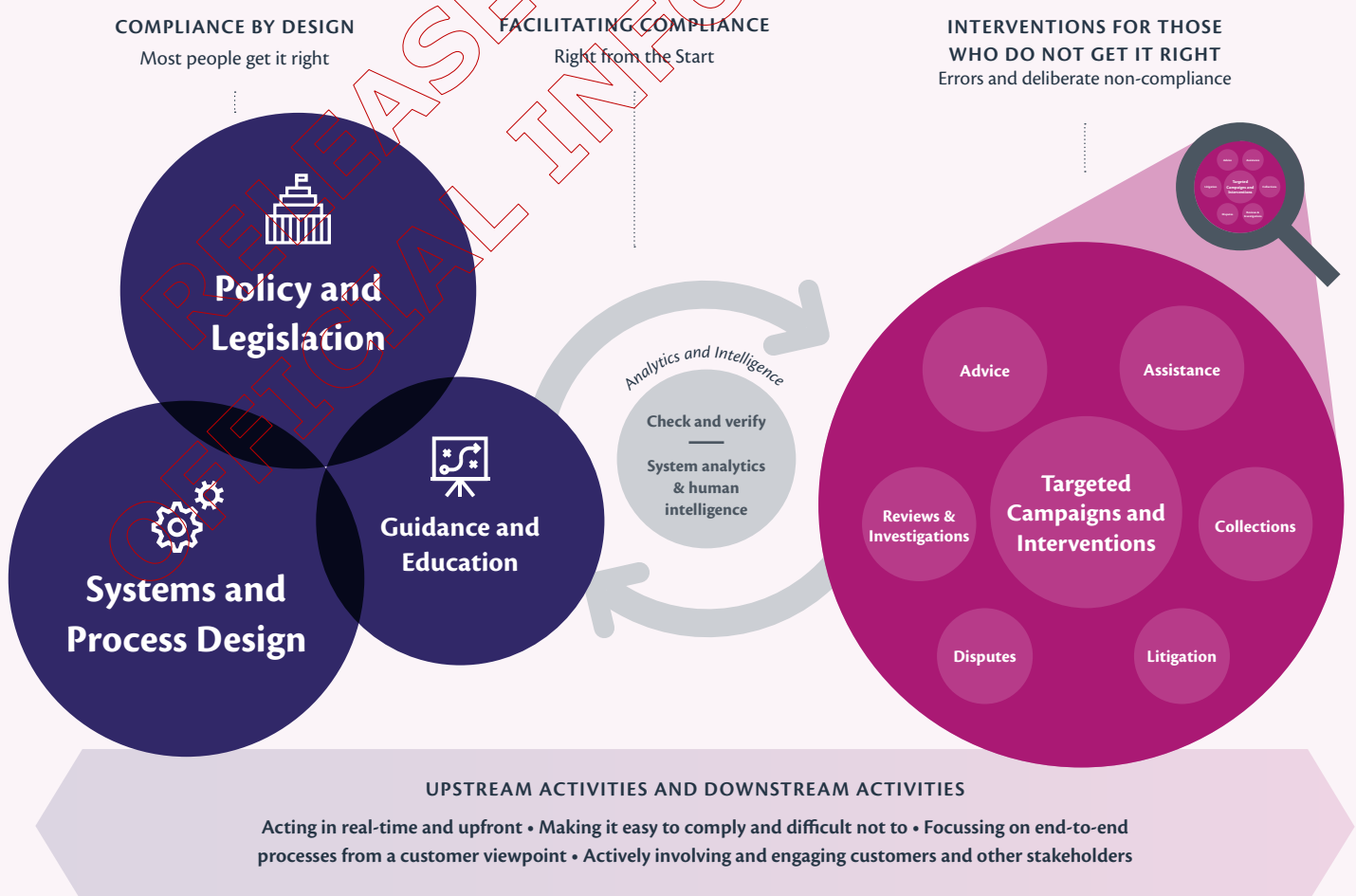


# Our compliance framework

The framework illustrated in the diagram below demonstrates what we have been able to truly achieve through the success of our multi-year multi-stage transformation programme. Through our programme we have been able to design our systems and introduce new policies that enable us to assure a larger part of our tax base which means we collect more revenue with reduced effort.

We have designed and enhanced our systems and processes to automate and make it easier for our customers. Through effective policy and smart system design buttressed by the appropriate guidance we are now able to ensure that most New Zealanders get the right tax treatment at the right time through the right channels with minimal effort on their part.

Through our transformation programme we have also gained a wide suite of sophisticated analytical capabilities which enable us to be more real-time and truly intelligence-led. These new capabilities coupled with human intelligence serve us well to design and deploy effective compliance campaigns, with a suite of multi-faceted tailored interventions. This ability to target our interventions to the right customers means we are only in the lives of those customers who are deserving of further inquiries and interventions.



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# Our compliance themes

The world has truly become a smaller place through globalisation and rapid technological advancements, which have only further accelerated through the necessities created by challenges associated with the COVID-19 pandemic.

Individuals and businesses are now working and investing across borders more than ever, especially as technological opportunities have arisen to work remotely, and the expectation is that this will continue as the new norm post the pandemic.

This changing landscape coupled with the need for governments to collect more tax to fund the COVID-19 relief initiatives has meant the area of international tax has become even more of a focus around the globe.

The aim of our international tax work is to collect 'the right amount of tax at the right time through the right channels' and to ensure we are compliant with all the international standards, retaining New Zealand's very good international reputation.

While New Zealand has a relatively compliant culture, we still need to be vigilant and reduce any opportunities for tax evasion and tax avoidance. This is especially the case where low or no tax jurisdictions can be used to evade or avoid tax obligations - for instance, where promoters may offer to set up and manage offshore trusts or companies that seek to conceal taxpayers' beneficial ownership of assets.

We are aware of the ease with which New Zealand companies, limited partnerships and foreign trusts can be formed and potentially used to exploit our legislation from abroad. We work with our treaty partners on joint compliance approaches and the increased transparency through the various exchanges of information to combat such threats.

## To this effect we focus on the following four key compliance themes:

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1

*Meeting our international obligations, through a comprehensive exchange of information programme*

2

*Effective use of the information and intelligence we receive from all our treaty partners, with a specific focus on New Zealanders with offshore investments and their tax residency status*

3

*Efficient administration of the New Zealand foreign trust regime*

4

*Supporting customers through any compliance issues arising as a result of the COVID-19 pandemic*

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# Our compliance approach in practice

We successfully meet all our international obligations every year, with strong support from all reporting New Zealand financial institutions in respect of FATCA and CRS requirements. New Zealand's financial institutions are required to collect relevant financial account information on their customers and submit it to Inland Revenue to exchange with our treaty partners.

Inland Revenue has reviewed the top 40 reporting financial institutions in the last two years to ensure they have the right systems and processes in place to be able to successfully deliver the quality of information required under the CRS. These 40 financial institutions cover over 95% of the reportable accounts in New Zealand. Overall, we are pleased with the efforts made across the great majority of the financial institutions within New Zealand. We are closely working with those financial institutions whose systems were identified as needing improvements.

New Zealand is now fortunate to receive considerable financial intelligence to which we had only limited access in the past. Through FATCA and CRS we receive information on individuals and related entities that includes tax identification numbers and financial account information (with details of the financial institution in which they have invested and the account balances).

We match all the information we receive to what we hold in our systems and take a risk-based approach to verify and address any variances, ranging from clarification of residency status through to assessment of undeclared offshore income.

Based on our analysis of this information, we have developed a number of compliance campaigns targeting in particular:

- Tax residence of highly mobile individuals
- Misuse of low or no tax jurisdictions

These campaigns create greater awareness and facilitate compliance. Since 2019, we have worked with almost 7,000 taxpayers and their agents to confirm they are meeting their international tax obligations in New Zealand and helped regularise tax affairs for those needing assistance.

The campaigns have brought in a number of other individuals and their associated tax obligations into our tax system. We have received more than 900 voluntary disclosures, and we expect to collect additional revenue annually from these customers without any further intervention. In nearly all other cases, satisfactory explanations and supporting information has been provided to enable verification.

We are also pleased to note that a number of New Zealanders heard about our campaigns third hand and have proactively made voluntary disclosures in respect of offshore income not previously returned, which highlights the benefits of this major transparency initiative and its wider deterrence effects.

We have seen many errors arising from a lack of awareness of obligations and the need to return overseas income in New Zealand, especially where the customers have had withholding tax deducted in other jurisdictions. Overall, we have found the majority of New Zealanders want to comply, the very few who are reluctant to cooperate are referred for more intensive audit examination.

# Top 10 facts

## ABOUT INTERNATIONAL TAX



Your tax residency **STATUS** in New Zealand is different from your immigration status.



In general, New Zealand tax residents pay income tax on their **WORLDWIDE** income while non-residents pay on income from New Zealand.



Your worldwide income can include **FOREIGN** income even if you have not repatriated it to New Zealand or you have paid tax on it in the other country or the income is exempt in the other country.



Some rules in New Zealand may tax **CAPITAL GAINS** and may do so even though the gain has not been realised. Examples include the foreign investment fund rules and financial arrangements rules.



New tax residents and former tax residents returning after **10 YEARS** may qualify for a temporary tax exemption on most, but not all, forms of foreign income.



New Zealand will usually give a **CREDIT** for tax paid to another country, capped at the amount of tax payable here on the foreign income.



We advise you to consult a tax **AGENT** knowledgeable in international tax if you're not sure how the law applies to your situation as some of the rules can be complex.



If New Zealand has a **DOUBLE** tax agreement with another country, it may affect how your income is taxed.



There are shortfall penalties for not declaring income but they can be reduced by up to 100% if you make a **VOLUNTARY** disclosure.



Inland Revenue exchanges financial **INFORMATION** about taxpayers annually with many other countries and matches it to tax returns.

# Helping you get it right from the start...

We have provided assistance to taxpayers and their agents in relation to foreign income, covering a number of issues:

## Transitional residence

There is a 48-month period for transitional residents. If this time is exceeded, transitional residents become subject to New Zealand tax on their worldwide income. The period of transitional residence begins on the first day of residence in New Zealand.

It ends on the earlier of:

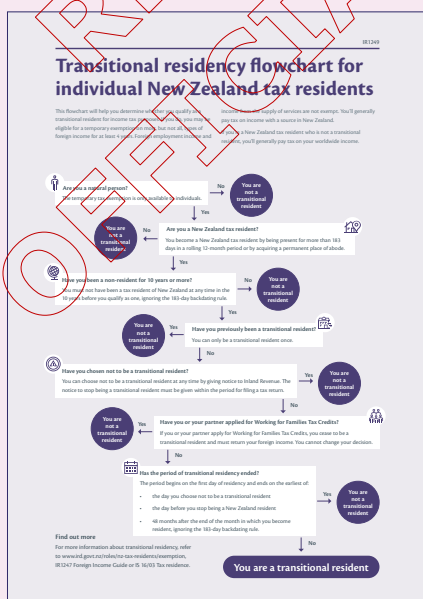
- when the person stops being a New Zealand tax resident
- on the last day of the 48th month after the month in which they first satisfied the tax residence tests.

You can also lose your transitional residence status if you or your partner apply for Working for Families Tax Credits or if you opt out.

In general, foreign-sourced income is exempt when earned by a transitional tax resident except for the following:

- foreign-sourced employment income
- foreign-sourced income relating to services.

Some transitional residents may have planned to leave the country before the 48-month transitional residence period ended but because of COVID-19, they have been unable to easily leave the country. A person should not be regarded as no longer a transitional resident just because they are stranded in New Zealand because of COVID-19. If a person leaves New Zealand within a reasonable time after they are no longer practically restricted in travelling, then extra days (i.e. when the person was unable to depart) will be disregarded.



SEE INLAND REVENUE'S TRANSITIONAL RESIDENCY FLOWCHART FOR INDIVIDUAL NEW ZEALAND TAX RESIDENTS ON PAGE 19

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## Foreign dividend income and the foreign investment fund (FIF) rules

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If you are a New Zealand tax resident who is not a transitional resident and own shares in a foreign company, the FIF rules may apply.

You need to calculate FIF income from a shareholding in a foreign company when:

- > the total cost of all your FIF interests is over \$50,000
- > the shareholding is not exempt from the rules.

If you or your shareholding is exempt from the FIF rules, other rules apply. You'll usually need to include any dividends you receive in your IR3 return and may have to pay tax on any gains from trading or buying with the purpose of sale.

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## Foreign dividend income and the controlled foreign company (CFC) rules

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If you are a New Zealand tax resident who is not a transitional resident and have an income interest of 10% or more in a CFC, you may have to pay tax on income attributed from that company.

"Control" for CFCs usually means total ownership of the non-resident company by a New Zealand resident. However, control can exist where:

- 5 or fewer New Zealand residents have a control interest of more than 50%
- 5 or fewer New Zealand residents control the shareholder decision rights
- a single New Zealand resident has a control interest of 40% or more, and no non-associated non-resident owns a larger control interest.

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## Foreign interest income and the financial arrangements rules

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If you are a New Zealand tax resident and party to a financial arrangement, you may have income under the financial arrangements rules.

Financial arrangements involve a deferral between when money is provided and when it's returned. Common examples are bank accounts and term deposits held in foreign currencies.

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## Foreign pension income and the foreign investment fund rules

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If you are a New Zealand tax resident who is not a transitional resident and are a beneficiary or member of a foreign superannuation scheme, you may have to calculate FIF income and include it in your IR3 return. If this is the case, you do not have to include the pension payments.

If the FIF rules do not apply, the pension payments received from a foreign superannuation scheme are taxable and need to be included in your IR3 return.

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## Foreign superannuation scheme withdrawals and the foreign investment fund rules

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If you are a New Zealand tax resident who is not a transitional resident and have an interest in a foreign superannuation scheme, you might have to pay tax on lump sum withdrawals or transfers.

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## Foreign rental income

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If you are a New Zealand tax resident who is not a transitional resident and own rental property overseas, you would generally need to pay tax on any rental income.

The rules for calculating income in the other country may differ from New Zealand and require you to make adjustments.

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## Foreign property gains

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If you are a New Zealand tax resident who is not a transitional resident and purchased a property overseas with the intention of selling it, any gains may be taxable even if the property was your main home and even if you also paid tax overseas.

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## Foreign social security pensions

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If you are a New Zealand tax resident who is not a transitional resident and receive a social security pension from another country, you will usually have to pay tax on it here.

If the other country also deducts tax, you may be able to claim a foreign tax credit in your tax return.

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## Foreign beneficiary income and taxable distributions from trusts

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If you are a New Zealand tax resident who is not a transitional resident and a beneficiary of a trust, you are generally taxable on your worldwide income. This can include beneficiary income and taxable distributions from any trust or estate overseas.

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## Taxpayers working remotely in New Zealand for overseas employers

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With the emergence of COVID-19 there have been a large number of New Zealanders returning to New Zealand and continuing to work remotely for non-resident employers, who have no other presence here. In addition, there have been visitors deciding to stay in New Zealand or come to New Zealand due to the COVID-19 pandemic, who are working remotely for their overseas employer while in New Zealand. Both of these scenarios pose different tax issues that need to be considered.

An exemption is provided for certain income that a non-resident derives from performing personal or professional services in New Zealand during a short-term visit of less than 92 days. If the visit is for more than 92 days, all income derived from the time of arrival is subject to tax in New Zealand. However, it is worth noting that this can be extended to 183 days, if there is a DTA between New Zealand and the other jurisdiction of residence, in terms of the employment/income for dependent services article.

New Zealand-based overseas employees should register as IR56 taxpayers, to ensure PAYE is still deducted in the scenarios outlined above. This means filing monthly PAYE returns declaring your salary and wages; and, paying PAYE to Inland Revenue.

In addition, if New Zealand has sole taxing rights in terms of a DTA you will be unable to claim a foreign tax credit. This relates to the tax that your employer may still be deducting for the salary and wages they are paying you from overseas. So that you are not double taxed, you will need to approach your overseas-based employer and request that they not deduct tax from your salary and wages. You will need to liaise with your employer and approach the overseas tax authority to request a refund of tax incorrectly deducted from your salary and wages while you have been working in New Zealand.

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# Offshore is no longer off limits



**OFFSHORE** investments have become far more transparent with the automatic exchange of financial account data under New Zealand's extensive network of international tax treaties.



All G20 countries, OECD members and offshore finance centres have **COMMITTED** to the exchange of information standards set through the OECD.



Inland Revenue has close working relationships with major tax treaty **PARTNERS** and is an active participant in both bilateral and multilateral projects dealing with data leaks such as the Panama Papers and the Pandora Papers.



Taxpayers should be wary of any offshore arrangement involving secrecy or concealment – arrangements that involve disguised ownership or hidden income should be treated with great **CAUTION**.



Make no mistake – increased international co-operation, improved technology and risk assessment capabilities, as well as the intelligence we continue to obtain, all mean it's very unwise to not declare offshore **INCOME**.



