Using New Zealand based foreign trusts

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Introduction

New Zealand is a land full of trusts. They form an important part of many New Zealanders' lives. There is no official record of trust use in New Zealand. However, it has been estimated 'that there is one trust for every 18 people in New Zealand'.[1] Many of those trusts are discretionary family trusts set up to hold the main family asset, the family home, with 'mum and dad' trustees. In the 2013 census 215,280 households (14.8%) reported that their dwelling was in a family trust (compared with 167,922 households (12.3%) in 2006).

In the author's experience, the overriding motivation for establishing family trusts in New Zealand in 2015 is the preservation, protection and prudential stewardship of family assets (with varying specific factors contributing to an individual's decision to establish a trust).

The motivation to preserve, protect and properly manage assets is not limited to New Zealand residents. In 2012 the Inland Revenue reported that there were approximately 7,700 trusts established by non-residents in New Zealand.[2] This article considers non-resident trust use in New Zealand and in particular, the specific issues that international trust and asset planning lawyers should be aware of when a client is looking for global solutions to asset planning and trust issues.

International trust structures

It is not unusual in today's global market for high net worth individuals to invest globally and to use structures outside their home jurisdiction to hold and protect assets. Although it is possible for an adviser to be an expert in his home jurisdiction, it is more difficult to be an expert in all the different jurisdictions that a client may want to use as part of his trust and asset planning. However, it is important that advisers have a good grasp on what the potential issues are and the good news is that where ever the jurisdiction, the issues tend to be the same – taxation, privacy, control and duration.

Taxation

Introduction

In New Zealand, the main tax statutes are the Income Tax Act 2007 (Tax Act), the Tax Administration Act 1994 and the Good and Services Tax Act 1985. The Tax Act governs the taxation of income, the Tax Administration Act governs the administration and enforcement of tax laws and the Good and Services Tax Act governs the value added goods and services tax charged on the supply of goods and services.

There is no stamp duty, estate duty, gift duty or inheritance tax in New Zealand. Further, there is no capital gains tax. Although there is not a separate capital gains tax regime, there are some provisions in the Tax Act that include gains that would often be considered as capital in nature as income and therefore liable to income tax. For example, under s CB 10 of the Tax Act an amount

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1 Law Commission, *Some issues with the use of trusts in New Zealand: review of the law of trusts, second issues paper* (NZLC IP 20), at para 2.1.

2 Response from the Inland Revenue to a query from the Law Commission. See *Review of the law of trusts: a Trusts Act for New Zealand* (NZLC Report 130, 2012), at fn 55.

that a person derives disposing of land is income if the land is sold within 10 years of acquiring it and at the time the person acquired it he was a land developer. Under the financial arrangement rules set out in subpart EW of the Tax Act gains on the sale, maturity or other realisation of certain financial arrangements (such as debt instruments) are treated as income.

Taxation of trusts

In New Zealand the taxation of trusts is governed by subpart HC of the Tax Act. The regime relating to the taxation of trusts is commonly called the 'settlor' regime because it is the settlor's residence that determines the tax liability of the trust. 'Settlor' is very widely defined in the Tax Act and includes any person who, at any time, transfers value to the trust.

Generally, trust income is taxed as 'beneficiary income' or 'trustee income'. Beneficiary income is defined in the Tax Act to be an amount of income derived in an income year by a trustee of a trust to the extent that:

(1) it vests absolutely in interest in a beneficiary of the trust in the income year; or

(2) it is paid to a beneficiary of the trust in the income year or within a certain period defined in the Tax Act.[3] This period will be a minimum of 6 months and a maximum of 15 months from the trust's balance date depending on the balance date of the trust and whether or not the trust uses a tax agent to file tax returns.

Beneficiaries are taxed on beneficiary income at their marginal rates of tax. Trustee income is income derived by a trustee of a trust that is not beneficiary income. Trustee income that is subject to tax in New Zealand is taxed at the flat rate of 33%.

