A Very Complicated Game of Hide and Seek

Will Automatic Exchange of Information Become a Game Changer in International Tax Evasion?

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“Taxes are the price we pay for civilisation.”

Oliver Wendell Holmes, Jr., U.S. Supreme Court Justice.

“It is not very unreasonable that the rich should contribute to the public expense, not only in proportion to their revenue, but something more than in that proportion.”

Adam Smith.

“The wealth, power, and illegality enabled by this hidden system are now so vast as to threaten the global economy’s legitimacy.”

Jeffrey Sachs, University Professor, Columbia University

“The advanced tax planning undertaken today by most global companies is as intelligible to the average person as particle physics.”

Alan Rusbridger, Former Editor-in-Chief of the Guardian

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To my parents for their endless love and support in everything I do.

ABBREVIATIONS

AEOI	Automatic Exchange of Information
ATO	Australian Tax Office
BEPS	Base Erosion and Profit Shifting
CAA	Competent Authority Agreement
CMAAT	Multilateral Convention on Mutual Administrative Assistance in Tax Matters
CRS	Common Reporting Standard
DTA	Double Tax Agreement
FATCA	Foreign Account Tax Compliance Act
FFI	Foreign Financial Institution
GFC	Global Financial Crisis
HTC	Harmful Tax Competition
IGA	Intergovernmental Agreement
IRD	Inland Revenue Department
IRS	Inland Revenue Service
ITA	Income Tax Act 2007
MNE	Multinational Enterprise
NFFE	Non Financial Foreign Entity
NZFI	New Zealand Financial Institution
OECD	Organisation for Economic Cooperation and Development
TAA	Tax Administration Act 1994
TIEA	Tax Information Exchange Agreement
TIN	Taxpayer Identification Number

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Introduction

On 3 April 2016, the world was alerted to the greatest data leak in history – the Panama Papers. Eleven and a half million documents held by Panamanian law firm Mossack Fonesca were leaked to the German newspaper Sueddeutsche Zeitung, which were then handed over to the International Consortium of Investigative Journalists for analysis.[1] The documents expose how thousands of Mossack Fonesca's high profile clients have laundered money, evaded and avoided taxes and eluded sanctions for nearly 40 years through the exploitation of the global financial system and the opacity of tax havens. Mossack Fonesca has been revealed as one of the world's greatest creators of corporate structures used to hide the ownership of assets for clients anywhere in the world. The leaked papers contained files on 214,488 offshore entities associated with people in over 200 countries.[2] But, Mossack Fonesca is only one of the hundreds of law firms and banks that operate in tax havens, and it is only a glimpse into the expanse of the offshore industry.[3] As the famous saying goes, "nothing in this world is certain but death and taxes."[4] However, unlike death, taxes can be avoided, evaded and aggressively mitigated. No amount of wealth and power will put you beyond the grasp of death, but it can certainly put you beyond the reach of tax authorities and the law.

The premise of this paper is the problem of international tax evasion, and the global efforts dedicated to its eradication.[5] Tax evasion and the growth of the offshore industry is a phenomenon that is illustrative of the weaknesses in the international tax paradigm. It is the product of sovereign states enacting tax policy unilaterally, in a

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[1] Richard Bilton "Panama Papers: Mossack Fonesca leak reveals elite tax havens" *BBC News* (online ed, London, 4 April 2016).
[2] The Consortium of Investigative Journalists "Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption" (3 April 2016) ICIJ <https://panamapapers.icij.org>.
[3] In this paper, "offshore industry" refers to the countries that provide policies that attract capital and income for the purposes of evading taxes in other jurisdictions, as well as the financial institutions and law firms that facilitate this taxpayer behaviour.
[4] Benjamin Franklin, who wrote in a 1789 letter "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes."
[5] Tax evasion is not to be confused with tax avoidance, which is the legal structuring of financial affairs in order to minimize tax liability within the bounds of the law.

system that incentivises tax competition between jurisdictions to attract foreign investment. Globalisation and digitisation have exacerbated the growth of the offshore industry by increasing the accessibility of foreign financial services and increasing the mobility of capital. The Panama Papers scandal illustrated the alarming pervasiveness of offshore tax evasion, and shed a rare light onto the darkest corners of the international tax system.

As a response to the growing global frustration toward the persistent malaise of offshore tax evasion, tax information exchange has become a burgeoning area of legal development aimed at reducing the opacity of the offshore industry. The most recent development is the Organisation for Economic Cooperation and Development's (OECD) new international standard of Automatic Exchange of Information (AEOI). The AEOI has been described as a "watershed moment" for global tax transparency, by virtue of its potential to proactively deter and detect illegal taxpayer activity in the offshore world.[6]

The purpose of this paper is to examine the hypothesised benefits of the AEOI, the legal ramifications for New Zealand under the Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016, and the likely impact the AEOI will have on international tax evasion. The focus is both domestic and international by virtue of the fact that domestic policy and international policy are heavily interconnected in matters of international taxation. An analysis of the AEOI's global impact is relevant to New Zealand, because the value of the AEOI to New Zealand is derivative of its success in the international sphere. Combating secrecy via information exchange is an "all or nothing situation" in that its effectiveness for participating countries is contingent on comprehensive global participation. Anything less will result in the issue of international tax evasion merely shifting from one part

[6] Andres Knobel and Markus Meizner "OECD's Automatic Information Exchange Standard: A Watershed Moment for Fighting Offshore Tax Evasion?" (12 March 2014) Tax Justice Network <http://www.taxjustice.net/>.

of the world to another.[7] Despite the promising premise of the AEOI, its impact on international tax evasion is conditional on effective global execution, which is arguably the greatest weakness of the AEOI. Therefore this paper asserts that despite New Zealand's conscientious engagement with the AEOI, the potential benefits to New Zealand's tax system are unlikely to outweigh the substantial costs to the Government, New Zealand financial institutions and the inroads made into taxpayer privacy.

Chapter I of this dissertation will illustrate the current paradigm of international taxation and its characteristics that have given rise to the unbridled tax evasion issue. This chapter will also discuss how the international tax system has reacted to globalisation and digitisation.

Chapter II will discuss various OECD-led efforts toward global cooperation for the purpose of addressing global tax evasion and avoidance. The purpose is to contextualise tax information exchange with other international efforts to combat tax evasion and avoidance. This chapter will also discuss the importance of tax information exchange in New Zealand, given its implication in the Panama Papers.

Chapter III will summarise the gradual developments in tax information exchange through the analysis of various international instruments. The aim of which is to map the progress from exchanging information upon request, to automatic exchanges of bulk information under the OECD's AEOI.

Chapter IV will detail New Zealand's implementation of the AEOI into domestic law, and the legislative changes proposed under the Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016. This section will evaluate the cost for New Zealand tax sovereignty given the OECD's institutional authority in leading the

[7] Inland Revenue *Regulatory Impact Statement: Implementing New Zealand's commitment to Automatic Exchange of Information (AEOI)* (13 May 2016) at [8].

new international standard. Furthermore, it considers the infringement of taxpayer rights as an unavoidable corollary to the AEOI.

Lastly, Chapter V will evaluate the AEOI's success on a global scale. The main issues are the OECD's lack of enforcement powers, the United States' non-compliance, and the innate bilateralism within the AEOI. Prima facie, the AEOI is a pivotal moment for global tax transparency, yet the feasibility of its global success warrants the concern that the issue of tax evasion will merely shift from one jurisdiction to another.[8]

[8] Inland Revenue *Regulatory Impact Statement: Implementing New Zealand's commitment to Automatic Exchange of Information (AEOI)* (13 May 2016) at [8].

Chapter I: The Current International Tax Regime

A International Tax Regime: A Sum of its Domestic Parts?

It must be clarified from the start that the phrase "international tax system" does not indicate a globalised system of taxation, and actually "there is no such thing as international tax".[9] Instead the phrase refers to the application of domestic tax systems to international business transactions, and the interaction between separate domestic tax systems.[10] The current system of international taxation is based primarily on the principles developed by the League of Nations in the post World War I era.[11] The main concern of the League of Nations was the elimination of double juridical taxation,[12] which was caused by governments taxing their residents on a worldwide basis.[13] To this extent, bilateral tax treaties were used as the main mechanism to allocate international taxing rights between countries, based on the concepts of source and residence, and active and passive income.[14] At the inception of the current system of international taxation, the dominant issue facing governments was the elimination of double juridical taxation and how it may be detrimental to economic growth. Ironically the problem has now reversed, as the current system faces epidemic tax avoidance and tax evasion, and governments struggle to subject sophisticated

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[9] Craig Elliffe *International and Cross Border Taxation in New Zealand* (Thomson Reuters, Wellington, 2015) at 1.