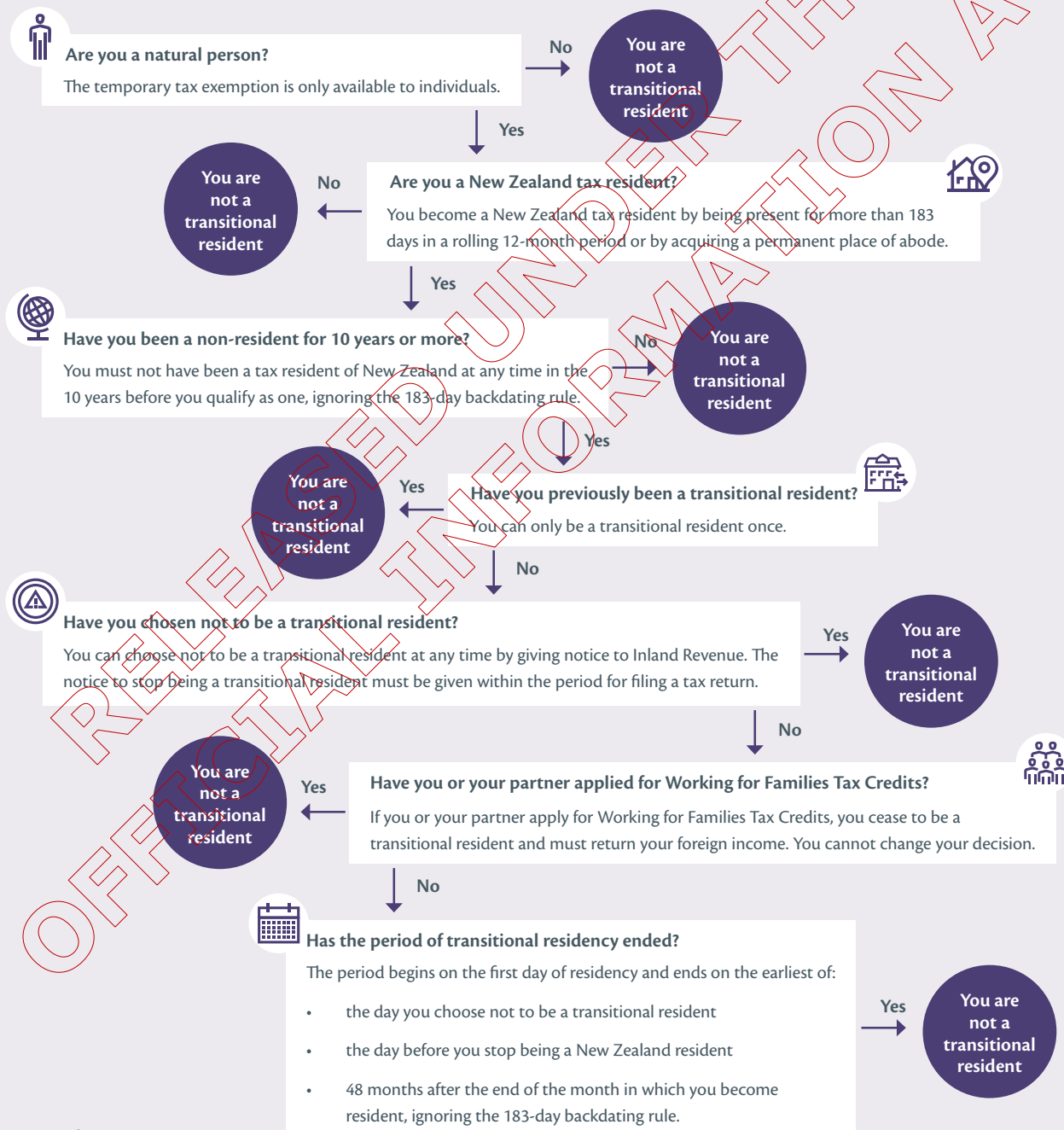
If you have not declared offshore income, then you should think seriously about taking professional advice to **REGULARISE** your taxation affairs through filing proactively a voluntary disclosure with Inland Revenue.

# Transitional residency flowchart for individual New Zealand tax residents

This flowchart will help you determine whether you qualify as a transitional resident for income tax purposes. If you do, you may be eligible for a temporary exemption on most, but not all, types of foreign income for at least 4 years. Foreign employment income and

income from the supply of services are not exempt. You'll generally pay tax on income with a source in New Zealand.

If you're a New Zealand tax resident who is not a transitional resident, you'll generally pay tax on your worldwide income.



**Find out more**

For more information about transitional residency, refer to [www.ird.govt.nz/roles/nz-tax-residents/exemption](http://www.ird.govt.nz/roles/nz-tax-residents/exemption), IR1247 Foreign Income Guide or IS 16/03 Tax residence.

**You are a transitional resident**

# International collaboration

Inland Revenue actively collaborates with treaty partners to identify and combat any opportunities for offshore evasion and other aggressive tax planning matters. Stronger collaboration and international partnerships provide earlier insights into schemes that are developed abroad and subsequently marketed in New Zealand. The various exchanges of information provide considerable intelligence.

Increasing level of globalisation has made international collaboration more of a necessity than an option. This collaboration provides assurance that Inland Revenue is aligned to international best practice. Specifically, this enables:

**New Zealand to meet its international obligations**

**The enhancement of our reputation internationally**

**Capacity building through international learning opportunities and sharing best practices**

There are several key international networks in which Inland Revenue actively participates.

## OECD standards

Our commitments to internationally agreed standards account for the vast bulk of our resource committed to meeting our international obligations. All of the international exchange of information standards are set by consensus at the OECD and have a direct impact on Inland Revenue's international tax strategy and policy settings.

## Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC)

Inland Revenue actively participates in the JITSIC Network which brings together over 35 of the world's national tax administrations that have committed to more effective and efficient ways to deal with tax avoidance. The network provides tax administrations with an agile mechanism for information exchange and collaboration, while ensuring that all exchanges of information are in accordance with the provisions of an effective bilateral or multilateral tax convention or a tax information exchange agreement. Inland Revenue has benefited through the sharing of intelligence and strategies dealing with emerging international tax risks as well as advances in analytical techniques and best practice compliance approaches. We also benefit from collective evaluation of major international data leaks via JITSIC, such as the Panama Papers and more recently the Pandora Papers.

## Study Group on Asia-Pacific Tax Administration and Research (SGATAR)

Inland Revenue is a member of SGATAR and actively participates in all SGATAR-related activities, which facilitate greater understanding between all Asia-Pacific nations, their context and what drives their respective compliance approaches.

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# International capacity building

Inland Revenue plays an active role on the global stage, assisting other countries' tax organisations to build their capabilities. We provide experts on an ongoing basis to train other tax administrations in all aspects of international exchange of information.

## Outreach to Asia-Pacific region

Working with international partners, we have been especially focused on supporting the implementation of international tax standards in Asia and the Pacific. We work closely with

OECD (Global Relations), SGATAR, and the Pacific Islands Tax Administrators Association (PITAA) to provide one-to-many outreach tax technical assistance.

Inland Revenue is a significant partner in the Pacific Initiative, a joint effort launched in 2020 involving the Australian Taxation Office, the Asian Development Bank, the Global Forum on Transparency and Exchange of Information for Tax Purposes, the OECD, PITAA and the World Bank Group. This initiative has been established to support the efforts of 16 Pacific jurisdictions in the phased implementation of tax transparency standards to prevent tax evasion and avoidance, while strengthening domestic resource mobilisation, taking into account the circumstances and specific needs of the Pacific Islands.

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# International disputes – Mutual Agreement Procedure

New Zealand has 40 DTAs, each with an article establishing a mutual agreement procedure (MAP) for resolving difficulties arising out of the application of the particular DTA. New Zealand has 11 TIEAs in force which also contain a MAP article, as well as 6 supplementary agreements to these TIEAs which include a MAP article.

Under the MAP article, the competent authorities of the contracting states engage with each other and endeavour to resolve disputes that arise from the way one or both contracting states are interpreting or applying the particular DTA. This process effectively equips the tax administrations with the practical means to ensure that cross-border income earning activity is taxed correctly in accordance with DTAs.

Our overall aim is to complete MAP cases within 12 months of receiving a request for assistance. The time taken to resolve MAP cases will vary depending largely on the complexity of the matter in dispute. We have experienced a moderate case load in recent years with good turnaround times.

New Zealand is a member of the Forum on Tax Administration's MAP Forum and has committed to resolving treaty-related disputes within an average timeframe of 24 months. We have also been subject to a rigorous peer review by the MAP Forum, the main recommendation being that we update a number of our older DTAs to the latest wording of the OECD Model Tax Convention, which we are progressing.

For further details on how to apply for a MAP request you can go to our website - [Mutual agreement procedure \(MAP\) \(ird.govt.nz\)](#).

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# What's on the horizon?

Inland Revenue will continue to run compliance campaigns to verify and facilitate compliance by New Zealand tax residents in returning their offshore income.

We have an ongoing monitoring programme:

- ensuring customers continue to return their overseas income as agreed during recent reviews carried out
- verifying customer records against additional information received from treaty partners for later years.

Inland Revenue has been working hard to assist customers regularise their tax affairs, and in most cases a voluntary disclosure has been accepted and penalties reduced. However, if the position is not maintained in future years (without a valid reason, i.e. a change in circumstances) or we receive additional information as to previously undisclosed sources of offshore income, then the review of these customers will be escalated to more in-depth examination.

In the spirit of increasing tax transparency to facilitate international tax compliance, the OECD has been working on two major new initiatives to address information gaps, leveraging off concepts and principles established in formulating the CRS.

## Gig and Sharing Economy

Over the last decade, the ability for buyers and sellers to connect through electronic marketplaces and digital platforms has created a new kind of economic activity which is becoming increasingly popular. This rapid growth of the gig and sharing economy has resulted in governments across the world evaluating their tax systems to ensure that tax settings do not create barriers to sensible economic activities, and also to ensure that tax is collected in respect of these activities.

The gig and sharing economy has the potential to generate economic benefits, providing innovative services for consumers and opportunities for employment that are flexible and accessible. However, the gig and sharing economy business model does not fit neatly within existing tax rules and administration.

There are various options to address this issue, including opportunities to improve compliance of sellers with their tax obligations, and increase fairness between traditional sellers and sellers operating in the gig and sharing economy.

The new OECD initiative establishes a best practice for jurisdictions to collect and exchange information, creating further transparency in relation to the operations of these platforms and in particular the income derived by sellers.

## Crypto Assets

The rise of crypto assets which are frequently offered, traded and serviced by non-regulated or lightly-regulated intermediaries has picked up considerable speed in the last few years.

The OECD is developing a framework for crypto-asset reporting by brokers, dealers and exchanges. It is proposed that these intermediaries report information about crypto-asset holdings and transactions, ensuring a level playing field with traditional financial products. Under this initiative, jurisdictions would then share this information with each other to give tax administrations visibility and enable effective risk assessments to be carried out.

# Contacts

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# Glossary

<p><b>CA</b> Competent Authority</p>	<p><b>CFC</b> Controlled Foreign Company</p>	<p><b>CRS</b> Common Reporting Standard</p>
<p><b>DIA</b> Department of Internal Affairs</p>	<p><b>DTA</b> Double Tax Agreement</p>	<p><b>FATCA</b> Foreign Account Tax Compliance Act</p>
<p><b>FIF</b> Foreign Investment Fund</p>	<p><b>FIU</b> Financial Intelligence Unit</p>	<p><b>G20</b> Group of 20 Highly Developed Countries</p>
<p><b>GST</b> Goods and Services Tax</p>	<p><b>IRS</b> International Revenue Strategy</p>	<p><b>JITSIC</b> Joint International Taskforce on Shared Intelligence and Collaboration</p>
<p><b>MAP</b> Mutual Agreement Procedure</p>	<p><b>NZFT</b> New Zealand Foreign Trust</p>	<p><b>OECD</b> Organisation for Economic Co-operation &amp; Development</p>
<p><b>PAYE</b> Pay As You Earn</p>	<p><b>PITAA</b> Pacific Islands Tax Administrators Association</p>	<p><b>RftS</b> Right from the Start</p>
<p><b>SGATAR</b> Study Group on Asia-Pacific Tax Administration and Research</p>	<p><b>TIEA</b> Tax Information Exchange Agreement</p>	

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# For more information please refer to:

- > [www.ird.govt.nz/international-tax/exchange-of-information/crs](http://www.ird.govt.nz/international-tax/exchange-of-information/crs)
- > [www.ird.govt.nz/international-tax/exchange-of-information/fatca](http://www.ird.govt.nz/international-tax/exchange-of-information/fatca)
- > [www.ird.govt.nz/international-tax/double-tax-agreements](http://www.ird.govt.nz/international-tax/double-tax-agreements)
- > [www.ird.govt.nz/international-tax/foreign-trusts-nz-resident-trustees](http://www.ird.govt.nz/international-tax/foreign-trusts-nz-resident-trustees)
- > [www.ird.govt.nz/international-tax/business/transfer-pricing/practice-issues/controlled-foreign-companies](http://www.ird.govt.nz/international-tax/business/transfer-pricing/practice-issues/controlled-foreign-companies)
- > [www.ird.govt.nz/income-tax/income-tax-for-businesses-and-organisations/types-of-business-income/foreign-investment-funds-fifs](http://www.ird.govt.nz/income-tax/income-tax-for-businesses-and-organisations/types-of-business-income/foreign-investment-funds-fifs)
- > [www.ird.govt.nz/income-tax-for-businesses-and-organisations/types-of-business-income/interest-and-dividends/financial-arrangements-rules](http://www.ird.govt.nz/income-tax-for-businesses-and-organisations/types-of-business-income/interest-and-dividends/financial-arrangements-rules)

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[www.ird.govt.nz](http://www.ird.govt.nz)

**In Confidence**

**OFFICE OF THE MINISTER  
OF COMMERCE**

The Chair  
**Cabinet Economic Growth and Infrastructure Committee**

**Misuse of New Zealand Companies and Limited Partnerships**

**Proposal**

That Cabinet agree to a number of measures aimed at reducing the misuse of New Zealand companies

**Executive Summary**

There is evidence that individuals and groups (particularly offshore interests) are misusing the New Zealand company incorporation regime and consequently threatening the international reputation of New Zealand.

Cabinet has agreed to some measures to address such misuse, which have been included in the Companies and Limited Partnerships Amendment Bill (the Bill) [EGI Min (10) 17/5 refers]. The Bill is currently before the Commerce Committee.

Since 2010, 248 New Zealand companies have been identified as being allegedly involved in facilitating crimes. This averages at more than eight companies a month, a significant increase from a rate of less than three companies a month between 2006 and 2010.

The removal of New Zealand from the European Union banking and corporate "white list" in February 2011 further highlighted the misuse of New Zealand companies. The activities of New Zealand registered shell companies have been linked to this removal, although the European Union's requirements relate primarily to anti-money laundering and terrorism financing controls. These will be addressed through the commencement of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 next year. The proposals in this paper relate to company and limited partnership incorporation and enforcement processes.

In light of the adverse impact of these issues on New Zealand's reputation as a well regulated jurisdiction, I recommend that Cabinet consider a number of further changes to the Companies Act 1993. The objective of these proposals remains to maintain and enhance the current high reputation of New Zealand as a place to do business. The proposals have been considered against the following requirements:

- a. An efficient company registration regime should remain a competitive advantage for New Zealand;
- b. Any measures should be effective in reducing misuse of the company registration regime;
- c. The costs of legitimate businesses should be minimal unless the benefits can be clearly demonstrated to outweigh those costs; and
- d. That, where possible, there are benefits of aligning with the Australian regime.

## In Confidence

I consider the amendments detailed below to meet these requirements. I have also been advised that they would not impact on New Zealand's World Bank ranking for either starting a business or for ease of doing business.

These measures, which are outlined in a table in **Annex 1**, can be grouped into three categories:

### **Accountability –**

- Requiring companies to have a director who is either a resident of New Zealand or a resident director in a prescribed enforcement country (initially Australia). Having a director who is resident in New Zealand or Australia will ensure that someone accessible to enforcement agencies is legally liable for the actions of the company.
- This measure will impact approximately 4,200 out of the 550,000 companies on the Register (0.77 per cent). Note however, around 1,200 of the 4,200 companies affected have been categorised as “high risk” by the Companies Office. It is therefore estimated that fewer than 3,000 legitimate companies will be affected by this change.
- These companies will need to hire a New Zealand resident director, at a cost ranging from a few thousand dollars to around \$50,000. This will only be an additional cost for these companies if they choose to hire an additional director rather than replacing an existing overseas based director.

### **Transparency –**

- Requiring disclosure of the date and place of birth of directors. This measure will better enable the identification of directors and will have negligible costs on business.
- Requiring companies to disclose their ultimate holding company, if they have one. This measure will provide public transparency so that persons dealing with a company can know where “control” ultimately lies. The costs on companies impacted by this measure will be low.

### **Enforcement –**

- Expanding the Registrar's power to seek information on the ultimate ownership and control of a company.

I recommend that these changes are applied to the Limited Partnerships Act 2008, to the extent that they are applicable. I further propose that Cabinet delegate responsibility to the Minister of Commerce, the Minister of Economic Development and the Minister of Finance to determine the extent to which these measures are applied to limited partnerships and the appropriate transitional provisions required to implement these measures.

The Bill would provide the appropriate legislative vehicle for progressing the recommended measures. If agreed, these proposals will be included as recommendations in the Ministry of Business, Innovation and Employment's departmental report to the Commerce Committee.