The general rule is that a trustee is liable for New Zealand income tax on income derived from New Zealand. The trustee is also liable for New Zealand income tax on foreign sourced income if the settlor is resident in New Zealand at any time during the relevant income year. However, the trustee will not be liable for New Zealand income tax on foreign sourced income if the settlor is not resident in New Zealand and the trust is a foreign trust.[4]

What is a foreign trust?

The Tax Act provides that a trust is a 'foreign trust' in relation to a distribution if no settlor is resident in New Zealand at any time in the period that:

(1) starts on the later of 17 December 1987 and the date on which a settlement was first made on the trust; and

(2) ends on the date of distribution.

If the trust is a foreign trust the trustee is only liable to tax on income derived from New Zealand. The trustee is not liable to tax on foreign sourced income even if the trustee is resident in New Zealand.

There are specific rules dealing with whether income has a New Zealand source. Foreign sourced income is income that is not treated as having a source in New Zealand.

The foreign trust regime has been part of New Zealand's tax law since 1988. The Law Commission recently commented that these:

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3 'Pay' is defined in section YA 1 of the Tax Act. The definition means that 'paid to a beneficiary' in the definition of 'beneficiary income' includes crediting the beneficiary for the amount.

4 And the trust is not a superannuation fund, a testamentary trust or inter vivos trust that had a settlor who died resident in New Zealand – section HC 26(1) of the Tax Act.

'[t]axation rules have led to a substantial foreign trust industry in New Zealand. The genesis of New Zealand as an offshore trust jurisdiction was the tax and trusts regime introduced in 1988. In short, the regime permits settlors residing outside New Zealand to settle trusts with New Zealand resident trustees without exposing the trustees, trust assets or their (non-resident) beneficiaries to tax in New Zealand.'[5]

Application of double tax agreements

Currently New Zealand has 39 double tax agreements (DTAs) in force. These provide relief from double taxation where a person is resident in one or both contracting states and derives income that is taxable in two jurisdictions. Where there is a foreign trust (ie a trust with a New Zealand resident trustee but no New Zealand tax liability because there is no New Zealand resident settlor, no New Zealand source income and no distributions to beneficiaries resident in New Zealand), the issue arises whether the trustee is resident in New Zealand for treaty purposes and therefore able to obtain the benefits arising under the treaty. One view is that treaty protection is not available to the New Zealand resident trustee. Some commentators (and the author) take the contrary view and consider that 'if a resident is liable for tax on any income, regardless of the capacity in which that income is received, the tests of residence and income are met and the majority of DTAs will apply'.[6] The author recently had cause to apply the USA/New Zealand Double Tax Agreement in the context of dividends paid by a US company to a New Zealand resident trustee. In the US Agreement 'resident of a Contracting State' does not 'include any person who is liable to tax in that State in respect only of income from sources in that State'. The view was taken that the wording of the US Agreement did not exclude the New Zealand resident trustee. The New Zealand resident trustee was a resident in respect of other income streams and therefore, the US Agreement applied. The effect of applying the US Agreement was that the amount of withholding tax was reduced to 15% of the gross amount of the dividends instead of 30%.

This is a complex issue and in any given case, advice should be sought and the particular circumstances including the type of income and the relevant treaty assessed. However, it should be noted that treaty protection may not always be available in a foreign trust context.

Privacy

New Zealand does not require trusts to be registered (unless the trust is a charitable trust).[7] However, a New Zealand resident trustee of a foreign trust (called a 'resident foreign trustee') is required to disclose certain information to the Inland Revenue and to keep financial and other records relating to the trust for New Zealand tax purposes.

Failure to comply with these requirements may result in the resident foreign trustee being taxed in New Zealand on the foreign trust's worldwide income. However, the trust will never become subject to tax in New Zealand on its worldwide income if the resident foreign trustee is a member of an 'approved organisation'. Organisations that have been granted approval are the New Zealand Law Society, the New Zealand Institute of Chartered Accountants (now part of Chartered Accountants Australia and New Zealand) and the Society of Estate and Trust Practitioners (ie the resident foreign trustee is a professional person such as a lawyer or an

5 Law Commission, *Review of Trust Law in New Zealand, introductory issues paper* (NZLC IP 19), at para 2.46.

6 *Taxation of Trusts* (CCH New Zealand, 2nd edn, 2011), at para 8240. See also J Prebble's articles, 'Accumulation trusts and double tax conventions' [2001] *British Tax Review* 69, at pp 70–75 and 'Trusts and double taxation agreements' (2004) 2(2) *eJournal of Tax Research* 192.