[10] Elliffe, above n 9, at 1.

[11] The League of Nations' discussion of the international tax issues were worded in terms of "imperial" and "colony" countries, which shows the political and economic differences between the early 20th century and today. The fundamental principles of the current international tax system were essentially developed by a small group of decision makers from World War I victor states, that were predominantly capital exporters: Bret Wells and Cym H. Lowell "Income Tax Treaty Policy in the 21st Century: Residence vs. Source" (2013) 5(1) Columbia Journal of Tax Law at 5.

[12] Juridical double taxation occurs when the same legal income in the hands of the same taxpayer is subjected to tax in more than one jurisdiction in the same period in cross border transactions: Elliffe, above n 9, at 120.

[13] Under the worldwide taxation model, countries tax their residents on both domestic income and foreign sourced income: Elliffe, above n 9, at 3.

[14] Active income refers to business profits and the taxing rights are allocated to source countries; passive income refers to dividends, interests and capital gains; and these taxing rights are allocated to residence countries subject to the source country's right to levy a withholding tax.

taxpayers, both individuals and corporations, to any tax at all.[15] This begs the question, has the current tax paradigm survived the changes in the global economy?

Under the current paradigm, every jurisdiction has sovereignty to set up a corporate tax system that it chooses to raise revenues for public expenditure. The concept of sovereignty, as a fundamental tenet of tax, "places the idea of the state front and centre".[16] The "principle of universality" in taxation gives states the right to tax persons globally, as long as there is a personal connection with the state levying the tax.[17] The "principle of territoriality", on the other hand, limits states within their own territory for the purposes of implementing domestic tax rules.[18] The application of these principles results in an inherent conflict between the breadth of the tax base and the limited scope of enforcement. Not only are states limited by their sovereignty in their ability to enforce tax laws extra-territorially, but they are also disadvantaged by the innate secrecy that exists between different countries' tax systems that enables taxpayers to conceal their assets offshore. Despite this, fiscal autonomy is considered a key attribute of state sovereignty, thus states are reluctant to engage in any degree of tax harmonisation, which would constitute an "assertion of sovereign authority by one state within the territory of another, which is contrary to all concepts of independent sovereignties."[19]

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[15] Michael P. Devereux and John Vella "Are We Heading Towards a Corporate Tax System Fit For the 21st Century?" (Working Paper Series, Oxford University Centre for Business Taxation, 2014) at 2.
[16] Taxes allow governments to raise revenue for the provision of public services, and fiscal policy has the power to influence the social and economic status quo. Taxes strike at the heart of what it means to be a government, hence why sovereignty remains the cornerstone of the international tax regime. Furthermore tax policies are an exclusively sovereign right in order to maintain "democratic accountability" and "democratic legitimacy": Diane M Ring "What's at Stake in the Sovereignty Debate?": International Tax and the Nation-State" (2009) 49(1) Virginia Journal of International Law 155 at 160.
[17] Xavier Oberson *International Exchange of Information in Tax Matters – Towards Global Transparency* (Edward Elgar Publishing, Cheltenham, 2015) at 1.
[18] Oberson, above n 17, at 1.
[19] *Government of India v Taylor* [1995] 1 A11 ER 292 at 299; Denham Martin "Development Regarding Exchange of Information and Assistance with the Collection of Foreign Revenue Claims under New Zealand's Double Tax Agreements and Domestic Laws" (paper presented to New Zealand Institute of Chartered Accountants, November 2011) at 4.

B The Impact of Globalisation and Digitisation

Globalisation is the phenomenon of extensive economic, social and political international integration and a movement away from "economic nationalism" toward a borderless world.[20] It is the product of increased economic liberalisation, international trade, and the removal of legislative controls on foreign investments, which has led to "unprecedented interconnectedness" of individuals, businesses and governments.[21] To a large extent, this has been facilitated by the popularised use of the Internet, which marks the transition from an "industrial world" to an "information world".[22]

On the other hand, digitisation refers to information technology advances that have changed the way we communicate, transact and network. Digitisation has driven the rapid development and exploitation of intellectual property that has increasingly become the main value driver in corporations.[23] The mobility of intangible property has had a significant impact on the corporate structuring of Multinational Enterprises (MNE) worldwide and it is an integral feature of most aggressive tax planning structures.

One of the most important products of globalisation and digitisation is the emergence of electronic commerce.[24] It allows taxpayers to situate their wealth globally and transact without time or geographic constraints. An unintended consequence of electronic commerce has been its contribution to tax evasion and the growth of the offshore industry. Electronic commerce has resulted in the proliferation of offshore financial arrangements that benefit from the characteristics of electronic commerce

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[20] Dale Pinto "Governance in a Globalised World: is it the End of the Nation State?" in *International Tax Competition: Globalisation and Fiscal Sovereignty*, Commonwealth Secretariat, London, 2002) 66 at 68.
[21] OECD *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013) at 28.
[22] Pinto, above n 20, at 70.
[23] OECD *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013) at 47.
[24] Electronic commerce has led to an increase in cross border transactions, and diversified the sources of foreign income of resident taxpayers. The chief operating officer of Credit Suisse stated "in no other industry do you see the impact of globalisation as enormously and dramatically as in finance": "Places in the Sun" (22 February 2007) The Economist <http://www.economist.com/>.

such as anonymity, accessibility, intangibility and disintermediation.[25] These aspects of electronic commerce place pressure on the out-dated features of the international tax system, such as the concept of "permanent establishment",[26] that is inconsistent with today's economic reality.[27]

Domestic tax systems have also become increasingly interconnected vis-à-vis the globalisation of taxpayers. Governments are increasingly able to use tax policy as a means of attracting investment into their economy, and such policies can have significant spill over effects on other countries' tax bases. Contrary to traditional practice, tax policy can no longer be enacted in a vacuum, in a world where the interaction of countries' domestic laws is inevitable.[28] Thus the concept of sovereignty is increasingly contentious in international tax matters because tax policies impact other nations.

C Tax Havens and Secrecy Jurisdictions: What is the OECD's Issue?

Globalisation, digitisation and fiscal sovereignty have created the perfect conditions for tax havens and secrecy jurisdictions to flourish. The ease of moving capital from one part of the world to another has contributed to the growing appeal of tax havens

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[25] Sara K. McCracken "Going, Going, Gone… Global: A Canadian Perspective on International Tax Administration Issues in the 'Exchange-of-Information Age'" (2002) 50(6) Canadian Tax Journal 1869 at 1873.

[26] The concept of a "permanent establishment" is the threshold for allocating taxing rights to a jurisdiction to tax active income on a source basis. The concept of a permanent establishment is premised on the existence of a physical presence such as a factory. It is a difficult concept to apply in the 21st century where it is possible to have a significant involvement in the economic life of another state and derive substantial profits, without having a taxable presence because the business is conducted through the Internet. See, for example, OECD *Preventing the Artificial Avoidance of Permanent Establishment Status – Action 7, OECD/G20 Base Erosion and Profit Shifting Project* (OECD Publishing, 2015) at 13. In 2001 the Indian Revenue Department's Foreign Tax Division advised the abandonment of the concept of permanent establishment, and suggested the OECD or the UN should devise an alternative concept to replace it: Arthur J. Cockfield "The Rise of the OECD as Informal 'World Tax Organisation' through National Responses to E-commerce Tax Challenges" (2006) 8 Yale Journal of Law and Technology 136 at 153.

[27] Devereux and Vella "Are We Heading Towards a Corporate Tax System Fit For the 21st Century?", above n 15, at 4.

[28] OECD *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013) at 28.

and secrecy jurisdictions that are designed to attract mobile activity and investment.[29] The attractiveness of these jurisdictions in the eyes of taxpayers simultaneously increases the incentives for governments to pursue these tax policies. The OECD considers the following features are characteristic of a tax haven:[30]

> (a) whether a jurisdiction imposes no or only nominal taxes (generally or in special circumstances) and offers itself, or is perceived to offer itself, as a place to be used by non-residents to escape tax in their country of residence;
> (b) laws or administrative practices which prevent the effective exchange of relevant information with other governments on taxpayers benefiting from the low or no tax jurisdiction;
> (c) lack of transparency; and
> (d) the absence of a requirement that the activity be substantial, since it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax driven.