# In Confidence

## Background

- 1 Criminals use multiple layers of corporate structures to hide a variety of serious crimes including money laundering, trafficking arms and illegal substances, and fraud, often with the assistance of lawyers, accountants, financial service providers and company formation agents. Corporate structures can be used by criminals to mask the source of funds used to buy property, conceal true ownership of property, maintain control of criminal proceeds and assets and obscure the link between illegal activity and assets. These layers make it exceptionally difficult for law enforcement agencies to identify individuals and hold them to account.
- 2 There is evidence that individuals and groups (particularly offshore interests) are misusing the New Zealand company incorporation regime and consequently threatening the international reputation of New Zealand. High profile or repeated instances of foreign-controlled New Zealand companies engaging in criminal activities overseas are likely to seriously impact New Zealand's international standing.
- 3 The primary causes of this increase in misuse of New Zealand's company registration system are:
  - a. The unprecedented promotion of New Zealand incorporated companies to wholly overseas interests by trust and company service providers (TCSPs);
  - b. The lack of information required about the beneficial ownership and control of New Zealand companies in comparison to similar well regulated jurisdictions such as Australia; and
  - c. The ability of persons based overseas to register a company in New Zealand via the internet or a TCSP, with no substantive link to, or apparent intention of operating in, New Zealand.
- 4 The Government has introduced a number of reforms to strengthen New Zealand's company registration system, while at the same time maintaining its reputation as a good and easy place in which to conduct business. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the AML-CFT Act), which comes into force on 30 June 2013, will impose a number of due diligence requirements on New Zealand based TCSPs. These providers will be reporting entities under this Act, requiring them to undertake identity verification and risk assessments and to report any suspicious matters to the NZ Police Financial Intelligence Unit. Overseas-based TCSPs will not be subject to this requirement.
- 5 In addition, the Companies and Limited Partnerships Amendment Bill (the Bill) includes a number of measures intended to reduce the misuse of New Zealand's companies regime and to give the Registrar of Companies (the Registrar) enhanced powers to respond to risks relating to the integrity of information recorded on the companies register (agreed by Cabinet in 2010 [EGI Min (10) 17/5 refers]).
- 6 The Bill passed its first reading in the House on 24 July 2012 and was referred to the Commerce Committee for consideration. The Committee has received 13 submissions on the Bill, a number of which propose that further measures to reduce the potential for misuse of New Zealand companies should be included in the Bill.

## In Confidence

### Developments

- 7 Since Cabinet's decision in 2010, a number of further incidents of the misuse of New Zealand entities for money laundering, fraud and tax evasion in overseas jurisdictions have come to light. Since 2010, the New Zealand Police Financial Intelligence Unit and Interpol have received 171 requests for assistance regarding 248 companies allegedly facilitating crimes. This averages at more than eight companies a month, a significant increase from the rate of less than three companies a month between 2006 and 2010. In almost all cases, limited information is able to be provided concerning the activities of the companies concerned, or who ultimately controls them.
- 8 A number of these cases have received considerable media attention and may have already damaged New Zealand's reputation as a well regulated jurisdiction. While the Companies Office is undertaking increased risk assessment of companies, there are limits to the effectiveness of this work under the current legislation. There has been specific criticism of the measures included in the Bill as not going far enough to prevent pervasive misuse of New Zealand-registered companies.
- 9 The misuse of New Zealand companies was further highlighted after New Zealand was removed from the European Union banking and corporate "white list" in February 2011. The activities of New Zealand registered shell companies have been linked to this removal, although the European Union's requirements relate primarily to anti-money laundering and terrorism financing controls. The commencement of the AML-CFT Act will put in place the measures required by the European Union in this area.
- 10 I am also aware of reputational issues involving the misuse of building societies and the Financial Service Providers Register. Officials are examining whether further measures are required to address these issues and will provide me with advice on these matters by the end of the year.
- 11 It is my view that in light of this information a number of further amendments to the Companies Act 1993 and the Limited Partnerships Act 2008 should be considered in order to improve the accountability, transparency and enforcement of these regimes. These proposals have developed out of Cabinet's request for further measures to improve 'legal person transparency' and assist the investigation and prosecution of serious crime [DES (11) 2/3 refers]. These measures are outlined in a table in **Annex 1**. They have been considered against the following requirements:
  - a. An efficient company registration regime should remain a competitive advantage for New Zealand;
  - b. Any measures should be effective in reducing misuse of the company registration regime; and
  - c. The costs of legitimate businesses should be minimal unless the benefits can be clearly demonstrated to outweigh those costs.
- 12 I consider the amendments detailed below to meet these requirements. I have also been advised that they would not impact on New Zealand's World Bank ranking for either starting a business or for ease of doing business.

## In Confidence

### Accountability Measure

#### Requiring New Zealand Companies to have a Resident Director

- 13 I recommend all New Zealand incorporated companies be required to have a director who is either a resident of New Zealand or a resident director in a prescribed enforcement country.
- 14 The Bill, as it currently stands, requires companies to have either a resident director or a resident agent. It includes an exemption for companies with resident directors in an enforcement country, which will include Australia. My proposal would involve removing the resident agent option from the Bill, but retaining the enforcement country exemption. The Companies Office would be able to require confirmation of residency on a risk assessed basis.
- 15 While the resident agent requirement was considered better than the status quo, it will only provide limited deterrence, as many criminals who seek to register a New Zealand company already use a local agent. The proposed duties for resident agents are not onerous and the penalties for non-compliance are light. There is no obligation for a resident agent to know much at all about the company they represent. In fact, it would be in their interests to know less rather than more about any such company.
- 16 Resident agents will therefore be of limited help to enforcement agencies and will in many cases not be legally liable for the actions of the company. Also, as there is no clear legislative precedent for such a company officer, the legal requirements necessary to underpin their functions and duties are novel and untested.
- 17 Requiring a resident director (without the alternative of a resident agent) would ensure that there is a person in New Zealand to hold criminally liable for the company's actions. Of the companies that have been identified as being involved in money laundering, fraud and tax evasion in overseas jurisdictions, a large number do not or did not have a resident director. I note that requiring a resident director is also consistent with the approach taken in a number of other jurisdictions, including Australia.
- 18 In addition, requiring a resident director would create a significant barrier for overseas based TCSPs that register companies in New Zealand. That is, offshore based TCSPs will need to seek the agreement of a New Zealand resident to act as a director for these companies, which may be difficult considering the legal liability associated with acting as a director. As noted above, New Zealand based TCSPs will be required to undertake due diligence and report suspicious matters to the Department of Internal Affairs under the AML-CFT Act.
- 19 The exemption of companies with resident directors from prescribed enforcement countries (Australia initially) is a compromise designed to ensure that this change does not impact Australia-based New Zealand companies, which currently make up the majority of companies without a New Zealand resident director. Additional countries will also be able to be prescribed if the Government is confident that they would impose New Zealand criminal fines.

## In Confidence

### *Impact*

- 20 The requirement for a resident director would therefore only impact the less than one per cent of New Zealand registered companies that are estimated not to already have a resident director in either New Zealand or Australia (4,200 out of 550,000). This figure is an estimate because information regarding directors' country of residence is only available for about 85 per cent of companies.
- 21 Around 1,200 of the 4,200 companies affected have been categorised as "high risk" by the Companies Office since risk assessment began in 2010. These companies are still on the register as they meet the current registration requirements. Many of these companies have been created by the 77 TCSPs that the Companies Office monitors. A number of companies that have previously been placed in this category have subsequently been tied to criminal activity. Deterring these entities from continuing to trade on New Zealand's reputation is a benefit rather than a cost to the New Zealand economy.
- 22 Therefore less than 3,000 of the companies affected are likely to be legitimately carrying on business in New Zealand. It should be noted a significant number of these companies are likely to be shell companies that have not yet been identified by the Companies Office.
- 23 I acknowledge that some companies may wish to have New Zealand subsidiaries, without New Zealand based directors, for legitimate governance reasons; however, these companies will have a range of options with different costs for complying with the new requirement.
- 24 Firstly, legitimate companies with substantive operations in New Zealand could hire a New Zealand based director. According to the Institute of Directors, average directors' fees are in the order of \$33,000 per year. The larger companies will pay an average of \$50,000 while at the very small end of the scale the fees would be around a few thousand dollars. These costs will only be incurred if a company decides to increase the size of its board rather than replacing an existing director. There may also be additional costs associated with the complication and inconvenience of having a director who is based in a different country to the rest of a company's board.
- 25 Companies that incorporate in New Zealand in order to hold intellectual property will need to hire a resident director, however I expect that the director fees would be low, reflecting the fact that the company is inactive.
- 26 Some resident directors may choose to act as a "proxy" for an overseas person by signing away their day-to-day powers over to another person, as allowed by the Companies Act. These proxy directors may have a lower level of legal liability for the actions of the company and would be less effective in assisting enforcement agencies. However, this could also provide a lower cost compliance option for overseas-based New Zealand companies that do not wish to have an actual director based in New Zealand.
- 27 Alternatively, persons based offshore are able to incorporate in their country of residence and still operate in New Zealand, without the need to have a New Zealand resident director.
- 28 I consider the benefits of this proposal to outweigh the costs that will be imposed on the relatively small number of legitimate companies affected.

## In Confidence

### Consultation

- 30 The majority of submissions to the Select Committee on the Bill have identified the limitations of the resident agent option, as stated above, with the Institute of Directors in New Zealand and the New Zealand Shareholders Association submitting that the resident agent option should be removed in favour of simply requiring a resident director.
- 31 The NZ Police, Reserve Bank, Financial Markets Authority and Ministry of Justice consider that this measure would significantly improve the effectiveness of enforcement actions. The Inland Revenue Department considers that the resident director requirement may also aid in their auditing of New Zealand companies, by providing a New Zealand based director to provide the required information and who is liable in certain circumstances for the tax obligations of the company.

## Transparency Measures

### Requiring a Date of Birth and Place of Birth

- 32 I recommend that company directors be required to provide their date of birth and place of birth. While Cabinet has previously decided not to adopt these measures, I consider them to be worth re-evaluating in light of recent examples involving the misuse of New Zealand companies. This information would be held by the Registrar and would not be on the public register.
- 33 These measures would provide additional levers for enforcement agencies to identify directors and general partners in an investigation. It is not uncommon for more than one person with the same name (e.g. father and son) to reside at the same residential address. Where enforcement or compliance action is required against an individual director, clear and accurate identification is desirable.
- 34 In a case where there are concerns about a company, the Registrar could, after the Bill is in force, require these details to be confirmed or corrected. If false details have been provided, the entity could be “flagged”, then deregistered and the directors and other officers banned.
- 35 Requiring directors to provide their date and place of birth would bring New Zealand company law into line with the Australian Corporations Act. This will in turn facilitate the harmonisation of the registration process between New Zealand and Australia. The United Kingdom and Singapore also require birth information from directors.
- 36 These requirements have been consulted on with industry groups, are not controversial and are of no significant cost to business. A number of submissions on the Bill are supportive of this measure.

## In Confidence

### Identifying Ultimate Holding Companies

- 37 A number of submissions to the Select Committee on the Bill have also proposed requiring companies to advise the Registrar of its ultimate holding company, if it has one. The ultimate holding company is a company which controls the registered company, whether by equity ownership or otherwise. This holding company is currently not readily apparent, especially if the chain of holding companies includes offshore entities. This disclosure is a matter of public interest and record so that persons dealing with a company can know where "control" ultimately lies.
- 38 Australian companies are currently required to publicly disclose their ultimate holding company to the Australian Securities and Investment Commission (ASIC). This only applies if the ultimate controller is a company rather than an individual. The ultimate holding company is defined in the Australian Corporations Act as the holding company that is not itself a subsidiary. In effect it is the company that has control over the composition of the board of directors.
- 39 I consider this proposal to have merit and recommend the Companies Act should be amended to require companies to inform the Registrar of their ultimate holding company if they have one, in line with Australian requirements.
- 40 The management of a company will know who their ultimate holding company is and I therefore consider there to be minimal compliance costs associated with this change.

### Enforcement Measure

#### Enabling Information on Ultimate Ownership and Control to be Required

- 41 I recommend expanding the Registrar's powers to allow him to require information identifying the ultimate ownership and control of a company. This change would go some way to addressing the concerns raised in the previous FATF assessment of New Zealand. New Zealand's next progress report to the FATF is due to be considered at the FATF plenary in October 2013. Included in the latest FATF standards, issued in February this year, is a recommendation that:

*Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.*

- 42 While the Registrar and other authorities already have investigation powers, these new powers would allow the Registrar to require companies and other relevant persons to provide information on who really owns the company if the shares are held in a trust, and to provide information on any person who is controlling the management of the company. Refusal to provide this information would be a serious and persistent breach of the Companies Act and could ultimately result in the removal of the company from the register.
- 43 This information would only be required by the Registrar on a risk assessed basis and the vast majority of New Zealand companies would be unaffected.

## In Confidence

### Limited Partnerships

- 44 The concerns relating the misuse of New Zealand companies also extend to the limited partnerships regime created under the Limited Partnerships Act 2008. From its inception there has been a high uptake of the New Zealand limited partnership vehicle by offshore interests which have no business presence in New Zealand and general and limited partners who are located wholly offshore. Many of registered limited partnerships are known to be carrying on business as offshore financial institutions.
- 45 The proposals in the paper would require limited partnerships to have a general partner who is: a natural person resident in New Zealand; or partnership with a partner who is a resident in New Zealand, or a New Zealand company with a resident director. This will apply to the approximately 440 limited partnerships out of the 1380 (32 per cent) currently registered who have no connection with New Zealand.
- 46 I propose that, to the extent that they are applicable, the proposed measures in this paper should also apply to limited partnerships, noting that some changes will be needed to reflect the differences between the companies and limited partnerships.
- 47 I propose that Cabinet delegate authority to the Minister of Commerce, the Minister of Economic Development and the Minister of Finance, to take decisions on minor policy issues relating to these changes, including the application of these proposals to limited partnerships.

### International Obligations

### Consultation

- 49 Consultation has been undertaken with the Registrar of Companies and the inter-departmental Organised Crime Policy Committee, comprising of: the Department of Prime Minister and Cabinet; the Police; the Inland Revenue Department; the Financial Markets Authority; the Reserve Bank; the Department of Internal Affairs; the Serious Fraud Office; Treasury; the Ministry of Foreign Affairs and Trade; and the Ministry of Justice. In addition, the views of submitters on the Companies and Limited Partnerships Amendment Bill have been taken into account when formulating these proposals.

### Financial Implications

- 50 While there will be costs associated with the establishment of any new registration requirement, the Companies Office considers that it would be able to absorb these within current baselines. The proposal to require a resident director will be less costly and complex to implement than the existing measure in the Bill allowing for resident agents.
- 51 The enhanced powers of the Registrar may give rise to enforcement action. Any costs to the Companies Office arising out of these proposals would be absorbed within the current baseline funding for its current enforcement functions.

## In Confidence

### Human Rights

- 52 The proposals in this paper appear to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1990. A final conclusion as to the consistency of the proposals with NZBORA will be possible once the legislation is drafted.

### Legislative Implications

#### Regulatory Impact Analysis

- 54 The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached. The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment, and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.

#### Quality of the Impact Analysis

- 55 The RIS provides adequate support for a decision on whether to remove the Resident Agent option. However, on the issues of transparency and enforcement the problem definition is not set out clearly enough to enable the reader to judge whether the proposed interventions will provide the best possible solutions. There has been only limited consultation on the proposals, but the RIS draws appropriately on the previous consultation and the input received during the Select Committee stage of the Bill.

#### Consistency with Government Statement on Regulation

- 56 I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

- Are required in the public interest;
- Will deliver the highest net benefits of the practical options available; and
- Are consistent with our commitments in the Government Statement on Regulation

#### Publicity

- 57 It is likely that the Bill's progression through the select committee process will receive some media attention. Recently some reporters have criticised the Bill as not going far enough to prevent the misuse of corporate entities. Conversely any decision to implement further measures may be opposed by some commentators if they are thought to create an impediment to the starting or running of a business. I do not propose any media statement on these matters while the Bill is under consideration by the Select Committee.

## In Confidence

### Recommendations

It is recommended that the Committee.