7 Charitable trusts need to be registered under the Charities Act 2005 to obtain certain exemptions from tax and other fiscal advantages.

accountant). If the resident foreign trustee is a New Zealand company, the requirement can be met by one of the directors being a member of the 'approved organisation'.

The following information is required to be disclosed to the Inland Revenue within 30 days of the resident foreign trustee's appointment:[8]

(1) the full name of the foreign trust or other identifying particulars such as the date of settlement of the trust;

(2) the name and contact particulars for the resident foreign trustee or trustees;

(3) whether a settlor is resident in the Commonwealth of Australia;

(4) the name of the 'approved organisation' the resident foreign trustee belongs to, if any, or, if the trustee is a company, the name and contact particulars of the director who is a member of the 'approved organisation';

(5) if the foreign trust has more than one resident foreign trustee, whether one of the trustees has been appointed as an agent for the purposes of making disclosures and keeping records, and if so, the contact details of that trustee; and

any changes in the above.

These rules came into force in 2006. At the time, the Inland Revenue commented '[t]he collection of this information will assist Inland Revenue to identify the appropriate trustee(s) when information about a foreign trust is requested by one of New Zealand's DTA partners'.[9] It went on to say:

> '[i]nformation will be provided to other DTA signatory countries on a case-by-case request basis, when Inland Revenue considers that there are valid grounds for requesting the information. Inland Revenue will not entertain general "fishing expeditions" from tax treaty partners for information on foreign trusts, or satisfy requests for information from countries that do not have a DTA or a tax information exchange agreement with New Zealand.'[10]

That was the position in 2006. However, the world is a different place now. Tax authorities all over the world are moving towards greater cooperation and coordination of their compliance activities as indicated by the commitment shown to the Organisation for Economic Co-operation and Development (OECD) Action Plan to combat international tax avoidance (which was released in 2013) at the G20 meeting of Finance Ministers and Central Bank Governors held in Cairns, Australia in September 2014.[11]

The multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention) came into force in New Zealand on 1 March 2014.[12] The Convention authorises the Inland Revenue and the tax authorities of other signatory countries to:

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8 Section 59B of the Tax Administration Act 1994.

9 (2006) 18(5) *Tax Information Bulletin,* June, at p 111.

10 Ibid, at p 111. One exception to this is where the settlor of the foreign trust is an Australian resident. In that case, the Inland Revenue will periodically request additional information about the trust (such as financial records, details of distributions to beneficiaries and the identity of the settlor) and provide this information to the Australian Taxation Office.

11 On 29 October 2014, the Minister of Revenue announced New Zealand's timetable for participation in a global automatic exchange of information. In the Minister's media statement he said 'New Zealand intends to align its timetable with Australia's and begin exchanging information on a voluntary basis from 2018, aiming for mandatory reporting in 2019'. On 26 November 2014, the Minister released two reports from officials which provide an update on the policy work being undertaken in line with the OECD Action Plan and also outline the expected timeline for related policy work. These reports can be found at www.taxpolicy.ird.govt.nz.

12 The Convention became effective for criminal tax matters from 1 March 2014 and for all other exchange of information matters, generally from 1 January 2015.

> 'assist each other regarding the exchange of information, unpaid tax recovery, and service of documents. It provides a means of significantly increasing New Zealand's ability to detect and prevent tax avoidance and evasion without the cost and resources that would be required for a bilateral agreement.'[13]

As with other jurisdictions around the world, New Zealand has recently entered into an Intergovernmental Agreement (IGA) with the USA relating to the implementation of the Foreign Account Tax Compliance Act (commonly known as FATCA). Trusts are entities under the IGA and depending on the particular circumstances of the trust may have FATCA registration and reporting obligations.