This definition captures countries such as the Cayman Islands, the Bahamas, Jersey, and the British Virgin Islands among many others.[31] What they offer is low or no taxes in a politically stable environment with business friendly laws and, most importantly, discretion, which often comes in the form of domestic secrecy laws.[32] The OECD's issue with tax havens is that they provide a place of refuge for taxpayers to conceal their income and profits from their residence jurisdictions in order to evade their tax obligations. Tax havens divert billions of dollars away from mostly wealthy

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[29] Secrecy jurisdictions often refer to countries such as Switzerland, Luxembourg and Austria that are unable or unwilling to obtain and hold financial information for the purposes of sharing it with other states according to international standards and practices. They are referred to as secrecy jurisdictions as opposed to tax havens because they have not traditionally been labelled by the OECD as such under the definition of tax havens provided in the Report on Harmful Tax Competition 1998. This is mainly due to exceptions in the tax haven definition that allow these powerful OECD member states to escape identification. There is no generally agreed definition of a tax haven "and the OECD has a long and very patchy record of misidentifying tax havens": "Will the OECD tax haven blacklist be another whitewash?" (20 July 2016) Tax Justice Network <www.taxjustice.net>.
[30] OECD *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing, 1998) at 22.
[31] These countries were identified by the OECD in 2000 as meeting the tax haven criteria established in the HTC: "Jurisdictions Committed to Improving Transparency and Establishing Effective Exchange of Information in Tax Matters" OECD < http://www.oecd.org/>.
[32] "Places in the Sun" (22 February 2007) The Economist <http://www.economist.com/>.

OECD countries toward small innocuous islands in the Caribbean and the Pacific every year. The famous case of Ugland House in the Cayman Islands allows thousands of taxpayers to use shell companies to maintain profits and income offshore.[33] Obama described Ugland House as either "the biggest building in the world or the biggest tax scam in the world."[34] Similarly the British Virgin Islands are home to 800,000 companies compared to its population of just 22,000.[35] Similarly, according to GDP per capita, Bermuda is the richest country in the world.[36]

More relevant than any principled judgements directed toward the governments of tax havens or secrecy jurisdictions is the impact of the incentive incompatibility in the current international tax system. The incentive incompatibility issue arises by virtue of the fact that governments acting in their rational self interests are motivated to act in ways that are inconsistent with the interests of other countries. The current tax paradigm incentivises governments to engage in tax competition and harmful tax practices to undercut eachother.[37] These policy choices that are deemed "harmful" to other countries are justifiable as the exercise of fiscal sovereignty in a manner that increases overseas investment and attracts capital to the domestic economy.

This competitive urge between governments is a major hindrance to enhancing greater global cooperation because countries can always stand to benefit from reneging on internationally agreed standards.[38] For instance, Ireland's competitive corporate tax policy enables them to attract foreign direct investment of MNEs such as Google and Apple. This leads to the development of a large financial services sector, which

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[33] Ugland House is the registered address of approximately 19,000 companies, and it is estimated that there is more money deposited in the Cayman Islands than there is in all the banks of New York City: Robert M. Morgenthau "These Islands Aren't Just a Shelter From Taxes" *New York Times* (online ed, New York, 5 May 2012).
[34] Nick Davis "Tax spotlight worries Cayman Islands" *BBC News* (online ed, London, 31 March 2009).
[35] Richard Eccleston *The Dynamics of Global Economic Governance: the Financial Crisis, the OECD and the Politics of International Tax Cooperation* (Edward Elgar Publishing, Inc., Cheltenham, 2013) at 29.
[36] "Places in the Sun" (22 February 2007) The Economist <http://www.economist.com/>.
[37] Michael Devereux "Tax Transparency and Tax Coordination: a new era for tax reforms in a globalised world" (Policy paper series, Oxford University Centre for Business Taxation, 2016) at [4.3].
[38] Devereux and Vella "Are We Heading Towards a Corporate Tax System Fit For the 21st Century?", above n 15, at 4.

becomes the cornerstone of the domestic economy. Consequently, countries become both politically and economically dependent on the financial services sector, and become adverse to greater international cooperative efforts that may hurt their economy.[39] Apple began its first operations in Ireland from the 1980's when Apple was a relatively speculative enterprise, and Ireland was one of the poorest countries in Europe keen to attract investment and fuel a slow economy.[40] Attracting Apple and employing this tax strategy was not without its risks. Therefore, criticisms of Ireland's tax practices are debatable given that it was a choice fairly afforded to them in the international tax system. Ultimately, it is a legitimate choice that a democratically elected government should have, and therefore the negative connotations associated with its policies are a "subjective opinion" derived from the philosophy of the OECD.[41]

Nevertheless, this has not stopped international efforts to prevent tax policy such as Ireland's. There have been various international efforts led by the OECD directed toward making the international tax regime "fairer" and more "transparent", which are discussed in the next chapter. These international efforts are targeted at taxpayers and governments but avoid readjusting their focus to the international tax paradigm itself, which permits and incentivises the development of the issues.[42] The unwillingness to consider the underlying framework as opposed to the surface symptoms has been the thematic flaw of these international efforts and thus the conventional issues with state sovereignty and prioritisation of domestic interests remains. [43]

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[39] Eccleston, above n 35, at 6.
[40] Poornima Gupta and Padraic Halpin "Apple has been Dodging Taxes in Ireland for more than 32 Years" *Business Insider* (online ed, Australia, 26 May 2013).
[41] David Simmons "Some Legal Issues Arising out of the OECD Reports on Harmful Tax Competition" in in *International Tax Competition: Globalisation and Fiscal Sovereignty*, Commonwealth Secretariat, London, 2002) 283 at 283.
[42] This is exemplary of John Braithwaite's concern that "the thicket of rules we end up with becomes a set of sign-posts that show the legal entrepreneur precisely what they have to steer around to defeat the purposes of the law": John Braithwaite "Rules and Principles: A Theory of Legal Certainty" (2002) 27 Australian Journal of Legal Philosophy 47 at 56.
[43] There is considerable inertia in the existing institutional framework of international taxation, and this strong path dependency has habitually limited the options for reform: Eccleston, above n 35, at 69.

Chapter II: The War on Tax Evasion and Avoidance

This chapter provides a brief overview of the past and current global efforts aimed at addressing international tax evasion and tax avoidance. Tax evasion is the illegal non-disclosure of income to circumvent the law and reduce one's tax liability and involves a "fraudulent intent".[44] It is a "governance failure" resulting from tax authorities being unable to exercise sufficient regulatory oversight due to the secrecy and lax regulation in the offshore industry.[45] Tax avoidance is the legal arrangement and structuring of financial affairs to minimise tax liability within the bounds of the law for "commercial effect".[46] It arises in the context of MNEs using artificially contrived tax-motivated structures to avoid paying tax virtually anywhere in the world by generating "stateless income".[47] Evasion and avoidance are distinct legal concepts that represent different issues in the international tax system, and demand their own tailored solutions. Despite the emotive rhetoric on the immorality of tax evasion and avoidance, taxpayer behaviour must ultimately be managed by law and not public perception.[48] This chapter will discuss the attempts to address both evasion and avoidance in order to place tax information exchange in the context of wider global efforts in tax. The focus will then shift back to tax information exchange, which is primarily targeted at tax evasion.

A The OECD's Harmful Tax Competition Report: A Cold Reception

The OECD's report on Harmful Tax Competition: An Emerging Global Issue (HTC), was launched in 1998 to enhance global tax transparency through the identification of tax havens and preferential tax regimes used for international tax evasion. The HTC was a very ambitious report backed by a strong rhetoric that "governments cannot

[44] C.C Branson "The International Exchange of Information on Tax Matters and the Rights of Taxpayers" (2004) 33 AT Rev 71 at 76.
[45] Allison Christians "Avoidance, Evasion and Taxpayer Morality" (2014) 44 Journal of Law and Policy 1 at 4.
[46] Branson, above n 45, at 76.
[47] Edward Kleinbard "Stateless Income" (2011) 11(9) Florida Tax Review 699 at 700.
[48] Christians "Avoidance, Evasion and Taxpayer Morality" above n 45, at 17.

stand back" and allow harmful tax competition to continue to undermine domestic tax bases.[49] The report led to the creation of the Global Forum on Transparency and Exchange of Information for Tax purposes (Global Forum) in 2000, which operates under the auspices of the G20 and the OECD.