- 1 **Note** that there have been a number of recent examples of New Zealand companies being used by criminals to mask the source of funds used to buy property, conceal true ownership of property, maintain control of criminal proceeds and assets and obscure the link between illegal activity and assets;
- 2 **Note** that the majority of these companies had no substantive link to New Zealand and were seeking to exploit New Zealand's reputation as a well regulated jurisdiction;
- 3 **Note** that while the Companies and Limited Partnerships Amendment Bill includes some measures to reduce this misuse, there are a number of further measures that could be implemented that would further improve the effectiveness of the Companies Act 1993 in this area, at minimal cost to legitimate businesses;
- 4 **Agree** that the Companies Act 1993 be amended to require New Zealand incorporated companies to have a director who is either a resident of New Zealand or a resident director in a prescribed enforcement country;
- 5 **Agree** that the Companies Act 1993 be amended to require directors to provide their date and place of birth to the Registrar when they are appointed;
- 6 **Agree** that the Companies Act 1993 be amended to require companies to publicly disclose their ultimate holding company, if they have one;
- 7 **Agree** that the Companies Act 1993 be amended to provide the Registrar with the power to require companies to provide information relating to their ultimate ownership and control;
- 8 **Agree in principle** that the same decisions made in respect of companies also apply to limited partnerships to the extent that they are applicable;
- 9 **Agree** that a committee consisting of the Minister of Commerce, the Minister of Economic Development and the Minister of Finance may take decisions on any necessary transitional provisions required to implement recommendations 4 – 8 above;
- 10 **Agree** that a committee consisting of the Minister of Commerce, the Minister of Economic Development and the Minister of Finance may take decisions on minor policy issues relating to these changes, including the application of these proposals to limited partnerships; and

Hon Craig Foss  
**Minister of Commerce**

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## In Confidence

### Annex 1 – Proposed Measures

	<b>Proposed Measure</b>	<b>Benefits</b>	<b>Potential Costs</b>
<i>Accountability</i>	Requiring New Zealand companies to have a director who is resident in New Zealand or a resident director in an enforcement country (Australia initially).	Resident directors are legally accountable for the actions of the company; able to usefully aid enforcement agencies in their enquiries; and less complex to implement than resident agents. It is difficult to quantify these benefits.	Around 4,200 out of 550,000 companies (0.77%) do not already have a director resident in NZ or Australia. Less than 3,000 of these companies are likely to be legitimate companies. The cost of a resident director may range from a few thousand dollars to around \$50,000, and may be defrayed by replacing an existing director.
<i>Transparency</i>	Requiring the date and place of birth of directors.	Provides additional levers to assist in the identification of directors in the event of an investigation.	While this would apply to all companies the costs would be negligible.
	Requiring companies to disclose to the Registrar their ultimate holding company.	Improves public transparency regarding the control of New Zealand companies and bring New Zealand into line with Australian requirements.	There is no data on how many companies have an ultimate holding company. However, the cost on impacted companies is likely to be low.
<i>Enforcement</i>	Expanding the Registrar's powers to seek information on the ultimate ownership and control of a company.	Would align New Zealand with the latest FATF recommendations regarding corporate transparency and provide a disincentive to use New Zealand companies for financial crime. Note most jurisdictions have this ability.	Would be applied on a risk-assessed basis and should not impose costs except on those firms under investigation.

## Regulatory Impact Statement

### Enhancements to the Companies and Limited Partnerships Acts to reduce misuse by organised crime

#### Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.
- 2 It provides an analysis of further measures to enhance the effectiveness of the Companies Act 1993 and the Limited Partnerships Act 2008 to better address issues relating to shell companies in order to ensure New Zealand remains a trusted place to do business. The status quo is considered to not sufficiently deter criminals from registering companies and limited partnerships in the first place, allow timely detection by the Registrar nor address the perception that New Zealand's company registration system is particularly vulnerable to misuse
- 3 The options fall out of further work the Ministry of Business, Innovation and Employment has done as requested by Cabinet to consider further measures for improving New Zealand 'legal person transparency' to assist the investigation and prosecution of serious crime [DES (11) 2/3 refers]. Options have been recommended in the context of a framework that:
  - a. An efficient company registration regime should remain a competitive advantage for New Zealand;
  - b. Any measures should be effective in reducing misuse of the company registration regime;
  - c. The costs of legitimate businesses should be minimal unless the benefits can be clearly demonstrated to outweigh those costs; and
  - d. That, where possible, there are benefits of aligning with the Australian regime.
- 4 Consultation has been undertaken with the Registrar of Companies and the inter-departmental Organised Crime Policy Committee, comprising of: the Department of Prime Minister and Cabinet; the Inland Revenue Department; the Financial Markets Authority; the Reserve Bank; the Department of Internal Affairs; the Serious Fraud Office; Treasury; the Ministry of Foreign Affairs and Trade; and the Ministry of Justice. In addition, the views of submitters on the Companies and Limited Partnerships Amendment Bill, currently before select committee have been taken into account when formulating these proposals.

Melanie Porter  
Manager, Corporate Law and Governance  
Competition, Trade & Investment  
Economic Development Group

## In Confidence

### Status Quo and Problem Definition

#### *New Zealand's Registration System*

- 1 The key feature of New Zealand's registration requirements is that anybody can register a company or limited partnership from anywhere, online, at low cost and with only basic information needing to be supplied. A company or limited partnership can be registered in New Zealand within a few hours of applying.
- 2 This reflects underlying principles of both the Companies Act 1993 and the Limited Partnerships Act 2008. Both Acts provide basic and adaptable requirements for the incorporation, organisation, and operation of those legal persons. A legal person can enter into contracts, undertake business transactions and take, or be subject to, legal action in its own right. This means the persons behind the company or limited partnership are able to take business risks with limited personal liability.
- 3 The Registrar of Companies ('the Registrar') is a statutory position that exercises the powers, duties and functions of the Registrar under the Companies Act and the Limited Partnerships Act. Details of the company or limited partnership are kept by the Registrar on specific registers.
- 4 The Registrar has powers of inspection to investigate compliance with the Companies Act, the Financial Reporting Act 1993 or the Limited Partnerships Act 2008. The Registrar also has powers to remove companies from the register for various grounds including where it is satisfied that the company has ceased to carry on business and there is no other reason for the company to continue in existence, or where the application or annual fee has not been paid.
- 5 The simplicity of the registration regime is deliberate and is a contributor to New Zealand's enviable reputation for ease of doing business. Coupled with its reputation as a well-regulated jurisdiction, this provides a comparative advantage that underpins New Zealand's ability to attract and retain internationally-mobile business investment.

#### *Companies and Limited Partnerships Amendment Bill*

- 6 A review in 2010 of the circumstances surrounding the SP Trading Ltd case<sup>1</sup> identified a number of areas where New Zealand's registration regime is out of step with comparable foreign counterparts. It further identified an inability for the Registrar to take administrative and investigative steps to ensure the integrity of the information on the companies register where he is aware that such information is inaccurate.

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<sup>1</sup> This New Zealand-registered company was implicated in a weapons smuggling operation in Thailand. It had no business presence in New Zealand and its sole nominee director had signed a comprehensive power of attorney regarding the control of the company to two offshore nationals.

## In Confidence

- 7 In October 2011 the Companies and Limited Partnerships Amendment Bill (the Bill) was introduced. The Bill is currently in the Select Committee process and a report back is due by 24 January 2013. It is expected to be enacted in the first half of 2013.
- 8 The Bill intends to address issues relating to shell companies in order to ensure New Zealand remains a trusted place to do business. As it was introduced will put in place the following measures:
  - a. Companies and limited partnerships, if they have no director or general partner resident in New Zealand (or an enforcement country<sup>2</sup>), will need to appoint a New Zealand resident agent to respond to requests from regulatory, investigatory and law enforcement agencies;
  - b. The Registrar has enhanced investigative powers to have information on the register confirmed or corrected and verified if required;
  - c. The Registrar can publish notes of warning on the register if it has concerns about the bona fides of a company or limited partnership on any of the current grounds for removal plus three new additional grounds. This warning power extends to inserting a flag in relation to any other company or limited partnership that shares a director, a general partner or an officer with that entity under investigation;
  - d. A company or limited partnership may additionally be removed from the register if it fails to assist the Registrar, or there is substantial or persistent failure to comply with the Companies Act 1993 or the Financial Reporting Act 1993; and
  - e. The Registrar can prohibit persons from acting as directors, general partners or resident agents for up to five years where the companies or limited partnerships for which they are responsible have been removed from the register through the exercise of the new removal powers.

### *Update since 2010*

- 9 The Bill goes some way towards addressing the vulnerabilities of the New Zealand registration system by putting in place additional registration and maintenance requirements. However, the measures in the Bill were recognised at the time as being limited in nature and that further work would be undertaken in order to address other issues around the misuse of New Zealand legal persons by offshore criminal interests.

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<sup>2</sup> This will be a country that has an agreement with New Zealand that allows for the recognition and enforcement there of New Zealand judgements imposing regulatory regime criminal fines.

## In Confidence

- 10 The wider package of work included:
  - a. Across government work being carried out in relation to key actions the *Response to Organised Crime* report (improving domestic and international information sharing, legal assistance and coordination; protecting against cybercrime; preventing bribery and corruption; enhancing anti-money laundering and crime proceeds recovery; disrupting identity crime and reducing misuse of legal persons);
  - b. The full implementation of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT) including imposing obligations on and supervision of trust and company service providers (TCSPs)<sup>3</sup>;
  - c. Responding to the Financial Action Task Force recommendations<sup>4</sup>; and
  - d. Establishment of the Registries Integrity and Enforcement Team within the Companies Office.
- 11 While by far the vast majority of the approximately 550,000 companies and limited partnerships registered are legitimate, low entry barriers and a high international standing also makes the New Zealand registration regime vulnerable to misuse.
- 12 Since 2010, there has been ample further evidence to show that New Zealand registered corporate structures are still being used by criminals, often with the assistance of TCSPs, to create a confusing web of legal persons to launder money, traffic arms and illegal substances, and commit tax and other fraud. Corporate structures can be used by criminals to mask the source of funds used to buy property, conceal true ownership of property, maintain control of criminal proceeds and assets and obscure the link between illegal activity and assets. These layers make it exceptionally difficult for law enforcement to identify individuals and hold them to account.
- 13 Concerns relating to the exploitation of the New Zealand companies registration regime by rogue offshore interests also extends to the limited partnerships regime established under the Limited Partnerships Act 2008. From its inception there has been a high uptake of the New Zealand limited partnership vehicle by offshore interests which have no business presence in New Zealand and general and limited partners who are located wholly offshore. Many of registered limited partnerships are known to be carrying on business as offshore financial institutions.

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<sup>3</sup> TCSPs act as formation agents for legal persons and legal arrangements, arrange for persons to act as nominee directors or trustee shareholders and/or provide registered offices or correspondence or administrative addresses for registered companies.

<sup>4</sup> New Zealand was last assessed in 2009 and is currently non-compliant with several FATF recommendations. Many of these will be addressed when the AML/CFT legislation comes fully into force in July 2013. The other main compliance gap is in the transparency of legal persons where authorities and regulators face difficulties obtaining information concerning the beneficial owners and ultimate controllers of companies and limited partnerships, as well as details of their activities.

## In Confidence

- 14 It appears that those who wish to conduct unlawful activities overseas are increasingly seeking to incorporate companies in New Zealand. They will do this:
- In order to benefit from New Zealand's positive reputation as a well-regulated jurisdiction which will provide a veneer of legitimacy and credibility to facilitate their unlawful conduct;
  - Because there is no need to have substantive links to New Zealand; and
  - Because it is easier and cheaper to register companies here than in other jurisdictions, meaning that New Zealand companies are essentially disposable, being easily and cheaply replaceable if offending is detected or the company is struck off.
- 15 The Police have provided statistics on how many requests it has received about New Zealand companies allegedly committing crime in foreign countries. Taskforce Bael<sup>5</sup> identified that between 2006 and 2010, 134 requests had been received from overseas law enforcement agencies by the FIU, Interpol and NZ Customs Service. These requests identified 143 NZ companies allegedly facilitating crime. This is less than three per month.
- 16 Since 2010, the FIU and Interpol have received a further 171 requests regarding 248 companies allegedly facilitating crimes. This averages at more than 8 companies a month being identified as being involved in crime.
- 17
- These are suspected of moving funds for overseas clients for the purposes of tax evasion and/or money laundering. Many of this person's companies have already been struck off the register.
- 18 Of the remaining 341 companies, 330 do not or did not have a resident director (97%). Many of these companies have also been struck off.
- 19 The two company formation agents that have registered the majority of the 391 companies have registered approximately 4,000 companies in total<sup>6</sup>. In total, since 2006, 305 requests have been received regarding 391 companies. These figures are only what is reported to the FIU. The true extent of companies being exploited for criminal purposes cannot be quantified.
- 20 Quantifying the extent of money laundering is complicated but is estimated by Police to be approximately NZ\$1.5 billion not including laundered funds relating to tax evasion. The Police and the FIU do not have enough information to accurately comment on the total scale of exploitation related to New Zealand offending but confirm that it is taking place.

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<sup>5</sup> An Organised Financial Crime Agency of New Zealand led multi-agency investigation as a result of the SP Trading incident.

<sup>6</sup> Noting that there are over 550,000 companies on the register and that over 3,000 of this 4,000 have already been removed by the Registrar.

## In Confidence

- 21 Similar statistics apply to limited partnerships where 32% of those currently registered have no connection with New Zealand. The evidence from Police is that the formation and sale of companies and limited partnerships in a 'ready-made' form is a common method for offshore interests to obtain a New Zealand corporate form.

### Conclusion

- 22 The status quo, including the passing of the Bill as it stands, will still not meet the current challenges and sufficiently deter criminals from registering companies and limited partnerships in the first place, allow timely detection by the Registrar nor address the perception that New Zealand's company registration system is particularly vulnerable to misuse.
- 23 In particular, the requirement for a New Zealand connection is weak, the information requirements for registration remain low and the Registrar is missing some simple but important tools for more effective enforcement.
- 24 If the status quo is maintained the risk of repeat examples like SP Trading Limited is still high. In cases where the illegal activity being conducted by the company involves breaches of international obligations such as United Nations sanctions, such episodes are especially undesirable. The repercussions of even a very small number of high profile cases have the potential to cause considerable reputational damage and reduction in confidence.

### Objectives

- 25 The framework for how the addition of further measures could usefully be considered is in the context that:
- An efficient company registration regime should remain a competitive advantage for New Zealand;
  - Any measures should be effective in reducing misuse of the company registration regime;
  - The costs of legitimate businesses should be minimal unless the benefits can be clearly demonstrated to outweigh those costs; and
  - That, where possible, there are benefits of aligning with the Australian regime.
- 26 It is intended that individuals and companies that do not pose a high risk will continue to use the company and limited partnership registration system on a 'good faith' basis. This will help ensure that New Zealand keeps its reputation as an easy place in which to do business while taking action against those who wish to undermine our good standing as a well-regulated jurisdiction.

### Analysis

- 27 In the context of the *All of Government Response to Organised Crime*, the Ministry of Business, Innovation and Employment was tasked by Cabinet to consider further measures for improving New Zealand 'legal person transparency' to assist the investigation and prosecution of serious crime [DES (11) 2/3 refers].

## In Confidence

- 28 We have considered the framework outlined above in relation to many options and have undertaken consultation with the Registrar and limited consultation with the inter-departmental Organised Crime Policy group.
- 29 In addition, submitters on the Companies and Limited Partnerships Amendment Bill have made suggestions on measures to further strengthen the objectives of the Bill.
- 30 We outline several measures below as to how the Companies Act 1993 and the Limited Partnerships Act 2008 can be strengthened to reduce the misuse of legal persons by increasing accountability, transparency and enforcement while at the same time imposing minimal costs on legitimate business.

### **Accountability – Removal of the Resident Agent Option**

- 31 Under the Bill, companies and limited partnerships will have a choice to either appoint a New Zealand resident director or a New Zealand resident agent.
- 32 The objective of the measure is to provide an entry point for enforcement agencies to gain information regarding the activities of the company. Under the status quo it is difficult and costly to effectively investigate a company if all individuals are located offshore. A choice of resident agent reduces costs for businesses that wish to register in New Zealand but otherwise do not wish to have a substantive connection with New Zealand.
- 33 We recommend removing the option of a resident agent so that a company must appoint a resident director<sup>7</sup>.

#### *Disadvantages of the Status Quo - Resident Agent Option*

- 34 The option of a resident agent was recognised at the time as being limited in nature. A resident agent will not be as effective at reducing misuse as the requirement to have a resident director and there are major disadvantages to retaining this option.
- 35 The most serious is that resident agents will not necessarily be of any help to enforcement agencies and will therefore defeat the primary objective of effectiveness. There is no obligation for a resident agent to know much at all about the company they represent and in fact, it will be in their interests to know less rather than more about any such company.
- 36 This is compounded by the less onerous duties of a resident agent who is an administrative officer only. Risk companies who are the target of this measures will undoubtedly choose a resident agent if the option is allowed. Risky company formation agents will only be too willing to perform this function. The resident agent requirement provides limited deterrence and may quickly become a loophole.
- 37 In addition, the resident agent is a new concept to New Zealand law there is no clear legislative precedent for such an officer. The legal requirements necessary to underpin their functions and duties are novel, uncertain and untested.

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<sup>7</sup> Or in the case of a limited partnership, a general partner who is a natural person resident in New Zealand or an enforcement country or where the general partner who is a partnership or company has at least one natural person who is resident in New Zealand or an enforcement country.

## In Confidence

- 38 Finally, the resident agent option will necessitate significant changes to the majority of the Companies Office online services, back office functions and search facilities to enable the new information to be collected, maintained and searched by the public. The extra costs may need to be passed on to all businesses.

### *Benefits of a Resident Director Only*

- 39 Police's and other agencies strong preference was, and still is, to require a resident director. Under this measure all companies which register in New Zealand would require at least one director to be ordinarily resident in New Zealand. The already agreed exemption for directors resident in enforcement countries will remain.
- 40 The exemption for companies with resident directors from prescribed enforcement countries is a compromise designed to ensure that this change does not impact Australia-based New Zealand companies, which currently make up the majority of companies without a New Zealand resident director. Additional countries will also be able to be prescribed if the Government is confident that they would impose both New Zealand civil and criminal penalties.
- 41 Requiring a resident director is only part of a response to reduce the misuse of companies and limited partnerships for organised criminal activities. However, the benefits that are that it will:
- a. Ensure that there is a person in New Zealand to hold criminally liable for the company's actions. A director owes duties to the company and therefore needs to have knowledge about the company;
  - b. Bring New Zealand company law into line with comparable jurisdictions including Australia;
  - c. Act as a better deterrent to offshore interests who do not intend to carry out lawful business. Anecdotal evidence from the Australian Securities and Investment Commission indicates that they do not experience a high incidence of the misuse of the Australian company structure by offshore interests. They attribute this to the deterrent effect of the requirement under the Australian Corporations Act for at least one company director to be ordinarily resident in Australia; and
  - d. Create a significant barrier for overseas based TCSPs that register companies in New Zealand. Offshore based TCSPs will need to seek the agreement of a New Zealand resident to act as a director for these companies, which may be difficult considering the legal liability associated with acting as a director.