In the author's experience, clients employing New Zealand trustees under the foreign trust regime are those for whom disclosure of material to New Zealand's Inland Revenue (or other similar agency) would be unwelcome but not unacceptable. In that sense, New Zealand presents itself as a trust centre where some of the more extreme rules of confidentiality present in other centres[14] do not exist and potential users make their choice on that basis. It is fair to say that the New Zealand government is committed to the ongoing negotiation of DTAs, tax information exchange agreements, as well as its OECD membership. In the author's view, these commitments indicate that clients should not assume that information about them will be free of scrutiny from the Inland Revenue.

The author understands that there are some jurisdictions (for example, in Latin America) that operate 'blacklists' effectively penalising the use of certain trust jurisdictions. Because New Zealand is a member of the OECD and is generally regarded as having a rigorous and robust taxation regime consistent with best international tax practice, to the best of the author's knowledge New Zealand is not on any of these 'blacklists'. As a consequence the use of the New Zealand based foreign trust regime remains a viable alternative for the residents of most foreign jurisdictions.[15]

Control

Trust law in New Zealand has two main sources – the common law derived from the courts and the Trustee Act 1956. The Trustee Act deals with the administration of trusts and sets out various powers and duties of the trust parties. The powers set out in the Trustee Act are default powers and 'apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of the instrument'.[16]

In the past, taxation laws such as estate duty and gift duty have had a significant impact on the structure of trust deeds. However, these taxes have now been abolished in New Zealand.

Trust deeds in New Zealand are generally very flexible. Other than the usual constraints of trust law[17] there are no legal restrictions to creating trust deeds with whatever terms are considered appropriate for the circumstances.[18] The settlor is free to set out the rules that will apply. He is free to reserve certain powers to himself and to give wide, discretionary powers to the trustees. It is not possible for the settlor to reserve unlimited powers to himself and deciding

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13 Report of the Foreign Affairs, Defence and Trade Committees, *Mutual Convention on Mutual Administrative Assistance in Tax Matters, Amended by the 2010 Protocol* (2013).

14 For example, where it is an offence for a person to make disclosure of the details (and existence) of a trust, company or other entity established in the jurisdiction (with only limited exceptions).

15 Subject always to the specific taxation regime of each jurisdiction.

16 Section 2(4) of the Trustee Act 1956.

17 Trusts are subject to the usual constraints of trust law. The three certainties must be met, they must be completely constituted and they cannot be created for an illegal purpose. If the trust relates to land (or is created under a will) it must be evidenced in writing.

18 The trust deed will always be interpreted subject to trustees' duties.

what powers to give and what powers to reserve will always be a matter of judgment for the settlor and his advisers. There have been some recent New Zealand cases where the concepts of a 'sham' trust and an 'illusory' trust have been discussed. In *Financial Markets Authority v Hotchin*,[19] where the settlor was not a beneficiary but was initially the sole trustee and then become one of two, the court found that there was an arguable case that a sham existed: 'Aspects of how it was operated . . . suggest that assets of the Trust have been, and been allowed to be treated as [the settlor's] although these transactions occurred after settlement'.[20] In *Clayton v Clayton*[21] the High Court found that a trust was invalid on the basis that it was an 'illusory trust' – that, objectively assessed, the settlor retained 'such control that the proper construction is that he did not intend to give or part with control over the property sufficient to constitute a trust'.

A discussion on flexible trust deeds is not complete without a comment on trustees' duties. The powers of a trustee set out in a trust deed will always be subject to his duties as a trustee. These are not set out in the Trustee Act 1956 but derive from the common law. 'It is generally accepted that there are some fundamental duties which, if excluded, mean that the relationship does not constitute a trust'.[22]