Harmful tax competition refers to practices adopted by jurisdictions that allow non-compliance with the tax laws of other countries and consequently erodes other countries' tax bases.[50] It encompasses jurisdictions that provide the setting for non-resident taxpayers to hold passive investments, book paper profits, and conceal their financial affairs from their home jurisdiction.[51] The report is centred on the notion that tax havens are inherently bad, as opposed to a rational by-product of the competitive forces in the international tax regime that are exacerbated by globalisation. On this note, Switzerland expressed its opinion that the HTC was a mouthpiece for developed high tax countries, and its bias failed to consider the diversity of tax regimes worldwide.[52]

The HTC was followed up by a subsequent progress report in 2000, which listed 35 jurisdictions considered to be tax havens.[53] To avoid being labelled "uncooperative tax havens" the report required that these states make a commitment to eliminate the

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[49] OECD *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing, 1998) at [85].
[50] McCracken, above n 25, at 1875. The report subcategorised "harmful tax competition" into two categories, "harmful preferential tax regimes" and "tax havens".
[51] Vaughn E. James "Twenty-First Century Pirates of the Caribbean: How the Organisation for Economic Cooperation and Development Robbed Fourteen Caricom Countries of Their Tax and Economic Policy Sovereignty" (2002) 34(1) Inter-American Law Review 1 at 13.
[52] McCracken, above n 25, at 1876. Switzerland is one of the most prominent secrecy jurisdictions in the world. Despite being a member of the OECD, it has habitually opposed OECD efforts in transparency.
[53] The OECD found the following states to be tax havens: Andorra, Anguilla, Antigua and Barbuda, Aruba, Commonwealth of the Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, The Commonwealth of Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, The Principality of Liechtenstein, The Republic of the Maldives, The Republic of the Marshall Islands, Monaco, Montserrat, The Republic of Nauru, Netherland Antilles, Niue, Panama, Samoa, The Republic of Seychelles, St. Lucia, St. Christopher & Nevis, St. Vincent and the Grenadines, Tonga, Turks & Caicos, US Virgin Islands, The Republic of Vanuatu: OECD *Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices* (OECD Publishing, 2000).

features of their tax policy, which constitute harmful tax practices.[54] "Defensive measures" were threatened for any non-compliant jurisdictions.[55] The OECD's recommendations would have severely impacted the financial services industry and "robbed" these jurisdictions of the sovereign right to set fiscal policy.[56] The recommendations were more controversial given that many Caribbean countries were initially encouraged to cultivate their financial services sector to bolster their economy and reduce reliance on foreign support.[57] The OECD had overstepped the boundaries in a way that immediately illuminated the constrained powers of a global institution, in an arena dominated by domestic interests.

The OECD's approach toward tax havens was disapproved of by the United States, and Treasury Secretary Paul O'Neill expressed his disagreement with any effort to harmonise world tax systems.[58] In a 2001 press release he said:[59]

> The underlying premise that low tax rates are somehow suspect and the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system is troubling.

These sentiments essentially stymied the HTC's progress, and consequently the OECD limited the HTC's scope to a commitment to transparency and effective information exchange.[60] The HTC received additional criticism for being undemocratic, in that it subjected non-OECD states to a tax transparency regime that they were unable to participate in the creation of. Furthermore, there was an obvious

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[54] OECD *Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices* (OECD Publishing, 2000) at 5.
[55] OECD *Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices* (OECD Publishing, 2000) at 18.
[56] James, above n 51, at 5.
[57] James, above n 51, at 29.
[58] See, for example, "US eases stance on 'tax havens'" *BBC News* (online ed, London, 20 July 2001).
[59] Paul H. O'Neill, Secretary of Treasury "Department of Treasury News Release" (press release, May 10, 2001); Tyler J. Winkleman "Automatic Information Exchange as a Multilateral Solution to Tax Havens" (2012) 22(1) Indiana International and Comparative Law Review 193 at 199.
[60] Cynthia Blum "Sharing Bank Deposit Information With Other Countries: Should Tax Compliance or Privacy Claims Prevail" (2004) 6(6) Florida Tax Review 579 at 599.

double standard when it was applied inconsistently to member states such as Switzerland and Luxembourg who refused to be bound by its terms and remained exempt from the OECD's procedures.[61]

C Black, White and Grey lists: A Spectrum of Not Much

The efforts toward international cooperation in tax matters regained political attention after the Global Financial Crisis (GFC) in 2008. The GFC was a cataclysmic event that devastated the global economy and decimated public finances. It dramatically undermined the regulatory status quo of the financial services industry and provided an opportunity to probe the tax-motivated behaviour of the financial services sector. The aftermath of the GFC rapidly generated distrust of banks and other financial institutions and this shift in public sentiment provided renewed impetus for enhancing international cooperation and tax transparency. At the London G20 meeting in April 2009, the former British Prime Minister and President of the G20 Gordon Brown said:[62]

> We stand ready to deploy sanctions to protect our public finances and financial systems. The era of bank secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information.

The commissioning of the OECD to produce these lists has been described as "sending the fox to guard the hen house", given that members include prominent secrecy jurisdictions such as the United States, Luxembourg, Switzerland and the Netherlands.[63] The lists produced by the OECD were white, grey, or black lists that categorised countries based on their level of compliance with international

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[61] Eccleston, above n 35, at 6.
[62] Oberson, above n 17, at 8.
[63] "Time to black-list the tax haven whitewash" (4 April 2011) Tax Justice Network <http://taxjustice.blogspot.co.nz>.

transparency standards.[64] Controversially, major secrecy jurisdictions were placed on the white list on the basis that they had 12 Tax Information Exchange Agreements (TIEA) in place. All the blacklisted countries were shifted to the grey list on the condition of a loose "commitment" to cooperation, and all they grey listed countries "scurried" into TIEAs with each other to move onto the white list.[65] These "naming and shaming" lists were criticised for their lack of substance,[66] and resulted in a "weak and arbitrary" measure of tax transparency that had no tangible impact on global tax transparency.[67]

D The Base Erosion Profit Shifting Project: Patching Up the Loopholes

The taxation of MNEs – or more accurately, the lack thereof – has recently been one of the most highly publicised issues in the international tax regime. MNEs such as Google, Apple, Amazon and Pfizer, have been regularly engaging in aggressive tax planning strategies, such as the "Double Irish Dutch Sandwich",[68] to avoid paying their "fair share" of corporate income tax.[69] This results in "double non taxation" that is characterised by the artificial segregation of taxable income from the activities that generated it.[70] Accordingly, MNEs are currently facing a "public crescendo of criticism" in regards to their tax motivated business practices that follow the letter of

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[64] Oberson, above n 17, at 8.
[65] "Time to black-list the tax haven whitewash" (4 April 2011) Tax Justice Network <http://taxjustice.blogspot.co.nz>.
[66] Ronald Sanders "The Future of Financial Services in the Caribbean" in *International Tax Competition: Globalisation and Fiscal Sovereignty*, Commonwealth Secretariat, London, 2002) 48 at 50.
[67] "Time to black-list the tax haven whitewash" (4 April 2011) Tax Justice Network <http://taxjustice.blogspot.co.nz>.
[68] One of the most well known examples of aggressive tax planning is Google's "Double Irish Dutch Sandwich". Under this arrangement, Google shifts its profits through various companies in Ireland, the Netherlands and Bermuda using deductible royalty payments for the use of Google's various intellectual properties, which are the main value drivers of the enterprise. This tax strategy is employed by most MNEs to shift income on paper to tax advantageous regions: Edward Kleinbard "Stateless Income", above n 47, at 706. In 2011 these royalty payments between various Google subsidiaries amounted to nearly 10 billion dollars: see, Robert Hutton and Jesse Drucker "U.K Lawmakers Slam Google over 'Contrived' Tax Strategy" *Bloomberg* (online ed, New York, 13 June 2013).
[69] See, for example, Matt Nippert "Top Multinationals Pay Almost No Tax in New Zealand" *New Zealand Herald* (online ed, Auckland, 18 March 2016).
[70] Devereux and Vella "Are We Heading Towards a Corporate Tax System Fit For the 21st Century?", above n 15, at 12.