### *Costs of a Resident Director*

- 42 The requirement to have a New Zealand resident director or agent will impose no costs on New Zealand based companies and limited partnerships which will already have resident directors or general partners as a matter of course. Similarly, there are many overseas companies with a genuine connection with New Zealand that also have resident directors or general partners.

## In Confidence

- 43 We estimate that the requirement to appoint a resident director will fall on approximately 0.77 per cent of companies (approximately 4,200) currently registered in New Zealand that do not already have either a resident director in New Zealand or in a likely enforcement country<sup>8</sup>.
- 44 The requirement will also apply to approximately 439 limited partnerships out of the 1380 currently registered.
- 45 Around 1,200 of the companies affected have been categorised as “high risk” by the Companies Office since risk assessment began 2010. These companies are still on the register as they meet the current registration requirements. Many of these companies have been created by the 77 TCSPs that the Companies Office monitors. A number of companies that have previously been placed in this category have subsequently been tied to criminal activity. Deterring these entities from continuing to trade on New Zealand’s reputation is a benefit rather than a cost to the New Zealand economy.
- 46 Therefore less than 3,000 of the companies affected are likely to be legitimately carrying on business in New Zealand. It should be noted that a significant number of these companies are likely to be shell companies that have not already been identified by the Companies Office. Examples of the types of legitimate companies that will be impacted by this change are:
- a. A New Zealand subsidiary with directors that are all directors or senior managers of its overseas parent company. In most of the situations that we are aware of, the immediate parent company is based in Australia and is required under the Corporations Act to have an Australian resident director. These companies would not therefore be affected.
  - b. New Zealand companies with a parent company elsewhere, such as the United States or Singapore, will be required to hire a resident director in New Zealand. These companies will either need to replace an existing director with a New Zealand resident or add a New Zealand resident as an additional director. This category is likely to consist of a relatively low number of large multinational companies.
  - c. Some companies that are based overseas but do carry out some business in New Zealand may have incorporated in New Zealand instead of in their home country for reputational or tax reasons. These companies will need to determine whether these benefits warrant hiring a director in New Zealand, or whether they would be better to incorporate in their home jurisdiction.
  - d. We are aware of some companies that incorporate in New Zealand in order to hold intellectual property, which may consist of New Zealand patents or may be purely a way of preventing a New Zealand entity from using their name. While these companies will need to hire a resident director, we expect that the fees would be low to reflect the fact that the company is inactive.

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<sup>8</sup> At this early stage, Australia only.

## In Confidence

- 47 The incremental cost for legitimate companies appointing a resident director will arise when they choose to increase the size of the board rather than replacing an offshore director. The costs will be in recruitment and remuneration of a resident director. There may also be additional costs associated with the complication and inconvenience of having a director who is based in a different country to the rest of the board e.g. communications (including time delays) and travel costs.
- 48 The Institute of Directors reports that there is no shortage of willing directors but it is the quality that will vary. This will need to be taken into account by legitimate businesses as will the following costs: The Institute of Directors 2011 Director Remuneration survey shows average directors' fees are in the order of \$33,000. The larger companies will pay an average of \$50,000. At the very small end of the scale the fees would be around a few thousand dollars. The cost of appointing a director for a legitimate company will be incrementally more than for the resident agent that otherwise may have been appointed. This cost was estimated in 2010 to be between \$500 and \$2000 p.a.
- 49 Some resident directors may choose to act as a "proxy" for another person by signing away their day-to-day powers over to another person, as allowed by the Companies Act. These directors may have a lower level of legal liability for the actions of the company and would be less effective in assisting enforcement agencies. However, this would also provide a lower cost compliance option for overseas-based New Zealand companies that do not wish to have an actual director based in New Zealand.
- 50 Proxy directors are likely to charge a broad range of fees, depending on how concerned they are about their level of legal liability. We are aware of some cases where New Zealand residents have been willing to act as directors for a very low charge.
- 51 While proxy directors will allow determined shell companies to incorporate in New Zealand, we do not consider that this will undermine the resident director requirement. These persons would still have a higher degree of legal liability than resident agents and would therefore act as a more effective and internationally recognised deterrent to the misuse of New Zealand companies. The Bill also provides the Registrar with the ability to ban directors for a period up to ten years for breaches of the Companies Act. Over time we expect that the banning and prosecution of New Zealand proxy directors will discourage New Zealanders from acting as a proxy director if they suspect the company is involved in criminal matters.
- 52 Companies could also choose to deregister as a company in New Zealand and instead register a company in their home jurisdiction. This company would be able to be registered on the New Zealand overseas company register and could continue to operate in New Zealand.

## In Confidence

- 53 We believe that the benefits of requiring a resident director will outweigh the marginal increased cost on a limited number of companies compared to a resident agent. Many of these companies will have no substantive link to New Zealand and are the intended target of this measure. The limited exemption proposal will remove these costs from those businesses that have a director residing in approved low-risk jurisdictions (specifically Australia at this stage). The option of other business governance options will reduce costs for those who wish to remain registered but otherwise have no desire to have a genuine New Zealand director.

### *Consultation*

- 55 The majority of submissions to the Select Committee on the Bill have identified the limitations of the resident agent option:
- a. The Institute of Directors in New Zealand and the New Zealand Shareholders Association have submitted that requiring that the resident agent should be removed in favour of simply requiring a resident director;
  - b. Bell Gully, the New Zealand Law Society, the New Zealand Private Equity and Venture Capital Association, and Simpson Grierson are critical of the effectiveness and cost of the resident agent proposal but do not specifically address resident directors; and
  - c. Joint submissions from Bell Gully, Chapman Tripp, Russell McVeagh and Simpson Grierson, along with an individual submission from Chapman Tripp specifically oppose requiring either a resident agent or a resident director based on costs to legitimate business.
- 56 Business New Zealand and the New Zealand Institute of Chartered Accountants continue to support the resident agent option as currently included in the Bill.
- 57 The Inland Revenue Department considers that the resident director requirement may also aid in their auditing of New Zealand companies, by providing a New Zealand based director to provide the required information and who is liable in certain circumstances for the tax obligations of the company.
- 58 This proposal is supported by all of the government agencies consulted with, aside from Treasury who have reservations about the cost to legitimate business. In particular, the NZ Police, Reserve Bank, Financial Markets Authority and Ministry of Justice consider that this measure would improve the effectiveness of enforcement agencies.

### **Transparency – More disclosure at registration**

- 59 The current registration requirements are considered to be set at a level suitable and appropriate for companies and limited partnerships that carry on legitimate business. The Registrar takes a light-handed approach in the expectation companies and limited partnerships and their promoters have legitimate purposes and an interest in facilitating social and economic benefits within New Zealand.

## In Confidence

- 60 Details of the company or limited partnership are kept by the Registrar on specific registers. Some details on the register are publicly available and some are not. This provides transparency so the public can know, to a certain extent, who they are dealing with.
- 61 The companies and limited partnership registration regime however fails to meet the objective of effectiveness in reducing misuse when dealing with criminal elements by not promoting transparency. Strengthening the registration regime in this regard should have a twofold benefit; firstly, increased transparency will deter criminals from registering companies and limited partnerships in New Zealand in the first place. Secondly, the availability of more accurate and up to date information about companies and limited partnerships will improve the integrity of the register and improve investigation and enforcement.
- 62 We recommend that further information is required that may help identify beneficial owners or ultimate controllers of risk companies or limited partnerships.

### **A. Director Birth Information**

- 63 This measure would require all directors to provide their date and place of birth to the Registrar and all general partners who are natural persons to provide their place of birth<sup>9</sup>. This information would form part of the register, but would not be available for public searching. It would be able to be used by the Registrar and other enforcement agencies in order to carry out their functions.

#### *Benefits*

- a. Better identification and verification of individuals (for example, in situations where two people such as a father and son with the same name, reside at the same address);
- b. Alignment with the Australian regime; and
- c. Provides a further piece of information for the Registrar to require confirmation or correction of under the enhanced powers under the Bill.

#### *Costs*

- 64 While this requirement will apply to all companies, no material costs to business have been identified as these details should be known to the director in any case.

#### *Consultation*

- 65 These requirements were consulted on in 2010 with business groups, are not controversial and are of no cost to business. Consulted parties reported that international directors expect to provide this information in any event, as it is a common requirement for overseas jurisdictions.
- 66 A joint submission to the Select Committee from Bell Gully, Chapman Tripp, Russell McVeagh and Simpson Grierson, and an individual submission from Chapman Tripp also raised this measure as information that could be captured to improve the status quo.

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<sup>9</sup> Date of birth is already a requirement for partners who are natural persons under the Limited Partnerships Act.

## In Confidence

### **B. Disclosure of Ultimate Holding Company**

- 67 A requirement that a company must advise the Registrar of its ultimate holding company, if it has one, would provide transparency regarding the control of the company. The ultimate holding company is a company which controls the registered company, whether by equity ownership or otherwise. This holding company is currently not readily apparent, especially if the chain of holding companies includes offshore entities. This is a matter of public interest and record so that persons dealing with a company can further know where 'control' ultimately lies.
- 68 This only applies if the ultimate controller is a company rather than an individual. Note that this may or may not be the same as the company's beneficial ownership, as control can be exercised by means other than ownership.

#### *Benefits*

- a. Alert the Registrar (and the public via register searches) who the true controller of the company is;
- b. Provide alignment with the Australian regime;
- c. Provide a further piece of information for the Registrar to require confirmation or correction of under the enhanced powers under the Bill; and
- d. Provide better compliance with the Financial Action Task Force recommendations.

#### *Costs*

- 69 While there is no data on how many companies would be impacted by this requirement, no material costs to business have been identified. This information will already be known.

#### *Consultation*

- 70 A joint submission to the Select Committee from Bell Gully, Chapman Tripp, Russell McVeagh and Simpson Grierson, and an individual submission from Chapman Tripp also raised this measure as information that could be captured to improve the status quo.

### **Enforcement – Further powers of the Registrar**

- 71 The enforcement regime of the Registrar will be given added strength under the Bill to deal with at risk companies and limited partnerships. There is value in continuing to enhance this regime to detect and prevent misuse of legal persons.
- 72 Specifically, we recommend that a further tool be added to increase transparency and uncover beneficial owners and/or ultimate controllers if it is necessary to do so. Improved enforcement will also provide a deterrent effect on criminals considering registering a legal person in New Zealand.
- 73 All submitters were comfortable with the increased powers of the Registrar under the Companies and Limited Partnerships Amendment Bill.

## In Confidence

### **Seeking information on ultimate ownership and control**

- 74 The Financial Action Task Force recommends that countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. This ensures an international standard that aids enforcement and inter-country assistance.
- 75 The Registrar's powers could be expanded to allow it to require information on the ultimate ownership and control of an entity to be provided as a result of a risk based assessment. This new power would allow this information to be obtained without the need to link the request other specific potential wrongdoing. Refusal to provide this information would be an offence under the Companies Act and could ultimately result in the removal of the company from the register.

### **Costs**

- 76 The vast majority of New Zealand companies would be unaffected. This power would also only be applied on a risk assessed basis, as with other inspection powers in the Companies Act. The benefits of increased transparency of the ultimate owners and controllers of companies would appear to outweigh any costs.

### **Conclusions and Recommendations**

- 77 It is recommended that:
- a. The option of resident agent be removed
  - b. Date and place of birth of company directors is collected at registration; and
  - c. That companies and limited partnerships must advise the Registrar of its ultimate holding company if it has one.
- 78 That the powers of the Registrar be clarified so that:
- a. The Registrar can require information on the ultimate ownership and control of an entity.

### **Implementation**

- 79 The proposals will require legislative amendments to the Companies Act 1993 and the Limited Partnerships Act 2008.
- 80 Enforcement will be undertaken through the enhanced powers of the Registrar, and by modifying the application process to ensure that all new incorporation applicants are subjected to the new regime.
- 81 Publicity would be given to legislative changes by way of a communications programme which would be delivered through the usual Companies Office systems. This would include website content, communication through the Ministry of Economic Development Monthly Business Update publication, media releases, and short articles in professional publications such as the New Zealand Law Society magazine Law Talk.

## In Confidence

### Monitoring, Evaluation and Review

- 82 Quarterly statistics on the number of requests from offshore enforcement agencies to the New Zealand police for assistance in investigations into New Zealand registered companies will be compared pre- and post- intervention in order to ascertain whether there has been a drop in the number of such companies involved in suspected criminal activity.
- 83 Monitoring of the effect of compliance costs will take place via the regular Companies Office surveys of its clients (which will include a specific question regarding the new processes), and via feedback through its website and contact centre. In addition, feedback from the business.govt.nz website (which is a cross-governmental business information website) will be monitored.
- 84 Monthly, quarterly, and annual registrations will be compared pre- and post-intervention to ascertain whether the intervention has had a material impact on the overall number of business registrations. These data will be collected by the Companies Office as a matter of course, and are able to be analysed in this manner at minimal marginal cost to the Ministry.

RELEASED UNDER THE OFFICIAL INFORMATION ACT

**OFFICE OF THE MINISTER  
FOR ECONOMIC DEVELOPMENT**

The Chair  
**CABINET ECONOMIC GROWTH AND INFRASTRUCTURE COMMITTEE**

**NEW ZEALAND COMPANY REGISTRATION PROCESS**

**PROPOSAL**

1 This paper seeks direction from Cabinet regarding the possible introduction of a number of statutory measures aimed at strengthening the New Zealand company registration regime to:

- a Address threats to the integrity and reputation of New Zealand's companies regime; and
- b Give the Registrar of Companies ("Registrar") enhanced powers to respond effectively to risks which might arise in relation to the integrity of information recorded on the companies register.

2 The objective of these proposals would be to maintain and enhance the current high reputation of New Zealand as a place to do business, which is at least in part due to our company registration system and the New Zealand company form. The Companies Act 1993 has basic and adaptable requirements for the incorporation of companies. These are: a name, one or more shares, one or more shareholders (who may have limited liability), and one or more directors.

The implementation of these proposals requires amendment to existing legislation.

**EXECUTIVE SUMMARY**

4 There is evidence that individuals and groups (particularly offshore interests) are misusing the New Zealand company incorporation process and consequently threatening the international reputation of New Zealand. One recent case to receive significant publicity, both in New Zealand and internationally, is that of SP Trading Limited, where a New Zealand-incorporated company controlled from overseas was involved in chartering a plane later used in weapons trafficking in contravention of United Nations sanctions. High profile or repeated instances of foreign-controlled New Zealand companies

engaging in criminal activities overseas is likely to seriously impact New Zealand's international standing.

5 The particular phenomena that sit behind these concerns relating to New Zealand's company registration system are:

a The unprecedented promotion of New Zealand-incorporated companies to wholly overseas interests by New Zealand and overseas company formation agents and brokers; and

b The ability of persons based overseas to register companies in New Zealand via the internet, with no apparent intention of operating in New Zealand.

6 Officials in the Ministry of Justice are currently considering substantive reform in the context of Anti-Money Laundering (AML) reforms and in connection with New Zealand's evaluation by the Financial Action Task Force (FATF) report, to which New Zealand must respond by October 2011. In the present context, one of the significant proposed reforms is to bring company formation agents within the scope of AML legislation. This will require them to be supervised and to undertake due diligence on their customers. In conjunction with this work, further, more substantive reforms to legislation relating to the activities of companies will be considered. However, I seek the direction of Cabinet as to whether it would also be appropriate in the short term to implement a limited number of statutory measures aimed at strengthening the New Zealand company registration regime, given that the more substantive work already underway will take some time to complete.

7 Accordingly, these proposals should be seen as part of a wider overall package of reforms to strengthen New Zealand's company registration system, while at the same time maintaining its reputation as a good and easy place in which to conduct business. In the medium term there is a broader range of issues arising out of New Zealand's obligations as a member of FATF. As well as AML issues, in the corporate law area these include concerns around shell companies and difficulties in identifying beneficial ownership of companies. In this context a shell company refers to a company which is party to a number of transactions without itself having any significant assets or operations. Such companies are often formed to hide the true parties to the transaction. This lack of transparency is further underlined by practices such as the registered shareholder of the company holding the shares on trust for a third party and the registered directors granting wide-ranging powers of attorney over the management of the company. These act to obscure the ultimate managers and beneficial owners of the company.

8 It needs to be stressed that the measures recommended in this paper will not be a "silver bullet" to prevent all future cases such as SP

Trading Limited and other similar instances of criminal and suspect activity. They will, however, strengthen the ability of the Registrar to test the bona fides of directors and the integrity of information supplied by company incorporators, and facilitate investigation and more targeted consequential action as appropriate. This will help deter those minded to exploit the highly regarded New Zealand company incorporation process for criminal and other suspect activities.

9 There are four broad groups of proposals that could be implemented in the short term which I believe would go some way towards achieving this outcome:

- a Requiring companies to appoint at least one director or an agent who is ordinarily resident in New Zealand;
- b Requiring directors to supply date and place of birth information;
- c Requiring all companies to apply for an IRD number as part of their registration application process; and
- d Enhancing the ability of the Registrar to investigate, respond to or remedy issues arising in regard to the bona fides of directors and shareholders and any integrity or compliance issues relating to company registration.