Control provisions in an international context

In an international context it is often desirable to include provisions in the trust deed that are not usually included in domestic trust deeds. The administration of a New Zealand foreign trust is carried on outside the client's home jurisdiction and often the client will want to retain a degree of influence and control over the trustee. The trust deed can be tailored to give the client some security and assurance in this regard by providing for some or all of a protector, a protector committee, an advisory committee and a management committee. The roles of these officers and committees are set out in the trust deed and vary depending on the client's needs and goals. For example, the trust deed could require the New Zealand trustee to obtain the approval of a protector or a protector committee prior to the exercise of certain trustee powers. Effectively the protector or protector committee is put in the position to veto any decision of the trustee. The sort of decisions the protector or protector committee could veto may include some of the following trustee decisions:

(1) to wind-up the trust;

(2) to make distributions of income or capital from the trust;

(3) to appoint or remove any persons as discretionary beneficiaries (if that power is vested in the trustee);

(4) to resettle all or any part of the trust fund;

(5) to distribute the trust fund on the vesting day;

(6) to enter into major transactions (as defined in the trust deed);

(7) to amend the trust deed.

In addition to the specific roles above, it is not unusual for the trust deed to give a named person such as the protector the power to remove the trustee and appoint a new trustee at any time (although the implications of holding such a power does need to be considered in the client's home jurisdiction).

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19 [2012] NZHC 323.

20 Ibid, at para 53

21 [2013] NZHC 301.

22 Law Commission op cit n 2, above, at para 5.3. The author notes that these fundamental duties are known by some as the 'irreducible core' of trustees' duties as described by Millet J in *Armitage v Nurse* [1998] Ch 241.

Other trust deed provisions in an international context

Although clauses excluding or limiting trustee liability for breach of trust are usually included in domestic trust deeds, extra protections (such as an anti-*Bartlett* clause[23]) are common in foreign trust deeds because the resident foreign trustee will be administering assets in another jurisdiction often held through companies or managed by managers.

Trustee exclusion clauses are not currently regulated by statute in New Zealand. However, the Law Commission has recently recommended in its *Review of the law of trusts: a Trusts Act for New Zealand*[24] that a new Trusts Act provide that the terms of a trust must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's own dishonesty, wilful misconduct or gross negligence. This recommendation represents a change in New Zealand law. The Law Commission's final report does not include a definition of 'gross negligence'. It is not a term easy to define and is likely to depend on the facts in each case.

In cross-border trust structuring, it is often the case that trust deeds need to be amended to accommodate changes in circumstances and tax laws. Therefore, it is generally advisable to have broad amendment powers included in the trust deed.

Trustees

A foreign trust can have non-resident trustees as well as New Zealand resident trustees. Any person with legal capacity to hold property can be a trustee. Often a foreign trust will have a separate New Zealand company incorporated to act as the trustee. There is no legislation that governs or regulates these private trustee companies except the Companies Act 1993, which applies to all companies. Registration of a company under the Companies Act and the ongoing compliance requirements of companies are not particularly onerous.[25]

A recent law change in New Zealand means that a company must have at least one director either living in New Zealand or in an 'enforcement country'.[26] This requirement comes into effect on 1 May 2015, but practically is unlikely to be an issue in the foreign trust context (because companies acting as trustees for foreign trusts usually have a New Zealand director who is a member of an approved organisation to avoid New Zealand tax liability).

The Companies Amendment Act (No 4) 2014 also introduced a number of other changes:

(1) Currently directors are required to disclose their name and address details as part of the registration process, and this information appears on the publicly available register of companies. From 1 May 2015, directors will also need to disclose their date and place of birth although this information will not be made publicly available.

(2) New Zealand companies will need to disclose prescribed information about the company's ultimate holding company (if any) including the ultimate holding company's name, country of registration, registration number and details of the holding company's registered office.

Entities for holding assets

It is not unusual for companies including 'look through companies' and other entities such as limited partnerships to be employed as part of the overall trust structure to hold specific assets.

23 These clauses derive their name from the case of *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515. An anti-*Bartlett* clause attempts to limit the trustee's duty of care in relation to the trust's investment in company assets; eg, no trustee is under a duty to interfere in the management of a company to preserve the value of the trust's investment in that company unless the trustee has notice of dishonest conduct.