the law but reduce their effective tax rates to single digits.[71] This has raised the question whether MNEs have a civic duty as good corporate citizens to act "morally" and subject themselves to what is accepted as a "fair" burden of tax.[72]

Regardless of whether MNEs have any morality, the underlying weakness of the international tax regime is exposed if such egregious tax avoidance is permitted by its rules. The need to reassess the state of the international tax rules and its interaction with a globalised and digitised economy is what spurred the OECD-led Base Erosion and Profit Shifting (BEPS) project. The BEPS project has released 15 Action Plans to date,[73] which aim to take a holistic and comprehensive approach to "aligning rights to tax with real economic activity" in order to "provide concrete solutions to realign international standards with the current global business environment".[74] Despite its ambitious rhetoric, the BEPS project does not intend to radically reform the existing tax paradigm but instead provides a "series of piecemeal recommendations for states to apply patches to the increasingly leaky international tax system".[75]

E International Tax Information Exchange: No More Secrets

Tax information exchange, which has been a constantly developing facet of international cooperation, is the sharing of taxpayer information between jurisdictions

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[71] Wells and Lowell, above n 11, at 4.

[72] Paying a "fair" share of tax is inconsistent with paying only what is mandated by the law, and moral obligations should not be conflated to legal obligations. It is well established that "anyone may so arrange his affairs that his taxes shall be as low as possible, he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes": *Helvering v Gregory* 69 F 2d 809, 810 (2d Cir. 1934).

[73] See, "BEPS Actions" OECD Centre for Tax Policy and Administration <http://www.oecd.org/ctp/beps-actions.htm>. The Action Plans include inter alia tightening the international standards on transfer pricing, hybrid mismatch rules, CFCs, and thin capitalisation. New Zealand has indicated its support for the BEPS project and is in the process of preparing for its implementation. See, Office of the Minister of Revenue *Base erosion and profit shifting (BEPS) – update on the New Zealand work programme* (prepared for Cabinet 2016).

[74] OECD *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013) at 8.

[75] "TJN briefing on the OECD's 'BEPS' project on corporate tax avoidance" (19 July 2013) Tax Justice Network <http://www.taxjustice.net>. John Braithwaite cautions that "a smorgasbord of rules engenders a cat and mouse legal drafting culture – of loophole closing and reopening by creative compliance. Moreover it engenders a structurally inegalitarian form of uncertainty": John Braithwaite, above n 42, at 57.

to target international tax evasion caused by the use of offshore financial arrangements. Tax information exchange has been able to achieve extensive global support and high political buy in because it constitutes a politically feasible solution that does not fundamentally alter the current international tax regime or dictate specific tax policies.[76] The most recent milestone in tax information exchange has been the introduction of the AEOI, which was initially signalled by the OECD in 2013.[77] This new international standard represents a proactive approach to improving tax transparency and cooperation between states.

Most tax systems in the world rely on the voluntary disclosure of information by taxpayers and the self-assessment of their tax burden.[78] In order for tax authorities to independently verify the accurate disclosure of such information, they have a wide range of auditing and investigative tools to inspect tax matters domestically.[79] However the effectiveness of these tools is limited by their power derived from domestic legislation, and is therefore bound by territorial restrictions.[80] The separateness of domestic tax systems creates a communication barrier between states, and attributes to the opacity of the international tax system. Taxpayers are able to exploit this disadvantage, because unlike tax authorities, taxpayers' ability to arrange their financial affairs is not limited to state borders. Thus vast amounts of money are directed offshore and this allows taxpayers to elude their domestic tax obligations.

The AEOI is intended to counter tax evasion through the systematic and periodic transmission of bulk taxpayer information between jurisdictions.[81] Tax information exchange allows tax administrations to obtain extraterritorial tax information that it can use to verify that their tax residents have accurately reported their financial assets

[76] Arthur J. Cockfield "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights" (2010) 42(2) UBC Law Rev 419 at 435.
[77] OECD *A Step Change in Tax Transparency: OECD Report for the G8 Summit* (OECD Publishing, 2013) at 4.
[78] Tax Administration Act 1994, s 15B.
[79] McCracken, above n 25, at 1870.
[80] McCracken, above n 25, at 1870.
[81] OECD *Automatic Exchange of Information: What it is, how it works, benefits, what remains to be done* (OECD Publishing, 2013) at 7.

and income for tax purposes.[82] It increases administrative awareness of the actual level of tax compliance and facilitates the timely implementation of tax policy and informed legislative responses.[83]

The advantage of the AEOI is its capacity to detect as well as deter, by encouraging voluntary compliance with tax laws from the outset. The OECD's Secretary General, Angel Gurria described this as:[84]

> A real game changer, globalisation of the world's financial system has made it increasingly simple for people to make, hold and manage investments outside their country of residence. This new standard on automatic exchange of information will ramp up international tax cooperation, putting governments back on a more even footing as they seek to protect the integrity of their tax systems and fight tax evasion.

Unlike the HTC, tax information exchange does not target tax havens to change their fiscal policies, but instead aims to undermine the benefits of moving capital offshore by eliminating secrecy through the exchange of taxpayers' financial account information. The focus on reducing secrecy is indicative of how global efforts in tax are maintaining the status quo of the current tax paradigm but addressing specific problematic characteristics of it that give rise to tax evasion. The focus on secrecy has given tax information exchange the political palatability that has sustained it as an integral part of international cooperation in tax.

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[82] Policy and Strategy, Inland Revenue *Implementing the Global Standard on Automatic Exchange of Information: An Officials' Issues Paper* (February 2016) at [1.4].
[83] OECD *Tackling Aggressive Tax Planning Through Improved use of Transparency and Disclosure* (OECD Publishing, 2011) at 12.
[84] "OECD delivers new single global standard on automatic exchange of information" (13 February 2014) OECD <www.oecd.org/>.

F New Zealand and the Panama Papers: Restoring the Trust

The exchange of information is also important in New Zealand's current circumstances given its recent implications in global tax evasion. New Zealand has robust tax laws that are in line with international standards, and being an active OECD member since 1973, it has "been a strong supporter of all international initiatives to improve transparency".[85] This is recognised in the international tax community as New Zealand obtained a "compliant" rating, the highest ranking possible, in the OECD Global Forum 2013 Peer Review.[86]

However New Zealand's reputation for transparency and the integrity of the foreign trust regime has recently been compromised since the Panama Papers scandal implicated New Zealand as a tax haven. Media reports have repeatedly asserted that wealthy individuals are using New Zealand foreign trusts for the purposes of tax evasion, aggressive tax planning and money laundering.[87] New Zealand faces "potential reputational damage" as a result of its "weak laws" and tarnished taxpayer confidence in a system that allows "shonky structures shrouded in secrecy" to persist.[88]

The Government Inquiry into Foreign Trust Disclosure Rules, also known as the Shewan Report, released in June 2016 was a response to the Panama Papers scandal and the allegations that ensued. The report indicated that New Zealand is not a tax haven but nevertheless must take steps to maintain its reputation as a country that

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[85] Inland Revenue *Regulatory Impact Statement: Implementing New Zealand's commitment to Automatic Exchange of Information (AEOI)* (13 May 2016) at [17].
[86] John Shewan *Government Inquiry into Foreign Trust Disclosure Rules* (The Treasury, 20 June 2016) at [2.3].
[87] See, for example Dan Satherley "Panama Papers: NZ 'absolutely conclusively' a tax haven – Hager" *Newshub* (online ed, Auckland, 9 May 2016); "Panama Papers: Mossack Fonesca leak reveals New Zealand used to keep tax secrets" *New Zealand Herald* (online ed, Auckland 4 April 2016); Michael Littlewood "Using New Zealand as a Tax Haven: How is it done? Could it be stopped? Should it be stopped?" (Working paper, University of Auckland, 2016).
[88] John Shewan *Government Inquiry into Foreign Trust Disclosure Rules* (The Treasury, 20 June 2016) at iv.

actively cooperates internationally to "counter money laundering, abusive tax practices and other illicit activities".[89]