10 These changes could be implemented relatively quickly and are consistent with the objective of maintaining New Zealand's reputation as an easy place in which to do business.

11 If all companies incorporated in New Zealand were to have either a director who is ordinarily resident in New Zealand, or a "local agent" who is resident in New Zealand, the Registrar and other parties would more easily be able to confirm the bona fides of those behind the company, test the accuracy of the personal particulars supplied as part of the registration process, and (where appropriate) hold someone to account for any breaches of the law. In order to minimise the cost to business emanating from well-regulated jurisdictions, certain exemptions to this requirement could apply where the company has directors resident in approved foreign jurisdictions, for example, Australia.

12 Requiring directors to provide information regarding their date and place of birth to the Registrar, while not constituting full identity verification, would provide an improvement to the ability of the Registrar to ensure that he is dealing with the correct individual. This birth information would not be available for public searching, however, but would be able to be used by the Registrar and enforcement agencies in order to carry out their statutory functions.

13 The third proposal is that all companies which register in New Zealand should be required to apply for an IRD number. About 80% of companies already do so as part of an optional service provided by the Companies Office; and a further significant percentage go on to obtain a number shortly after incorporation. The aim of this requirement would be to provide a disincentive to those seeking to take advantage of New Zealand's high international standing, but which do not intend to carry out lawful business in New Zealand.

14 Under the Companies Act 1993 the sanctions available to the Registrar to respond to recent cases which have attracted media interest are almost exclusively criminal. Where individuals are located offshore, the deterrent effect of and the ability to resort to such sanctions is clearly limited. The final proposal is therefore to introduce enhanced powers for the Registrar to enable him to undertake effective investigation and consequent administrative action, including:

a The power to require someone to confirm or correct information on the Companies register;

b The ability to "flag" a record on the Companies Office website as being under enquiry as to the integrity of the information or potential non-compliance with the Act;

c The power to remove from the register a disqualified or prohibited person who acts as a director in contravention of such disqualification or prohibition; and

d The power to ban a person from being involved as a director or manager of a company where they have provided inaccurate information to the Registrar or have persistently failed to comply with the requirements of the Companies Act or the Financial Reporting Act.

15 These proposals would impose relatively low additional compliance costs on companies. New Zealand-based companies would face almost no additional compliance costs, since such companies will already meet the requirements of a New Zealand-based director and an IRD number, and will only have to meet the additional requirement of supplying birth information of the directors. In the case of companies which have offshore directors, however, there would be some additional compliance costs by way of the requirement for a New Zealand based director or agent (although these would be mitigated by the proposed exemption for approved foreign jurisdictions). It should be noted, however, that the resident director proposal goes no further than the minimum requirements imposed by other comparable jurisdictions.

## **BACKGROUND**

16 The media reporting of the SP Trading Limited case in late 2009/early 2010 highlighted certain issues with New Zealand's

company registration regime. SP Trading Limited is a New Zealand-registered company which was involved in the charter of a plane that was intercepted at Bangkok airport with a cargo of weapons. The flight originated in North Korea. UN Security Council sanctions prohibit trading in arms with North Korea. SP Trading Limited had no business presence in New Zealand. Its sole director was a New Zealand-based nominee director who had signed a power of attorney handing over all authority over the affairs of SP Trading Limited to two Ukrainian individuals. The sole shareholder was another New Zealand registered company, which held those shares on trust for the same two Ukrainians.

17 Investigations by the Organised and Financial Crime Agency of New Zealand (OFCANZ) in the SP Trading matter have provided further details on the scope of the problem. They confirm that the basic *modus operandi* employed in the formation of SP Trading has been followed by a number of New Zealand-based company formation agents, who sell a “package” of company documents to an overseas company broker. In many of the cases which have come to OFCANZ’s attention, both the sole director and the sole shareholder are based overseas. OFCANZ considers that many of the clients of the formation agent responsible for the formation of SP Trading are involved in illegal activity. From January 2006 to February 2010 New Zealand Police and the New Zealand Customs Services received between them 134 enquiries relating to 143 New Zealand-registered companies. These companies were implicated in criminal activity overseas, including smuggling, money laundering and tax fraud.

18 IRD consider that if these companies are involved in criminal activity overseas, they are also likely to be involved in tax fraud or evasion. A New Zealand-registered company with its effective base in Panama recently committed a significant tax fraud in the United Kingdom. This sort of fraud affecting our OECD partners impacts negatively on New Zealand’s international reputation. IRD is concerned that New Zealand will receive a poor report in an OECD forum later this year because it is unable to provide information which many other countries would be able to supply about such companies.

19 The Reserve Bank has similar concerns with respect to “overseas financial institutions”, of which approximately 1000 have been incorporated in New Zealand over the past three years. These shell companies are used to carry on banking activities without the necessary regulatory controls, and many appear to be engaged in fraudulent activities.

20 New Zealand’s highly-regarded company registration requirements are more straightforward than those of other similar jurisdictions, such as Singapore, Australia, and Canada. In particular, New Zealand makes extensive use of the internet for the process of company registration. It is unique in that it is a low-cost jurisdiction both in terms of entry costs and due to the fact that it does not impose an

annual licensing fee. As a result, it is an attractive jurisdiction in which to incorporate a company.

21 There is a risk that people who wish to conduct unlawful activities overseas may increasingly seek to incorporate companies in New Zealand, in order to benefit from New Zealand's positive reputation. This may provide a veneer of legitimacy with which to facilitate their unlawful conduct. The SP Trading case has become a very visible focus of such concerns.

22 While I believe that the prevalence of such cases is still relatively low in comparison to the total number of companies registered, and similar issues exist in other jurisdictions of equal standing, a number of agencies consider that New Zealand's international standing has already been affected and believe that further high-profile incidents could see it seriously damaged.

#### COMMENT

23 It is impossible to impose a set of requirements in the company registration process that will entirely prevent the establishment of companies which undertake criminal or suspect activity overseas. However, there are features of New Zealand's registration processes which could be improved to bring our companies law more into line with other comparable jurisdictions. Where New Zealand-registered companies are used for overseas criminal activities these changes will provide some deterrence to those using these companies (and their formation agents), and provide greater disincentives to use New Zealand as a country for this type of behaviour.

24 I therefore propose that Cabinet consider a limited number of measures relating to the company registration process. These measures are aimed at enhancing New Zealand's standing as a well-regulated jurisdiction in which to carry on business. The objective of these proposals is to better ensure that the current high reputation of New Zealand company registration system and New Zealand companies is maintained, while maintaining a system of low compliance costs for bona fide businesses. I believe they should be considered in light of the recent events and the threat they pose to New Zealand's international reputation.

25 I emphasise that these measures are limited in nature and relate to the company registration process only. Further work will need to be undertaken in order to resolve other issues around the abuse of the New Zealand corporate structure by offshore criminal interests. To that end, officials will consider a range of other mechanisms, including some in relation to AML and New Zealand's response to FATF, that could further deter the use of New Zealand registered companies for activities like those of SP Trading Limited. This might include matters such as:

- a Regulation or prohibition of nominee directors;

- b Recording the beneficial ownership of companies;
- c Measures concerning open-ended powers of attorney;
- d Identification or verification of the identity of directors and shareholders, for example by way of a unique identifier such as a passport number;
- e Dealing with the issues of shell financial institutions; and
- f Regulation of company formation agents by including them as reporting entities under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

26 Such measures require greater consideration and consultation than the measures proposed in this paper. They are therefore progressing on a slower timeframe. Justice have the lead on matters relating to New Zealand's obligations to FATF and wider justice sector-related issues, including international criminal activity. Officials have prepared a discussion paper on the regulation of company formation agents. In addition, the recent MED discussion paper on the Review of Securities Law seeks views on the public enforcement of directors' duties. It highlights the position in Australia, where directors of a company can be prosecuted if they are reckless and fail to exercise their powers for a proper purpose.

### **Ease of doing business**

27 New Zealand possesses an enviable reputation for ease of doing business, ranked number one in the World Bank Doing Business indicators (for starting a business) in both 2008 and 2009 and number two in the overall "Ease of Doing Business" ranking behind Singapore. It is necessary to ensure that any proposed measures do not unduly impede the activities of New Zealand companies with foreign ownership legitimately carrying on business. The measures set out below aim to strike an appropriate balance between deterring the sorts of activities highlighted above and ensuring ease of business for New Zealand companies.

### **New Zealand Resident Director or New Zealand Agent**

28 The first option is to introduce a requirement for all New Zealand-registered companies to have at least one representative person resident in New Zealand. This could be achieved in one of two ways:

- a Requiring all companies to have at least one director who is resident in New Zealand; or

- b Where a company does not have at least one director resident in New Zealand, requiring it to appoint a “local agent” who is resident in New Zealand.

#### *New Zealand Resident Director*

29 New Zealand company law is out of step with that of comparable overseas jurisdictions (including Australia, Singapore and Canada) which require at least one director to be resident in the “home” country. Under this option New Zealand would align its company law to introduce a New Zealand resident director requirement.

30 This would have the benefit of ensuring that there is at least one person legally responsible for the affairs of the company resident in New Zealand. This would be within the existing, well-established framework of directors’ duties. The Registrar would be able to look to the resident director to provide information about the company and be accountable for that information. The current prosecution of the New Zealand-based director in the SP Trading case shows that the New Zealand authorities will take strong action where those directors do not take their obligations seriously. However, that sanction is not available where the directors are based overseas. In this context, it is noteworthy that SP Trading Ltd’s sole shareholder and sole director are now based in Vanuatu. The evidence from OFCANZ is that a number of New Zealand companies where neither the director nor shareholder has any connection with New Zealand are sold to overseas brokers.

31 This requirement would mean that companies that do not already have New Zealand-resident directors will need to appoint a director. They would then have a substantive connection with New Zealand and an identifiable individual available for New Zealand authorities to question if any issue concerning the registration or the overseas activities of the company arose. Those individuals would run the risk of prosecution if, for example, the information they provided to the Registrar was false or misleading. This would provide a disincentive to individuals acting for directors based outside of New Zealand, where the bona fides of those external directors was in doubt.

32 Such a requirement would not cause issues for New Zealand-based businesses, as most companies with a business presence in New Zealand will comply with this requirement. Some international companies, however, may have all of their directors residing offshore and may be reluctant to appoint a New Zealand resident director. The limited exemption proposal I set out below should resolve this issue for most businesses where they also have a presence in an approved jurisdiction.

#### *New Zealand Local Agent*

33 A less intrusive alternative to the New Zealand resident director proposal would be to require a New Zealand resident “local agent”.

Local agents would be required to accept service of legal proceedings and ensure that the company met its disclosure and maintenance of records obligations under the Companies Act. They would not have any say in the operation of the company.

34 Such a local agent would be required to meet certain statutory qualifications (e.g. they must be a natural person and not be an undischarged bankrupt or disqualified from being a director). They would:

- a Be required to provide evidence of their valid appointment and continuing authority;
- b Be authorised to accept service or notices on the company's behalf;
- c Be required to file or give any information about the company to the relevant regulatory agencies; and
- d Be liable for any penalties imposed on the company for any breach by the company of the Companies Office filing requirements under the Companies Act (for example, the requirements to file documents, and to be responsible for custody and maintenance of share registers etc.)

35 As the local agent concept is new to New Zealand law, the rights and obligations on a local agent would need to be carefully considered to ensure that they are confined to being administrative in nature and not so onerous as to constitute de facto directors' duties, which would deter individuals from taking up an essentially representative role. As a result this option may take longer to implement than the requirement for a New Zealand resident director.

36 All public sector agencies consulted on this paper expressed reservations regarding this alternative. They considered that the accountability and liabilities of such a company officer are likely to be negligible, and thus the requirement is unlikely to provide an effective deterrent.

#### *Exemptions for Approved Jurisdictions*

37 For either the resident director or local agent options described above I propose to have certain exemptions, particularly for Australian-owned New Zealand companies and potentially for jurisdictions where there are reciprocal information sharing arrangements. Under this proposal, companies which have at least one director resident in an approved overseas jurisdiction which has reciprocal enforcement or information sharing arrangements with New Zealand would be exempt from the requirement to appoint a New Zealand resident director or local agent. It would mitigate the compliance costs to companies from approved jurisdictions which do not already have New Zealand-resident

directors, and enable New Zealand authorities to leverage off the registry integrity measures existing in approved jurisdictions, ensuring that the measure is only as burdensome as necessary to achieve the desired public policy objective.

### **Director Date and Place of Birth Information**

38 Currently directors are required to submit to the Registrar information regarding their name and residential address. Directors are not required to submit their date or place of birth. I do not consider a residential address alone is a comprehensive tool for identification. It is not uncommon for more than one person with the same name (e.g. father and son) to reside at the same residential address. Where enforcement or compliance action is required against an individual director, clear and accurate identification is desirable. This proposal thus supports the proposal for New Zealand-resident directors or local agents, by helping to ensure that those individuals provide more information to allow the Registrar to verify their identity if required.

39 Other related registers in New Zealand also require this information. For example, the Limited Partnerships Act 2008 requires all general and limited partners to supply their dates of birth as part of the application for registration. To protect directors' privacy that information is not publicly accessible. These arrangements have been in force for almost two years without the Registrar having received any concerns or complaints regarding its operation.

40 The United Kingdom requires place and date of birth information from those consenting to act as directors. Singapore and Hong Kong in addition require passport or identity card numbers. Requiring directors to provide their date and place of birth would also bring New Zealand company law into line with the Australian Corporations Act. This will in turn facilitate the harmonisation of the registration process between New Zealand and Australia.

### **Mandatory IRD Numbers**

41 Under this proposal all companies would be required to apply for an IRD number as part of their application for registration. Requiring a mandatory IRD number would provide an additional disclosure or verification step to off-shore interests selecting New Zealand as a jurisdiction of convenience, while at the same time providing a service for commercially minded companies which will be either cost neutral or actually reduce their compliance costs.

42 Currently the Companies Office offers the option of obtaining a company IRD number as part of the registration process. This removes the need to provide the same information twice to two separate agencies. About 80% of companies use this service.

43 The requirement for an IRD number entails submitting personal information relating to individual directors of companies. This information would be subjected to the usual checks carried out by IRD and would, therefore, provide another level of verification for those involved with New Zealand-registered companies based and operating overseas. It will not entail any change to the existing data sharing arrangements between the Companies Office and IRD.

44 Again, this measure does not offer a complete solution to the problem of New Zealand being used as a jurisdiction of convenience. Several New Zealand company formation agents apply for IRD numbers and bank account numbers as a matter of course for their clients, in an attempt to add further substance to the persona of the company as a New Zealand registered entity. Even so, the measure leaves open the opportunity for IRD to introduce enhanced verification procedures in the future.

### **Enhanced Powers for the Registrar**

45 The Registrar currently has limited powers of inquiry and intervention to test the integrity of company information. This proposal would give the Registrar enhanced powers to investigate, respond to or remedy issues arising in relation to the bona fides of directors and shareholders, and any integrity or compliance issues relating to companies. In particular, the following powers could be given (or existing powers strengthened) to allow the Registrar to:

a Require companies, directors, shareholders and/or local agents to confirm or correct existing information on the Companies Register;

b “Flag” on the Companies Office website a company’s registration in certain circumstances;

c Remove a company from the Companies Register in certain circumstances;

d Remove a director from a company if that person is disqualified under the Companies Act;

e Extend the criteria for the imposition of management banning orders to include persistent non-compliance with the filing and reporting obligations of the Companies and Financial Reporting Acts or where they have provided inaccurate information to the Registrar; and

f To the extent necessary, extend the Registrar’s investigation powers to matters where a company or its directors have not complied with the disclosure requirements of the Companies Act.

46 As is the case with other proposals in this paper, these enhanced powers will not, in themselves, defeat the opportunity for off-shore interests to use New Zealand as a corporate jurisdiction of convenience. These proposals will, however, enable improved investigation and enforcement, and timely public notice of irregularities around information held on the Register about a company without imposing additional compliance costs on legitimate business activity.

*Confirm or correct existing information*

47 From time to time the Registrar becomes aware that certain information on the Register is inaccurate. This may be due to simple oversight. For example, a director's address was correct at the time of registration, but that director has since moved. However, sometimes inaccuracies are deliberate.

48 The Companies Act provides a criminal offence for providing false statements to the Registrar, and certain other criminal offences for failure to provide updated records to the Registrar. The Registrar also has the power to correct the Register in certain circumstances, but (with the exception of clerical error), only on application from a person and only after giving certain public notice. Finally, the Registrar has a limited power to inspect a company and its records. However this is a relatively formal process.

49 Given the importance of the accuracy of the information on the Register, the Registrar could be given wider authority to require a person (whether company, director or shareholder) to either confirm that the information about that person is correct, or to provide updated information. This would be a relatively simple and straightforward mechanism to improve the accuracy of the information on the Register, without the more complicated and formal processes of correction or inspection.

50 Further, the existing offence provisions relating to failure to provide information and providing false statements to the Registrar could be extended to apply to any information required by the Registrar. In addition, the new enforcement powers described below could be made applicable in cases of failure to provide information or providing false information. This would enable the Registrar to act quickly to deter and disrupt the activities of those who provide false information concerning the companies with which they are associated.