24 Law Commission op cit n 2, above.

25 These obligations include the requirement to keep records (including accounting records). Certain records are available for inspection by the public – the certificate of incorporation, the constitution, the share register, the full names and residential addresses of the directors and the registered office and address for service.

26 Currently Australia is the only prescribed enforcement country.

It is trite to say that the type of asset holding vehicles used by international clients as part of their trust structure varies depending on the overall objectives of the client, the relevant jurisdictions involved and taxation and other laws.

In a New Zealand context, a company is most commonly used to hold assets. However, a company registered under the Companies Act 1993 is liable to tax in New Zealand on its worldwide income and therefore may not be suitable for international clients. Entities that are 'look through' for tax purposes may be more suitable.

The Tax Act was amended in 2010 and new rules relating to the tax treatment of closely held companies came into effect in 2011. The amendments created a new entity called a 'look through company' (or LTC). A LTC is a company that is 'looked through' for tax purposes. It is primarily intended for closely held domestic companies. However, it may be used in an international context as an asset holding vehicle of a New Zealand foreign trust.

There are specific rules relating to LTCs including:

(1) The company must make a valid election to be a LTC under the Tax Act.

(2) A LTC must be resident in New Zealand and not treated as 'not resident in New Zealand' under a double tax agreement.

(3) It must have five or fewer 'look through counted owners'. Shareholders of a LTC must be natural persons, trustees or another LTC. There are special rules for determining the number of look through counted owners. In the case of a trustee shareholder, the test looks through to the natural person beneficiaries of the trust, which includes looking through any corporate beneficiaries to the company's shareholders. A beneficiary of a trust is counted as a look through owner if it has received income from the LTC as beneficiary income.

(4) A LTC must have only one class of shares.

If a LTC does not meet any of the rules at any stage during an income year, it loses its status as a LTC starting from the first day of the relevant income year.

A LTC's income is passed through to the owners and each owner is responsible for any tax payable on their net LTC income. Deductions and losses are generally treated the same way. An owner is entitled to use losses up to the value of their investment, referred to in the Tax Act as the 'owner's basis'. Limited partnerships can be used in the same way and may be useful where there are difficulties meeting the five or fewer 'look through owners' requirement of LTCs.

As with companies, limited partnerships are formed by registering certain documents with the Registrar of Companies. Although not filed with the registration documents, a limited partnership must also have a written partnership agreement. The Limited Partnerships Act 2008 states that the agreement must provide for certain matters such as when the partnership terminates and the entitlement of partners to distributions.[27]

Limited partnerships must have at least one general partner and at least one limited partner and a person may not be both a general partner and a limited partner of the same limited partnership at the same time. A general partner is responsible for the management of the partnership and is liable for the partnership's debts. A limited partner must not take part in the management of the partnership and is only liable to the extent of their capital contributions.

As a result of the Limited Partnerships Amendment Act 2014, from 1 September 2014 a limited partnership must have at least one general partner who has a connection to New Zealand or to an 'enforcement country'. This requirement will be met if the general partner:

27 Section 10 of the Limited Partnerships Act 2008.

(1) resides in New Zealand or lives in an 'enforcement country' and is a director of a company that is registered in that country;

(2) is a limited partnership with at least one general partner residing in New Zealand or living in an 'enforcement country' and is a director of a company that is registered in that country;

(3) is a partnership governed by the Partnership Act 1908 with at least one partner residing in New Zealand or living in an 'enforcement country' and is a director of a company that is registered in that country;

(4) is a company registered in New Zealand.

Applications to become a limited partnership now require the full name, residential address, date and place of birth of every general partner who is a natural person and the name and address of every general partner who is not a natural person. If the general partner is a limited partnership, a partnership governed by the Partnership Act 1908 or a company, the applications will also need to include the full name, residential address, date and place of birth of the general partner, partner or director as the case may be. This information will appear on the register of limited partnerships but only the Registrar of Companies will be able to search the register for date and place of birth information. Information held about limited partners is confidential to the Registrar.[28]

Once registered, the limited partnership is a separate legal entity providing limited liability to its investors. However, like LTCs, limited partnerships are transparent or look through entities for tax purposes. It is the partners who are treated as carrying on the activities of the partnership and holding the assets of the partnership in proportion to their shares in the partnership.