The Shewan Report comes to the overall conclusion that the existing foreign trust disclosure rules are "inadequate" and not "fit for purpose".[90] It highlighted the minimal disclosure requirements for foreign trusts and the non-existent sanctions for non-compliance, the effect of which is to provide very little assistance to other countries for the protection of their tax bases. For non-residents there is very little risk of New Zealand authorities exchanging information with other jurisdictions to expose any tax evasion or money laundering activity.[91] As a result, the Report recommends that foreign trusts should be subject to a registration process, which includes a signed declaration that the person establishing the trust agrees to provide information to comply with the record keeping requirements in the Tax Administration Act 1994 (TAA), the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and the AEOI Common Reporting Standards (CRS).[92] It also recommends the establishment and maintenance of a foreign trusts register searchable by regulatory agencies.[93]

The Government has decided to implement all the recommendations contained in the Shewan Report, and the changes to the disclosure requirements for foreign trusts are contained in the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill, which was introduced to Parliament August 2016. The Bill introduces a new definition of "taxpayer identification number" (TIN) to s 3(1) of the TAA, which is the equivalent of a tax file number assigned to a taxpayer by a foreign jurisdiction.[94] A TIN is not only applicable to the foreign trusts register, but also to the Foreign

[89] John Shewan *Government Inquiry into Foreign Trust Disclosure Rules* (The Treasury, 20 June 2016) at iv.
[90] At [1.2].
[91] At [1.4].
[92] At [1.18].
[93] At [1.17].
[94] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) at pt 1 cl 8(9).

Account Tax Compliance Act[95] (FATCA) and the AEOI regime. It is part of the information supplied to the Inland Revenue Department (IRD) to register a foreign trust in New Zealand under the proposed s 59B.[96] Proposed s 59D then sets out the requirements for a resident trustee of a foreign trust to provide an annual return for the trust to the Commissioner.[97] Furthermore, the taxpayer secrecy provisions in s 81 of the TAA are being amended through the insertion of a new subsection, which allows the Commissioner to provide information relating to the registration of a foreign trust to a member of the New Zealand Police or an officer, employee or agent of the Department of Internal Affairs.[98] This expands the scope of sharing taxpayer information and represents an infringement to the protection of taxpayer secrecy, sanctioned by the Government for the purposes of combating international tax evasion. As will be discussed in Chapter IV, the consequence of greater information exchange has been the erosion of taxpayers' right to privacy.

These amendments are intended to ensure that New Zealand's laws are "fit for purpose" and to demonstrate the commitment toward eliminating a legal environment that tolerates the use of foreign trusts to commit tax avoidance and evasion.[99] The concerns highlighted in the Shewan Report indicate that to a large extent, New Zealand's benefit from implementing the latest transparency standards are reputational and for the purposes of signalling its commitment to international standards.

The preceding discussion has shown that tax evasion and improving transparency are the most germane issues for New Zealand in regards to the international tax system. Given this domestic position in international tax matters, the next chapter is directed

[95] The FATCA will be discussed further in Chapter III.
[96] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) at pt 1 cl 10. See Appendix 1 for the full list of registration and disclosure requirements for foreign trusts with a resident trustee under proposed s 59B.
[97] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) at pt 1 cl 10. See Appendix 1 for the requirements of an annual return under proposed s 59 D.
[98] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) at pt 1 cl 11(z).
[99] John Shewan *Government Inquiry into Foreign Trust Disclosure Rules* (The Treasury, 20 June 2016) at [1.1].

specifically toward tax information exchange and the international instruments under which it has developed in the lead up to the AEOI.

Chapter III: Developments in Tax Information Exchange

In order to show how the norms for information exchange have changed over time to arrive at the current standard of the AEOI, it is necessary to begin with the origins of information exchange. As globalisation and digitisation increase the interconnectivity of taxpayers, a parallel development has been the increase in the scope of tax information exchange that has largely been driven by the OECD and the work of the Global Forum.[100] The scope of information sharing has evolved from previously being based on reciprocity, to exchange being based on the ability to collect and the other country's need for it, and now being based on the automatic exchange of bulk information. This leads to the increasing internationalisation of taxpayer information and the periodic sharing of information formalising the relationships between revenue authorities all around the world.[101] The development of international instruments has contributed to the transparency-enhancing infrastructure that has led to the AEOI.

A Exchange of Information Upon Request

1 Article 26 of the OECD Model Convention

Double Tax Agreements (DTA)[102] are the main bilateral instruments used by countries to allocate taxing rights in cross border transactions to prevent double juridical taxation on these transactions.[103] New Zealand currently has 40 DTAs in

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[100] OECD *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013) at 7.
[101] Michael Dirkis and Brett Bondfield "The Developing International Framework and Practice for the Exchange of Tax Related Information: Evolution or Change?" (2013) 11(2) eJournal of Tax Research 115 at 122.
[102] DTAs are instruments of public international law as well as domestic public law once adopted into legislation. This "dual heritage gives DTAs a unique position in tax law because it necessitates special rules for interpretation" and under s BH1(4) of the ITA, Parliament has indicated DTAs have an overriding effect over the Act: Elliffe, above n 9, at 584.
[103] DTAs are increasingly important for addressing tax avoidance and evasion, and Action Plan 6 of the BEPS project will make this explicit in the OECD Model Convention. The title of the OECD Model Convention will expressly state "for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance": OECD *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6, OECD/G20 Base Erosion and Profit Shifting Project* (OECD Publishing, 2015).

force with its main trading and investment partners,[104] which are generally modelled on the OECD Model Convention on Income and on Capital (the Model Convention).[105] As well as allocating taxing rights, under art 26, the Model Convention provides for information exchange between countries "on request". "On request" information exchange involves one country applying to another country to supply certain information pertinent to a resident taxpayer. The contents of the tax information exchange stipulated by art 26 in its original form were quite limited and the conditions under which it was justified were narrow. Information could only be exchanged to the extent that it was consistent with the domestic laws of either state; information could only be given if it were also mutually beneficial to the requested state's tax base; and information could only be given in relation to the type of tax that was the subject of the bilateral treaty.[106]

However in 2005, art 26 underwent considerable extension through the addition of paras 4 and 5, which altered the threshold for information exchange to take place.[107] Article 26 now states that information will be provided if it is "foreseeably relevant for the administration or enforcement of taxes of every kind" and it requires each party to "use its powers to obtain and provide such information even if it is not needed for its own tax purposes".[108] The wording has been changed from providing information that "is necessary" to a lower threshold of information that is "foreseeably relevant" and clarifies that information exchange is purposed for "administration or enforcement" of domestic laws or taxes. This extends the ambit of information capable of being shared and provides for information exchange to the widest possible extent. According to para 4, countries are not limited to providing information to other tax authorities that would be of reciprocal benefit to their own tax

[104] For a current list of New Zealand's tax treaty partners see, "Tax treaties" Inland Revenue <https://taxpolicy.ird.govt.nz/tax-treaties>.
[105] The OECD Model Convention forms the basis of most DTAs and provides a template for bilateral negotiations concerning tax coordination and cooperation but departure from its articles is possible. The Model Convention is supplemented by a series of OECD commentaries that provide interpretive guidance on the contents of the Model Convention provisions.
[106] Dirkis and Bondfield, above n 101, at 120.
[107] Martin, above n 19, at 4.
[108] OECD Model Tax Convention on Income and on Capital (2014), art 26.

base and explicitly states that the limitations in para 3 are not to be used to refuse an information request on the basis that there is no domestic benefit derived from the exchange of this information.[109] The new language of art 26 opens up the breadth of information exchange beyond what is in the domestic tax interest, and the exchange of information is no longer constrained by "reciprocity". The ability of tax administrations to use their information gathering powers solely in the interests of another states' tax base is a significant movement away from the "sharing what one has" model of exchange.[110] This level of cooperation contrasts with the separateness of domestic tax systems that the current international paradigm is premised on. The changes to art 26 are analogous to the general international trend of greater interaction between tax authorities, which has been necessitated by the increasingly global activities of taxpayers. Although tax authorities are limited territorially in their ability to enforce taxes, states have cooperated around this issue to use the assistance of other states to manoeuver around territorial constraints.