*Flag registration*

51 Under this proposal the Registrar would be given the discretionary power to "flag" a company's record on the Companies Office website to show that it is under investigation in certain circumstances. This would provide a public notice that there may be material concerns about information on the register relating to that company which is the subject of inquiry by the Registrar. It would not

indicate any actual wrongdoing or affect the legal powers of the company. This would ensure that persons dealing with the company are aware of the data integrity concerns of the registry. Accordingly, bona fide businesses would be alerted to such companies and the “flagged” companies would be subject to heightened scrutiny from the legitimate businesses with which they do business. As such, it provides a heightened level of awareness and scrutiny. The discretion to “flag” a company would be exercisable in the following circumstances:

- a Where the Registrar has reasonable grounds to believe that the company or its directors or shareholders may have provided inaccurate information for the register, or in response to a request from the Registrar; or
- b Where the Registrar has reasonable grounds to believe that the company or its directors or shareholders may be in persistent breach of the Companies Act or the related Financial Reporting Act. This would not apply to minor or transitory breaches of the Companies Act; or
- c Where the Registrar has reasonable grounds to believe that the company may have ceased to carry on business. The Registrar already has the power to remove a company from the Register where it has ceased to carry on business; but as this process takes many weeks, as a precursor to removal I propose that the record be “flagged”.

#### *Removal from the Companies Register*

52 The Registrar has the power to remove a company from the Register (strike it off) in certain circumstances, for example where the company has ceased to carry on business.

53 Under this proposal, the Registrar would also have the power to remove a company from the register for the grounds specified in paragraph 51, above. The removal provisions under the Companies Act contain a range of procedural safeguards to enable companies to have adequate notice of the intended removal of a company, to enable affected parties to object to an intended removal and to ensure a transparent and fair process. These safeguards would equally be applied to a removal of a company following its failure to resolve the issues raised in the “flagging” process. The proposal would allow the Registrar to take relatively quick and inexpensive administrative processes to end the activities of companies whose bona fides were in serious doubt, or which had persistently breached their legal obligations.

54 The Registrar would retain the existing powers to bring criminal prosecutions for breaches of the Companies Act.

### *Removal of director*

55 As discussed above, the Companies Act 1993 provides that certain persons are disqualified from acting as company directors. For example, a person who has been convicted in New Zealand of a crime involving dishonesty is prohibited from managing a company. While the Act provides that it is an offence for a person to act as a director in contravention of this prohibition, the Registrar has no ability to simply remove the person from the Register. Furthermore the Act does not disqualify a director with equivalent convictions in another country.

56 The existence of the prohibition from acting as director, coupled with the ability to prosecute where a person acts in contravention of the prohibition, are in my view undermined by the fact that there is no legal ability for the Registrar to take simple administrative steps to prevent a disqualified person continuing to act as a director or being appointed as a director pending any prosecution and by the focus on New Zealand convictions.

57 I propose, therefore, that the Registrar would be empowered to remove from the public record a director of a company where the person is disqualified or prohibited under the Companies Act from being a director. Further work will need to be done on how best to deal with situations where directors have a criminal record or have been banned from serving as a director in another country.

58 This proposal will make it more difficult for suspect companies to find New Zealand-based directors or local agents to act for them. The evidence from OFCANZ, confirmed by searches of the Companies Register, is that limited numbers of people are engaged as the sole directors of a large number of suspect companies. If any of those people are banned as directors, the Registrar would be able to remove them as directors from all of the companies with which they are involved. This would then leave the company at risk of being “flagged” and ultimately removed from the Register for persistent breach of its legal obligations. Again, the proposal makes it more difficult for suspect companies to do business in New Zealand, while retaining the ease of business for legitimate companies which comply with their obligations.

### *Management banning orders*

59 The Registrar has the power to ban certain persons from being a director or involved in the management of a company for up to five years.<sup>1</sup> This arises invariably from their mismanagement causing company failure. The Court has the power to ban persons in a wider range of circumstances, such as where the person has been convicted of a crime involving dishonesty, or has persistently failed to comply with

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<sup>1</sup> The recent MED discussion paper on the Review of Securities Law seeks views on extending the maximum period for Registrar-imposed bans to ten years, and allowing the High Court to impose indefinite bans (increased from the current maximum of 10 years).

the requirements of a number of enactments which govern business such as the Companies Act 1993, the Securities Act 1978 or the Securities Markets Act 1988.

60 In practice, the Registrar has been far more active in issuing management bans than the Courts because the more expeditious and less expensive administrative process has served in most cases. Only the High Court, however, has the power to ban a director for persistently failing to comply with the requirements of the Companies Act.

61 Under this proposal the Registrar's power to make banning orders would expand to allow him to ban a person who has been a director of a company removed from the register on the grounds in paragraph 51(a) and (b) above, and whose acts or omissions have contributed to such removal. As is the case currently, the director would be banned for up to five years. As with the existing management bans imposed by the Registrar, where the person was the director of two or more companies that have been removed, the onus would shift to the director to show that he/she has not contributed to the circumstances giving rise to the removal of the companies.

62 The Companies Act provides a range of procedural safeguards that the Registrar must satisfy prior to banning a person. These include the requirements for notice to be given to the director and the ability for that person to make representations to the Registrar. The Companies Act also contains a right of appeal against decisions of the Registrar. These safeguards would equally apply to any extended power of the Registrar to prohibit directors.

63 The banning of a director would see that person removed as a director from all of the companies they were associated with, in accordance with the proposal at paragraphs 55 to 58, above

#### *Banning local agents*

64 If the proposals relating to local agents are adopted, to ensure consistency, the management banning orders discussed above would need to be extended to local agents. That is, a person banned from acting as a director would be banned from acting as a local agent too, and a person that is the local agent of a removed company could be banned from acting as either a director or local agent.

#### **Limited Partnerships**

65 My concerns relating to registration processes under New Zealand company law extend to the registration of limited partnerships under the Limited Partnerships Act 2008. My officials have noticed from the inception of the limited partnerships regime that there has been a high uptake by offshore partnerships which have no presence in New Zealand and carry out all of their business offshore. As with the

offshore companies, there is concern as to the activities of many of the limited partnerships. Officials are aware that some company formation agents (who register offshore shell companies) are also in the business of forming limited partnerships for foreign clients.

66 I therefore propose that, to the extent that Cabinet agrees to the proposals for reform suggested above, they should apply also to limited partnerships. Officials would need to carry out some further work to identify the necessary adjustments to take into account differences between the entities such as the fact that limited partnerships do not have directors, but instead have a combination of general and limited partners, and report to me with proposals to align the requirements for limited partnerships.

### **International Obligations**

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### **International Funds Service Development Group**

69 The International Funds Services Development Group (IFSDG) was established to investigate the opportunities available to New

Zealand to become an Asia-Pacific funds domicile and funds administration centre where collective investment schemes can be incorporated and serviced. In their pending final report to Ministers, the IFSDG raises the issue that the registration and maintenance of a New Zealand company does not require a single resident director. In their view, this is incompatible with establishing New Zealand as a trusted location for international financial services, largely because of enforcement concerns. The requirement of at least one resident director would aid accountability and better protect New Zealand's business reputation. Therefore, the proposals within this Cabinet paper are consistent with the recommendations of the IFSDG and would facilitate New Zealand's endeavours in this area.

### **CONSULTATION**

70 The Treasury, Ministry of Justice, New Zealand Police, Reserve Bank, OFCANZ, Department of Internal Affairs, IRD, Privacy Commissioner, Securities Commission and Ministry of Foreign Affairs and Trade have been consulted on the contents of this paper. The Department of Prime Minister and Cabinet has been informed. Their comments have been taken into account in the preparation of this paper.

71 Targeted consultation has been carried out with the Commercial and Business Law committee of the New Zealand Law Society, the New Zealand Institute of Chartered Accountants, the Institute of Directors and Business New Zealand.

Their comments were taken into account in the preparation of this paper.

### **FISCAL IMPLICATIONS**

72 The enhanced powers of the Registrar may give rise to enforcement action. Any costs to the Companies Office arising out of these proposals would be absorbed within the current baseline funding for its current enforcement functions.

73 IRD has noted that a significant increase in company registration is within its present capability to manage, although it could affect its processing workflows. They consider that there is possibility that the proposal for mandatory IRD numbers could involve additional expense, although no costing work has been done.

### **HUMAN RIGHTS**

74 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993.

## LEGISLATIVE IMPLICATIONS

75 Amendments to the Companies Act 1993 and the Limited Partnerships Act 2008 would be required if these proposals are approved.

## REGULATORY IMPACT ANALYSIS

### 76 Regulatory Impact Analysis Requirements

The Regulatory Impact Analysis requirements apply to the proposals contained in this paper, and therefore a Regulatory Impact Statement (RIS) is attached to this paper. The RIS has been reviewed by the regulatory impact analysis review panel of the Ministry of Economic Development.

### 77 Quality of the Impact Analysis

The Deputy Secretary, Economic Strategy Branch, Ministry of Economic Development, and members of the Regulatory Impact Analysis Review Panel have reviewed the RIS prepared by the Ministry of Economic Development and associated supporting material, and consider that the information and analysis summarised in the RIS is sufficiently comprehensive and robust, and effectively communicated to enable Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.

### 78 Consistency with Government Statement on Regulation

I have considered the analysis and advice of my officials, as summarised in the attached RIS and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

- Are required in the public interest
- Will deliver the highest net benefits of the practical options available, and
- Are consistent with our commitments in the Government Statement on Regulation

## PUBLICITY

79 The Ministry of Economic Development will post a copy of this paper and the accompanying RIS on its website and that of the Companies Office.

## RECOMMENDATIONS

80 It is recommended that the Committee

- 1 **NOTE** that there is a risk that New Zealand could become a jurisdiction of choice for criminal interests that wish to incorporate a company in a reputable jurisdiction, with the potential for harm to New Zealand's international reputation as a result;
- 2 **NOTE** that work on broader issues relating to corporate law and AML requirements will continue;
- 3 **NOTE** that other comparable jurisdictions require at least one director to be ordinarily resident in the jurisdiction in which the company is registered;
- 4 **NOTE** that the International Funds Services Development Group is likely raise the issue that the registration and maintenance of a New Zealand company does not require a single resident director as an obstacle to establishing New Zealand as a trusted location for international financial services;
- 5 **AGREE** that :
  - 5.1 The Companies Act 1993 be amended so that all New Zealand-registered companies must have at least one director resident in New Zealand;
  - OR**
  - 5.2 While recognising that it may have limited deterrent effect, the Companies Act 1993 be amended to require all New Zealand-registered companies have at least one director *or a local agent* resident in New Zealand;
  - OR**
  - 5.3 There should be no new requirement for either a New Zealand resident director or local agent;
- 6 **AGREE** that, should Recommendation 5.1 or 5.2 be accepted, companies which have a director resident in a jurisdiction which has entered into information sharing arrangements with the Registrar of Companies (e.g. Australia) by exempted from the requirements of the Recommendation;

7 **AGREE** that:

7.1 The Companies Act 1993 be amended to require directors to provide date of birth and place of birth information to the Registrar when they are appointed;

**OR**

7.2 There should be no new requirement for directors to provide date and place of birth information to the Registrar when they are appointed;

8 **AGREE** that:

8.1 The Companies Act 1993 be amended to require all companies to apply for an IRD number as part of the company registration process;

**OR**

8.2 There should be no mandatory requirement for companies to apply for an IRD number as part of the company registration process;

9 **AGREE** that:

9.1 The Companies Act 1993 be amended to provide the following additional or enhanced powers for the Registrar:

9.1.1 The power to require companies to confirm or correct information on the Register;

9.1.2 The power to “flag” records on the Register as being under investigation, if:

9.1.2.1 The Registrar has reason to believe that the company or its directors or shareholders have provided inaccurate information on the Register, or in response to any request for information or inspection by the Registrar; or

9.1.2.2 The Registrar has reason to believe that the company or its directors or shareholders are in persistent or serious breach of the Companies Act 1993 or the Financial Reporting Act 1993; or

9.1.2.3 The Registrar has reasonable grounds to believe that the company has ceased to carry on business;

9.1.3 The power to remove the registration of a company for the grounds listed in Recommendation 9.1.2;

9.1.4 Amending the existing power of the Registrar to ban a person from being involved as a director or manager of a company to include the following as grounds for making such a banning order:

9.1.4.1 The person has been involved as a director or manager of a company or companies that have been removed from the Register under Recommendation 9.1.3 where that person has contributed to such removal; or

9.1.4.2 The person has been involved as a local agent of a company to which the power to make a banning order would otherwise apply;

**OR:**

9.2 The status quo should be retained and the Registrar should not be conferred any of the additional powers set out in Recommendation 9.1;

10 **NOTE** that the Companies Amendment Bill will implement any changes agreed to in recommendations 5.1, 5.2, 6, 7.1, 8.1 and 9.1, above;

13 **AGREE** in principle that the same decisions made in respect of companies apply also to limited partnerships;

14 **AGREE** that the Minister of Commerce may take decisions on minor policy issues that arise as the Bill is

drafted, including the application of these proposals to limited partnerships;

- 15 **INVITE** the Minister of Commerce to issue drafting instructions to Parliamentary Counsel Office to give effect to recommendations 5.1 or 5.2, 6, 7.1, 8.1 and 9.1, above; and
- 16 **AGREE** to the Ministry of Economic Development publishing this paper and the accompanying Regulatory Impact Statement on its website and that of the Companies Office.

Hon Simon Power  
Minister for Economic Development

Date signed: \_\_\_\_\_

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30 June 2010

## REGULATORY IMPACT STATEMENT

### COMPANY REGISTRATION PROCESSES

#### AGENCY DISCLOSURE STATEMENT

This Regulatory Impact Statement has been prepared by the Ministry of Economic Development. It provides an analysis of a limited range of statutory measures designed to strengthen company registration processes in order to improve the reputation of New Zealand's company registration system, and gives the Registrar of Companies enhanced powers to respond to risks which might arise in relation to the integrity of information recorded on the companies register.

There is separate work being undertaken by officials in the Anti-Money Laundering context which will make recommendations on other measures (including additional substantive changes to the operation of company formation agents) aimed at reducing the abuse of the New Zealand corporate form by offshore interests. The statutory measures in this paper deal only with a range of changes to the company registration regime under the Companies Act 1993 that can be made quickly.

The analysis undertaken includes consideration of the known crime statistics in relation to New Zealand registered companies operating offshore. In addition it takes into account the impact of the proposals on the overall body of New Zealand registered companies by reference to the statistics relating to the number of companies involved.

Targeted consultation, particularly with representatives of business interests such as Business NZ and the Business Law Committee of the New Zealand Law Society, also guided the options considered.

The main constraint on the achievement of the targeted outcomes is the requirement that compliance costs on legitimate businesses are not increased; that is, measures target, so far as practicable, only those offshore persons seeking to register a New Zealand company with no intention of conducting business here. A further constraint on assessing the true magnitude of the problem is the criminal nature of the activity which has given rise to the proposals. By its very nature this activity is covert and its true extent must be a matter of speculation, although it is probably safe to assume that the number of entities engaged in such activity is greater than the reported incidence brought to the attention of enforcement agencies.

The policy options will impose minimal costs on New Zealand based companies and low costs on legitimate overseas businesses from some jurisdictions which seek to operate via a New Zealand registered company. They will not impair private property rights. Whilst a very small proportion of companies (under 3% of companies on the companies register) may face a new barrier to operating in New Zealand by virtue of the requirement to appoint a New Zealand resident director or local agent, the benefits to New

Zealand's international reputation would outweigh such costs. The policy proposals will not override fundamental common law principles.

Liz Thomson  
Manager, Legal Services, Business Services Branch

## **STATUS QUO AND PROBLEM**

### **Status Quo**

The registration and administration of companies is governed by the Companies Act 1993 and its subordinate legislation.

New Zealand's company registration regime is low-cost and straightforward by comparison to foreign jurisdictions. The incorporation process is highly electronic, can be entirely completed online, and does not require directors to be present in, or resident of, New Zealand. The registration requirements of the Companies Act impose no additional entry criteria for companies which register in New Zealand but which are controlled by offshore interests, including those who do not carry on business in New Zealand. In addition, the application fee for incorporation is low by international standards, and New Zealand is unique in not imposing an ongoing annual licensing fee.

The simplicity of the regime is a contributor to New Zealand's enviable reputation for ease of doing business. Coupled with its reputation as a well-regulated jurisdiction, this provides a comparative advantage that underpins New Zealand's ability to attract and retain internationally-mobile business investment.

### **Problem Definition**

Ironically, the confluence of low entry barriers and high international standing also makes the New Zealand registration regime vulnerable to misuse by illegitimate offshore operations. A review of the circumstances surrounding the SP Trading Ltd event<sup>2</sup> has identified a number of areas where New Zealand's regime is out of step with comparable foreign counterparts. It has further identified an inability for the Registrar of Companies to take administrative and investigative steps to ensure the integrity of the information which appears on the companies register where he is aware that such information is inaccurate.

The lack of any requirements under the Companies Act registration criteria to address the issue of wholly offshore interests being able to use the New Zealand company structure makes it very easy for these operations to use the company registration process to create a false sense of association with New Zealand. In turn, this enables such operations to enjoy a lesser degree of scrutiny than might otherwise be applied when conducting their affairs around the globe. Where these affairs are unlawful, the reputation of New Zealand in general - and its company registration regime in particular - may be tarnished

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<sup>2</sup> This New Zealand-registered company was recently implicated in a weapons smuggling operation in Thailand. It has no business presence in New Zealand and its sole nominee director had signed a comprehensive power of attorney regarding the control of the company to two Ukrainian nationals.

by association. This has implications for the integrity of the registration regime and its appeal to legitimate offshore investment.