Duration

The rule against perpetuities in New Zealand is a combination of common law and statute. Currently, to be validly created an interest in property must either:

(1) be vested when it is created; or

(2) vest no later than 21 years after the death of a person who was alive at the time that the interest was created.

The Perpetuities Act 1964 introduced some changes to the common law rule including:

(1) Providing for a fixed term perpetuity period not exceeding 80 years. This did not replace the common law rule but allowed an alternative period to be specified.

(2) Enacting a 'wait and see rule'. If a disposition is invalid because it infringes the rule against perpetuities, the disposition is treated as if it were not invalid until such time (if any) as it becomes certain that the vesting must occur, if at all, after the end of the perpetuity period.

It is generally accepted by practitioners and others dealing with the rule that the common law and statutory provisions are complex and difficult to follow. They give rise to uncertainty even among professionals.

The Law Commission recently recommended:[29]

(1) Repealing the Perpetuities Act 1964 and providing that the common law rule against perpetuities is of no application in New Zealand.

(2) That a new Trusts Act should provide for a default duration of 150 years for all trusts. A

28 Ibid, s 57.
29 Law Commission op cit n 2, above, Recommendation 49.

shorter period can be specified in the trust instrument. At the expiry of 150 years, all trust property is to be vested in accordance with the provisions contained in the trust instrument or if the trust deed is silent about who is to receive the property, it is to be vested in all surviving beneficiaries in equal shares.

(3) That a new Trusts Act should provide that trusts which include a mechanism to calculate the vesting date rather than specifying a duration shall continue until the earlier of the date resulting from the calculation, or 150 years from the establishment of the trust.

Clients who are establishing foreign trusts now should consider whether they want the option to extend the period when the proposal becomes law (if it does become law). As more jurisdictions alter their rules on perpetuity periods, it is becoming more common to see clauses that allow the trustee to change the perpetuity period to take advantage of any change in the law. In the author's view it is better to have a specific clause dealing with this issue rather than rely on a general amendment power.

Conclusion

New Zealand is more than a land full of trusts. It is a land with stable government with clear separation of powers between the legislature, executive and judiciary. It has reputable courts and is 'considered to have sophisticated levels of advice from lawyers and accountants and a judiciary that is relatively advanced in understanding trusts'.[30] It was ranked first equal with Denmark in Transparency International's Corruptions Perceptions Index, which 'ranks countries and territories based on how corrupt their public sector is perceived to be'.[31]

In New Zealand the fundamental common law principles around trusts, duties and equitable rights are well developed. Settlors are given considerable freedom to structure trusts in ways that best suit their circumstances.

Like a number of other common law jurisdictions, New Zealand has begun the process of reviewing and updating its trust law and the first stage of this review is now completed. The Law Commission's final report[32] was tabled in Parliament on 11 September 2013. The Law Commission recommends a new Trusts Act 'fit for a New Zealand context but consistent with overseas trust law'. It proposes a modern new Trusts Act that updates, revises, reformulates and enlarges the current Trustee Act 1956. The government announced prior to the September 2014 general election that it agreed with the key recommendation to enact a new Trusts Act but that 'further work is required on the detail'. The government has been re-elected and the new Minister of Justice has recently been quoted as saying that the work is 'progressing'.

In the author's view, it is only a matter of time before a new Trusts Act is enacted. However, an updated, revised, reformulated and enlarged Trusts Act with better informed trust parties and more effective and efficient trust administration must be another favourable step forward for any non-resident considering using a foreign trust in New Zealand.

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30 Law Commission op cit n 2, above, at para 2.19 quoting Mark Bridges 'Recent international trust cases that will have a material impact on the trust industry' (paper presented to STEP New Zealand Trust Conference, Auckland, March 2012).
31 2013 Corruption Perceptions Index www.transparency.org/cpi2013/results.
32 Law Commission op cit n 2, above.