Paragraph 5 of art 26 of the Model Treaty responds to the issues arising from banking secrecy that had previously hampered the effective exchange of information.[111] Paragraph 3 states that a contracting state has no obligation to provide a requesting state with information that is inconsistent with the laws and administrative practices of the requested state.[112] Subsequently para 5 stipulates a contracting state shall not decline the supply of information solely because the information is held by a bank or other financial institution.[113] Thus para 5 overrides para 3 to the extent that it overcomes the obstacle of bank secrecy.[114] The Commentary clarifies that all kinds of information are to be supplied pursuant to art 26, regardless of the source.[115] This is a significant step toward reducing secrecy in the current international tax system. This

[109] Martin, above n 19, at 5.
[110] Shelley Griffiths "New Zealand: Information Sharing and Gathering and the New Zealand-Australia DTC" in *Tax treaty Case Law around the Globe – 2011* (Linde Verlag, Vienna, 2011) 471 at 484.
[111] In most jurisdictions, either by virtue of contractual obligations between the bank and the account holder, or by statutory provision, the confidentiality of a customer's financial accounts with a bank is protected from disclosure: Branson, above n 44, at 79.
[112] OECD Model Tax Convention on Income and on Capital (2014), art 26(3).
[113] OECD Model Tax Convention on Income and on Capital (2014), art 26(5).
[114] OECD Commentary on Update to Article 26 on the OECD Model Tax Convention (2012) at 16.
[115] Martin, above n 19, at 7.

demonstrates a considerable widening of the ambit of art 26 that effectively supersedes the domestic law that explicitly protects secrecy of taxpayer information. These excursions into taxpayer privacy are a recurrent theme in the development of information exchange, as will be seen throughout this chapter.

2 Avowal Administrative Attorneys

The effect of art 26 was discussed in *Avowal Administrative Attorneys v District Court at North Shore*[116] in the context of the New Zealand-Australia DTA.[117] There was an exchange of taxpayer information from the IRD to the Australian Tax Office (ATO), which was challenged by the taxpayer on the basis that art 26(2)(b) of the DTA states that the Commissioner is not obliged to supply information to the ATO of the kind that could not be obtainable under the laws of Australia. This argument was founded on the fact that the way in which the Commissioner obtained the taxpayer information in New Zealand was not "precisely the same" as the ATO Commissioner's powers to obtain information in Australia, thus the information could not be obtained in the same way under Australian law.[118] The Court of Appeal rejected the taxpayers' argument and interpreted art 26(2)(b) as meaning there is no obligation to pass on information that would not be obtainable "under Australia's tax laws or administrative practices by a broadly analogous process".[119] The Court of Appeal held it would be "absurd" to require the Commissioner to conduct searches that complied "precisely" with both New Zealand and Australian laws, and they did not accept the strained interpretation of the Treaty.[120] It would be absurd if the

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[116] *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2010] NZCA 183. The ATO had initiated an exchange of information process with the IRD with regard to Avowal Administrative Attorneys Limited for their involvement in promoting tax schemes detrimental to both New Zealand and Australian tax bases. The IRD accessed Avowal's properties in New Zealand and seized information from the hard drives at the business premises pursuant to s 16(1) of the Tax Administration Act. The case revolves around Avowal challenging the legality of the search and the exchange of information with the ATO under the Australia-New Zealand double tax agreement.

[117] Agreement Between New Zealand and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (signed 27 January 1995) is modelled on the OECD Model Convention.

[118] *Avowal Administrative Attorneys Ltd,* above n 116, at [56].

[119] At [56].

[120] At [57].

requirements under the respective information gathering laws were contradictory to the extent that they could not be complied with simultaneously, and therefore no information could be shared between the states.[121]

The Commissioner of the IRD alternately argued that had there been no obligation to supply the information to the ATO by virtue of art 26(2)(b), the Commissioner could nevertheless "voluntarily" supply the information.[122] However this leads to the question of what effect ss 81 and 88 of the TAA could have to potentially prevent the supply of information that is not "required" but "volunteered".[123] Section 81 protects the secrecy of taxpayer information, whereas s 88 states secrecy obligations will not prevent the disclosure of taxpayer information if it is "required" under a DTA.[124] The Court did not have to decide on this issue, but stated, "on the face of it, s 81(1) requires secrecy and s 88 applies only to information which the Commissioner *is required* to provide under the DTA, not to information which he chooses to provide voluntarily".[125] Hence uncertainty remains in regards to the legality of voluntarily supplied information, but it seems the Court tentatively indicated it did not want to read s 88 down.[126]

3 Article 27 of the OECD Model Convention

Article 27 was also introduced into the Model Convention in 2005 to provide for the assistance in the collection of taxes between states.[127] This is in contrast with the well established "revenue rule", which states that "there is a well established and almost universal principle that the courts of one country will not enforce the penal and revenue laws of another country".[128] The Supreme Court of Canada aptly described

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[121] Griffiths, above n 110, at 478.
[122] *Avowal Administrative Attorneys Ltd,* above n 116, at [60].
[123] Griffiths, above n 110, at 478.
[124] Tax Administration Act 1994, ss 81, 88.
[125] *Avowal Administrative Attorneys Ltd,* above n 116, at [60] (emphasis added).
[126] Griffiths, above n 110, at 479.
[127] OECD Article 27 and Commentary of the Model Tax Convention on Income and on Capital (2005).
[128] *Williams & Humber Ltd v W&H trade Marks (Jersey) Ltd* [1986] A.C. 368, 428; Martin, above n 19, at 24.

this as an "ancient rule" in *USA v Harden,*[129] with countries increasingly expanding their cooperative ambit to include the enforcement of each other's tax laws.[130] Under art 27, contracting states may agree to use their resources for the purposes of enriching the other parties' tax base and use all means necessary to assist in the collection of taxes for another jurisdiction.[131] Article 27 is an acknowledgement of the territorially limited nature of domestic systems and the inevitable need to enlist other jurisdictions for the enforcement of tax laws. Despite the current international paradigm in which domestic systems are designed and operated unilaterally, the unprecedented globalisation of taxpayers is having an impact on the cooperative relationship between separate tax systems. Article 27 is a recognition that in this globalised and digitised world economy, it is mutually beneficial, if not crucial, for tax authorities to co-operate in order to remain effective in enforcing tax compliance.

4 Tax Information Exchange Agreements

Tax Information Exchange Agreements (TIEA) are based on the 2002 OECD Model Agreement on the Exchange of Information on Tax Matters, and similarly to art 26 of the OECD Model Convention, they provide for information exchange upon request. Unlike DTAs, they are bilateral agreements that provide exclusively for tax information exchange; hence they are much narrower in scope. TIEAs were developed by the OECD and the Global Forum, and emerged from the HTC in 1998 discussed in Chapter II. The "lack of effective information exchange" was cited as one of the main characteristics of harmful tax practices, thus TIEAs were created for the purposes of promoting international cooperation in tax matters.[132] TIEAs have analogous processes as DTAs for requesting information from partner states, and they have also followed the same path as DTAs by providing that the requested state

[129] *USA v Harden* [1963] S.C.R. 366, 41 D.L.R. (2d) 721 at 724.
[130] Cockfield "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights", above n 76, at 442.
[131] Martin, above n 19, at 27.
[132] OECD Model Agreement on Exchange of Information on Tax Matters (2002).

cannot decline to supply information on the basis that it is held by a bank or other financial institution, or because it relates to the ownership interests in a person.[133]

TIEAs are intended for use where a DTA may not be considered appropriate; perhaps because only one country has an income tax system and allocating taxing rights is unnecessary. Many TIEAs are predominantly signed between income taxing jurisdictions and tax havens, to provide the basis for the exchange of information where there is no DTA because double taxation is not an issue, but the possibility of tax evasion still exists. New Zealand currently has 11 TIEAs in force, many of which with countries generally regarded as tax havens.[134] Accordingly, in practice, information exchange under TIEAs is likely to be a one-way street with the high-tax developed country making the vast majority of the information requests.[135] This demonstrates that where information exchange is on a request basis, the level of information flow is not necessarily reflected in the quantity of TIEAs in place. This was the main weakness in the OECD's "black white and grey lists" that in substance did not improve the level of global tax transparency.