Further, the Companies Act 1993 ("the Act") confers only limited powers on the Registrar of Companies to take action where he is aware that a company or its directors are failing to ensure that the information which appears on the register is accurate, and that the company is complying with its registration requirements. While the Act allows prosecution of individuals (including directors) who make or authorise false or misleading statements relating to the affairs of a company, there is no ability for the Registrar to take steps to ensure that the information relating to the company which appears on the companies register is accurate and complete.

The Organised and Financial Crime Agency of New Zealand ("OFCANZ") has advised that the New Zealand Police have, over the last three years, assisted overseas authorities with around 134 information requests relating to New Zealand registered companies operating from offshore believed to be engaging in criminal activity overseas. Each investigation may involve a web of companies, registered both in New Zealand and offshore. In addition, the Reserve Bank has received frequent complaints and enquiries about "offshore financial institutions" incorporated in New Zealand but with no other connection to the country. It estimates that there are at least 1000 such companies on the register, of which a number are suspected of carrying out fraudulent activities

New Zealand and overseas company law formation agents are known to be actively promoting New Zealand to offshore interests (including those of a dubious nature) as a jurisdiction of choice due to its lighter company regulatory environment in comparison with other jurisdictions.

There are currently around 530,000 companies on the companies register, so the number of suspect companies is a small proportion of the overall body of New Zealand registered companies. The repercussions of even a very small number of high profile cases however, has the potential to cause considerable reputational damage and reduction in confidence.

If the status quo is maintained the risk of repeat examples like SP Trading Limited under the current regime is high. In cases where the illegal activity being conducted by the company involves breaches of international obligations such as United Nations sanctions, such episodes are undesirable.

Concerns relating to the exploitation of the New Zealand companies registration regime by rogue offshore interests also extends to similar concerns with the limited partnerships regime established under the Limited Partnerships Act 2008. From the inception of this regime there has been a high uptake of the New Zealand limited partnership vehicle by offshore interests which have no business presence in New Zealand and general and limited partners who are located wholly offshore. Many of registered limited partnerships are known to be carrying on business as offshore financial institutions.

## **OBJECTIVE**

The overall objective is to make low cost changes to the registration system that would reduce the risks of a recurrence of undesirable events similar to those that arose in the SP Trading case.

## OPTIONS

### Option 1 - Requiring Full Identity Verification of Directors

This option would involve requiring full verification of the identity of directors of companies at the time that they are appointed. Such verification would involve the checking of a number of corroborating identification documents such as birth certificates and passports. However, this option is not being recommended because:

- It is relatively straightforward for offshore individuals who are engaged in illegal activities to falsify identity information, and relatively difficult for agencies in New Zealand to check the bona fides of identity information provided from offshore;
- Even if law enforcement agencies are able to prove that identity information has been falsified, investigation and enforcement of individuals located offshore is problematic, costly and time-consuming;
- Although the Identity Verification Service will provide assurance as to the identity of New Zealand individuals, there is currently no sufficiently developed technology to accurately verify the identity of the higher risk category of offshore directors;
- Full identity verification in and of itself would not deter determined criminal elements from exploiting the good reputation of the New Zealand companies regime.

### Option 2 - Requiring Disclosure of Beneficial Control of Companies

This option would require shareholders and directors of companies to disclose information regarding the beneficial ownership of shares held on trust, as well as the identity of those who control companies in cases where directors are acting pursuant to a power of attorney or other arrangement. Such disclosure could facilitate targeted crime prevention and enforcement. This option was discounted at this time because it will be considered by officials working on the report back to FATF in October 2011.

## PREFERRED OPTION

The preferred option is to introduce a combination of measures to amend the Companies Act 1993.

### A Enhancing the Powers of the Registrar

Under this measure the Registrar of Companies would have enhanced powers to take administrative and investigatory action if he has reasonable grounds to believe that the company or its directors are in breach of their registration requirements. Such powers would be additional to the ability to bring a prosecution for making or authorising the making of false statements which currently exists under the Companies Act 1993.<sup>3</sup>

<sup>3</sup> Section 377 Companies Act 1993

In summary, it is proposed that the Registrar be given the following powers:

- a Require companies, directors, shareholders and/or local agents to confirm or correct existing information on the companies register in situations where the Registrar;**
- b “Flag” publicly a company’s registration in circumstances where the Registrar has reasonable grounds to believe that:**
  - The company or its directors or shareholders have provided inaccurate information for the register, or in response to a request from the Registrar;
  - The company or its directors or shareholders are in persistent breach of the Companies Act or Financial Reporting Act;
  - The company has ceased to carry on business.
- c Remove a company from the Companies Register for the same reasons that he would be able to flag their registration, following a range of procedural safeguards to ensure that there is a power to object to such removal;**
- d Remove a director from a company if that person is disqualified under the Companies Act;**
- e Extend the criteria for the Registrar to impose management banning orders to include persistent non-compliance with the filing and reporting obligations of the Companies and Financial Reporting Acts or where they have provided inaccurate information to the Registrar; and**
- f Extend the Registrar’s investigation powers to matters where a company or its directors have not complied with the disclosure requirements of the Companies Act.**

#### *Benefits*

- Increased confidence for those searching the register regarding the accuracy and integrity of information on the register;
- Improved protection to investors, creditors and others who deal with companies by:
  - Providing a clear warning on the register when a company is under investigation for breaching its registration requirements under the Companies Act;
  - Enabling the removal of a company from the register if it fails to rectify breaches of its registration requirements;
  - Enabling the Registrar to ensure that companies do not continue to be recorded on the register as fulfilling their basic registration requirements (e.g. that they have at least one director) when in fact they do not;
  - Permitting the Registrar to remove persons who are disqualified from acting as a director from office due to the company’s failure to remove them as a director;
  - Enabling the Registrar to ban directors for a period of up to five years if they repeatedly fail to ensure that a company is fulfilling its registration requirements;
  - Making it easier for the Registrar to confirm the bona fides of those persons behind any company, and to hold any company to account for breaches of law.

#### *Limitations*

This measure will not prevent New Zealand registered companies controlled by rogue offshore interests from carrying out illegal activities. It provides only

the means for ensuring that the consequences of such activities are not exacerbated by misinformation in relation to such companies being permitted to remain on the register.

#### *Costs*

The enhanced enforcement powers of the Registrar would have cost implications (both direct and indirect) for those firms suspected of failing to comply with compliance and disclosure requirements. Such costs would include the compliance cost of correcting information on the register and reputational costs for companies which are the subject to the exercise by the Registrar of the powers outlined. This compliance cost would range from a minimal cost for submitting forms containing, for example, a correct residential address (there is no fee for filing such documents, but if professional advisors are used a fee based on such a professional's hourly rate would be incurred), up to a significant cost due to loss of business opportunities arising from the action of the Registrar in alerting the public to the fact that the company is not meeting its registration requirements.

The costs of the increased functions of the Registrar would be absorbed from within existing baseline funding.

#### **B New Zealand Resident Director/Agent**

Under this measure all companies which register in New Zealand would require at least one director to be ordinarily resident in New Zealand. This requirement is contained in the company laws of other comparable jurisdictions such as Australia, Canada and Singapore. Alternatively, rather than requiring a New Zealand resident director, a local agent could be required, who would act as a New Zealand representative of the company, with limited functions such as being able to accept service on behalf of the company and holding information relating to the company. Unlike a director, the local agent would not be responsible for the governance of the company, and would not be subject to or liable for the directors' duties imposed under company law.

It is proposed that companies whose directors are resident in approved jurisdictions should be exempted from this requirement. Jurisdictions which have entered into information sharing arrangements with the Registrar of Companies (for example, Australia) would be eligible to be exempted from this requirement.

#### *Benefits*

- Introducing the resident director requirement would bring New Zealand company law into line with Australia, Canada and Singapore;
- The duties and liabilities imposed by company law on a New Zealand director would act as a deterrent to offshore interests who do not intend to carry out lawful business. Anecdotal evidence from staff of the Australian Securities and Investment Commission indicates that they do not experience a high incidence of the misuse of the Australian company structure by offshore interests. They attribute this to the deterrent effect of the requirement under the Australian Corporations Act for at least one company director to be ordinarily resident in Australia;
- The presence of a company representative in New Zealand would provide an entry point for enforcement agents to gain information regarding the activities of the company. Under the status quo it is

difficult and costly to effectively investigate a company if all individuals are located offshore;

- The company representative would provide a point of accountability for the activities of the New Zealand company. Under the status quo there is often no identifiable and/or available individual who is liable for the actions of the company. The accountability of the resident director measure would be greater than that of the local agent, given the director's greater responsibility for the actions of the company;
- It would overcome issues relating to service on directors located offshore, which is problematic for practical and logistical reasons.

#### *Limitations*

- The presence of a New Zealand resident director or local agent will not necessarily prevent a company from engaging in illegal activities;
- As the New Zealand resident director would in some cases be appointed merely to fulfil the registration requirements for incorporating in New Zealand, a nominee director with no real role in the business may be appointed. This was the case with SP Trading Limited, which had a nominee New Zealand resident director who executed a power of attorney handing all control of the company over to Ukrainian individuals;
- Even if a New Zealand resident director was not a nominee, there may not be a sufficient pool of well qualified and experienced directors available to take up directorships;
- In the case of the local agent alternative, the level of accountability of the local would be minimal given the restricted role of the agent in comparison with a company director.

#### *Costs*

This requirement would not impose a regulatory cost on New Zealand-based businesses since they will have New Zealand resident directors as a matter of course.

As both New Zealand resident directors and local agents would in many cases charge fees for their services, costs would be imposed on some international businesses. It is estimated that less than 3% of the total number of companies on the register would fall into this category. This number would reduce significantly if the exemption proposal is approved (i.e. companies whose directors reside in approved jurisdictions are not required to appoint a New Zealand-resident director or local agents).

The quantum of such a fee would vary according to the type and size of any business undertaken by a company. At the lower end of the scale the fee would be around a few hundred dollars. At the upper end, the fee would be much higher – for example in the case of company with operations the size of some of our largest listed companies, fees in the hundreds of thousands are occasionally paid. Based on Companies Office statistics, nearly 95% of companies on the register can be characterised as small or medium sized businesses. The higher fee levels would therefore apply to around 5% of affected companies. Based on the weighted average of the size of most companies involved, an estimate of the compliance cost is a range of between \$500 up to \$5000 per company, with a small number of larger multinational companies liable for the higher fee which directors of such entities could expect to charge. It should be emphasised that this is an estimate, however.

Given the vast range of businesses undertaken by companies it is difficult to calculate a standard fee for such services.

In the case of a local agent it is expected that the fee would be significantly lower. A local agent would not have a role in the governance of the company, and would not be subject to the directors' duties imposed under company law. The functions of a local agent would be confined to accepting service of documents and holding information relating to the company. An estimate of the fee for an agent is in the range of \$500 to \$2000 per annum.

The costs are a justifiable regulatory burden because:

- ***Other comparative jurisdictions to New Zealand impose such requirements, therefore New Zealand would not be at a competitive disadvantage;***
- ***A number of existing businesses will have access to agents already in the form of New Zealand employees or professional advisors. All companies are required to have an address for service and registered office, and it would be a small additional step to nominate a party at that address as a local agent or director;***
- ***The limited exemption proposal will remove these costs from businesses whose directors reside in approved low-risk jurisdictions.***

There is also an element of compliance imposition on the way in which some international businesses carry out their business. A number of international companies, particularly those based in Australia, prefer to incorporate a New Zealand subsidiary and control its operation from a parent company with all members of its board of directors located in its home jurisdiction. Such entities may be reluctant to appoint a New Zealand resident director for issues of convenience, such as the logistical requirements of holding board meetings where one director is resident in New Zealand.

### **C Director Birth Information**

This measure would require all directors to provide their date and place of birth to the Registrar of Companies. In the same way that the Limited Partnerships Act is drafted, this information would form part of the register, but would not be available for public searching. It would be able to be used by the Registrar and other enforcement agencies in order to carry out their functions under the Companies Act. There will be privacy issues around the collection of this personal information, and consultation with the Privacy Commissioner will be required.

#### **Benefits**

- Better verification of individuals against whom action may be taken (for example, in situations where two people such as a father and son, reside at the same address);
- Alignment with Australian company law, which would in turn help in facilitating the harmonisation of New Zealand and Australian company registration processes.

#### **Costs**

There is a very low financial cost for this requirement. The date of birth information would be collected by way of a field on either the form for the

application for incorporation, or the form of consent to be appointed a director, either at the time that the company is formed or when the director is appointed. Consulted parties reported that international directors expect to provide this information in any event, as it is a common requirement for overseas jurisdictions.

#### **D Mandatory Tax Numbers**

This measure would make it mandatory for all companies to apply for a tax number as part of the registration process. Under the status quo this is an option for companies, and around 80% of companies currently do so.

##### *Benefits*

- All directors would be subjected to the standard Inland Revenue Department checking processes, including its “failsafe” systems;
- The requirement would send a signal to those seeking to incorporate in New Zealand that they should be doing so with the ultimate intention of carrying on business here.

##### *Limitations*

- not all companies will be taxpayers immediately upon incorporation. For example, shelf companies formed by organisations such as legal firms, accountants or company formation agencies for on-selling to clients may not be used for the conduct of a business for some time after their formation;
- the obtaining of an IRD number will not necessarily prevent the conduct of illegal offshore activity via a New Zealand company vehicle. It is not uncommon for company formation agents to include the obtaining of an IRD number as part of the “package” of services which they provide to offshore clients.

##### *Costs*

- There is no fee for applying for a tax number, and no related or downstream costs associated with obtaining a tax number. On the contrary, the removal of duplicate processes for applying for company registration and a tax number would result in a reduction in compliance costs to firms.

#### **Benefits of the Preferred Option**

Notwithstanding the limitations to the measures discussed above, the preferred option will improve the standing of New Zealand’s company and limited partnerships registration regimes.

- **Reputation:** The proposals would address the perception that New Zealand’s company registration system is particularly vulnerable to incidents;
- **Comparability with similar jurisdictions:** the proposals would bring New Zealand’s company law registration requirements more into line with other similar jurisdictions, thus reducing the scope for it to be particular target jurisdiction for rogue offshore interests;
- **Deterrence:** the imposition of increased registration requirements are aimed at deterring those who view New Zealand as a jurisdiction of convenience. The fact that the registration requirements and the

Registrar's powers are being increased would send a signal that such activity is being subjected to increased scrutiny and enforcement;

- Compliance with international obligations: the preferred option would go towards reducing the risk that New Zealand companies or limited partnerships may engage in activities which may breach international obligations such as United Nations sanctions measures;
- Trans-Tasman harmonisation: the introduction of the resident director proposal and the date and place of birth proposal would bring New Zealand's company law into line with that of Australia. That in turn would facilitate the harmonisation of registration processes between New Zealand and Australia;
- Better enforcement: the resident director or agent requirement coupled with the date and place of birth information would enable enforcement agencies to undertake more effective enforcement.

### **LIMITED PARTNERSHIPS**

Concerns relating to the exploitation of the New Zealand companies registration regime by rogue offshore interests also extends to similar concerns with the limited partnerships regime established under the Limited Partnerships Act 2006. It is therefore proposed that the same measures be applied to limited partnerships with the necessary modifications to take into account their differing legal structure (e.g. the fact that they have general partners rather than directors).

### **CONSULTATION**

#### *Departmental consultation*

The Treasury, Ministry of Justice, New Zealand Police, Inland Revenue Department, Department of Internal Affairs, the Privacy Commissioner and Ministry of Foreign and Trade have been consulted on the contents of the paper.

#### *Targeted Consultation*

Targeted consultation has been carried out with the following groups: the Commercial and Business Law committee of the New Zealand Law Society ("NZLS"), the New Zealand Institute of Chartered Accountants ("NZICA"), the Institute of Directors and Business New Zealand.

## **IMPLEMENTATION**

The proposals will require legislative amendments to the Companies Act 1993 and the Limited Partnerships Act 2008.

Enforcement will be undertaken through the enhanced powers of the Registrar, and by modifying the application process to ensure that all new incorporation applicants are subjected to the new regime.

Publicity would be given to legislative changes by way of a communications programme which would be delivered through the usual Companies Office systems. This would include website content, communication through the Ministry of Economic Development Monthly Business Update publication, media releases, and short articles in professional publications such as the New Zealand Law Society magazine *Law Talk*.

## **MONITORING, EVALUATION AND REVIEW**

Quarterly statistics on the number of requests from offshore enforcement agencies to the New Zealand police for assistance in investigations into New Zealand registered companies will be compared pre- and post- intervention in order to ascertain whether there has been a drop in the number of such companies involved in suspected criminal activity.

Monitoring of the effect of compliance costs will take place via the regular Companies Office surveys of its clients (which will include a specific question regarding the new processes), and via feedback through its website and contact centre. In addition, feedback from the business.govt website (which is a cross-governmental business information website) will be monitored.

Monthly, quarterly, and annual registrations will be compared pre- and post-intervention to ascertain whether the intervention has had a material impact on the overall number of business registrations. These data will be collected by the Companies Office as a matter of course, and are able to be analysed in this manner at minimal marginal cost to the Ministry.