5 Limits of DTAs and TIEAs: Ask and You Shall Receive?

Although the growing number of DTAs and TIEAs signal a commitment to transparency and cooperation, information exchange upon request is limited because it does not permit tax authorities to embark on "fishing expeditions".[136] This means that an unfocused request for information without substantial grounds could be challenged and denied.[137] The standard for tax information on request is ineffective for detecting and deterring tax evasion because it creates a catch-22 where authorities

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[133] Oberson, above n 17, at 7.
[134] New Zealand has TIEAs in force with Cayman Islands, Cook Islands, Curacao, Gibraltar, Guernsey, Isle of Man, Jersey, Marshall Islands, Netherlands Antilles, Niue and Sint Maarten. New Zealand has TIEAs that are signed but not yet in force with, Anguilla, Bahamas, Bermuda, British Virgin Islands, Dominica, St Christopher and Nevis, St. Vincent and the Grenadines, Turks and Caicos Islands, and Vanuatu: "Tax treaties" Inland Revenue <https://taxpolicy.ird.govt.nz/tax-treaties>.
[135] Martin, above n 19, at 17.
[136] Martin, above n 19, at 5.
[137] Martin, above n 19, at 5.

must have prior knowledge of the tax evasion before requesting the information, and this is hardly likely given the bank secrecy laws in place. Without information in the first place, tax authorities are scarcely in a good position to be able to request information from other jurisdictions. Article 5 in the OECD Model Agreement requires the information sought by the requesting party to be "foreseeably relevant", and although this is a lower threshold than "necessary", it is nevertheless difficult to satisfy without a high level of peripheral knowledge about the taxpayer and their financial circumstances. Any requests for information also compel the requesting state to produce the taxpayer's identity; a statement on the information sought; a description of the particular tax purpose; a statement on the grounds on which they believe the information sought is in the possession of the requested state; and the name and address of the person in possession of the information.

To require information for the purposes of obtaining information is counterintuitive and contrary to the fundamental premise of information exchange. Therefore regardless of the increase in bilateral agreements, there can be no meaningful change in tax transparency. This standard of information exchange provides the base line for assessing the impact of more recent developments in information exchange, and how the new international standard purports to be a "game changer" in tax transparency.

B Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The Multilateral Convention on the Mutual Administrative Assistance in Tax Matters (CMAAT) is a multilateral mechanism,[138] developed by the OECD and the Council of Europe in 1988 for the purposes of providing a legal framework for countries to assist each other in the exchange of information, unpaid tax recovery and service of documents.[139] CMAAT covers all types of taxation, and it is a mechanism for the

[138] Although CMAAT is a multilateral instrument, the information obtained by one signatory cannot be passed onto a third party unless prior authorisation has been given. Countries are also able to tailor the extent of their obligations by making reservations provided under art 30(1).
[139] Foreign Affairs Defence and Trade Committee *Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Amended by the 2010 Protocol* (14 June 2013).

exchange of information on request, spontaneously and automatically as well as providing for the joint tax audit of multinational corporations and assistance in the collection of taxes. Initially it was open only to members of the OECD and the Council of Europe and came into force in 1995. CMAAT was amended by protocol in 2010 to open it up to countries outside of these organisations, thereby giving it the potential to become the leading global instrument for tax cooperation. In essence, CMAAT is a consolidation of the administrative assistance provided in DTAs and TIEAs formatted in a multilateral agreement open to the world.[140]

The CMAAT has undergone several changes that align it with the international standard seen in DTAs and TIEAs. Article 21.2.c states that a party is not required to "supply information which is not obtainable under its own laws or its administrative practice, or under the laws of the applicant state or its administrative practice". Thus refusal to supply information could arise due to differences in the respective tax authorities' information gathering powers or bank secrecy laws. Previously the CMAAT did not contain the additional provisions in the DTAs and TIEAs, which oblige states to obtain information held by banks, and ownership information on persons and arrangements.[141] However, the addition of para 4 eliminates the use of bank secrecy laws to justify information exchange refusals, and imposes a "positive obligation" on parties to exchange all kinds of information.[142] The addition of this paragraph reflects the international trend in this area and creates consistency between DTAs and TIEAs.[143]

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[140] Many countries have signed the CMAAT but have not ratified it. These states are Andorra, Barbados, Brazil, Bulgaria, Chile, El Salvador, Gabon, Guatemala, Israel, Kenya, Liechtenstein, Monaco, Morocco, Niue, Philippines, Senegal, Switzerland, Turkey, Uganda and the United States: "Will the OECD tax haven blacklist be another whitewash?" (20 July 2016) Tax Justice Network <www.taxjustice.net>.

[141] This includes information on settlors, trustees, and beneficiaries of trusts and foundations under art 5.4 of OECD Model Agreement on Exchange of Information on Tax Matters (2002).

[142] OECD and Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters Amended by the 2010 Protocol (2010), art 21(4).

[143] OECD Commentary on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as Amended by the 2010 Protocol (2011) at [210].

New Zealand became a signatory to CMAAT in 2012, which was then given legal effect on 21 October 2013 under the Double Tax Agreements (Mutual Administrative Assistance) Order.[144] The main significance of CMAAT in the context of this paper is that it provides a multilateral platform for the AEOI, and it constitutes the legal basis for implementing the Common Reporting Standard (CRS) into New Zealand legislation. Conceptually, CMAAT marks the transition from the old international standard of information exchange upon request, to the new international standard of the AEOI.

C Automatic Exchange of Information

1 Foreign Account Tax Compliance Act

The United States FATCA is a law enacted in March 2010 under the Obama Administration for the purpose of targeting offshore tax evasion by United States residents.[145] FATCA is a significant piece of United States legislation that implements the automatic exchange of information between the United States and 113 countries that have signed an Intergovernmental Agreement (IGA) with the United States.[146] It was catalysed by the Union Bank of Switzerland (UBS) scandal,[147] and it has been described as the most "aggressive extraterritorial enforcement of one country's tax

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[144] Double Tax Agreements (Mutual Administrative Assistance) Order 2013 enacted under section BH1 of the Income Tax Act 2007.
[145] Foreign Account Tax Compliance Act 26 U.S.C. §§1471 – 1474.
[146] "Resource Centre: Foreign Account Tax Compliance Act (FATCA)" U.S Department of the Treasury <www.treasury.gov>.
[147] The FATCA was catalysed by the UBS case in 2008 in which a senior official of UBS admitted his assistance to a Californian real estate billionaire to avoid $200 million in taxes on his $7.26 billion in assets through the use of offshore trusts. Under mounting pressure from the United States Government, it led to a settlement agreement where UBS paid $780 million in fines and provided the account details of thousands of United States account holders in exchange for the United States not charging UBS with aiding thousands of clients evade United States taxes through various foreign accounts. This case marks a critical period where global standards of tax transparency and the exchange of information came to the forefront of the global political agenda and took priority over bank secrecy and taxpayer rights to privacy. The United States directly challenged Switzerland's culture of bank secrecy and the offshore tax evasion it enables: Taylor Ball "International Tax Compliance Agreements and Swiss Bank Privacy Law: A Model Protecting a Principled History" (2015) 48 George Washington International Law Review 233 at 234.

law" in history.[148] FATCA imposes due diligence and reporting obligations on foreign financial institutions (FFI) all over the world to supply the Inland Revenue Service (IRS) with information pertaining to United States resident account holders or of foreign entities in which United States taxpayers hold a substantial ownership interest.[149]

FATCA imposes a 30 percent withholding tax on all United States resident investments in non-compliant financial institutions, thereby essentially preventing FFIs from taking part in the United States financial market if they do not agree to implement FATCA.[150] This "sticks" approach demonstrates the leveraging of economic power to enlist the assistance of financial institutions globally for domestic tax purposes.[151] As Prime Minister John Key states, "If we didn't comply then there were significant implications for New Zealand, and in fact they've made everyone in the world who wants to do business with them comply under those terms."[152]

The burden of billions of dollars in compliance costs, placed on FFIs and governments for the enforcement of United States tax laws has been criticised as "unfair" and a concerning display of "American fiscal imperialism".[153] Essentially the United States' targeting of tax evaders is being funded by the other governments and financial institutions, and soliciting them as "unpaid US tax collectors".[154] The regulatory, administrative and monetary burden imposed by FATCA is draconian and

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[148] Richard LeVine, Aaron Schumacher and Shudan Zhou "FATCA and CRS" (2016) Journal of International Taxation 43 at 46.
[149] Financial institutions must obtain information on the United States resident account holder's name, address, Unites States TIN, the account number, the name and identifying number of the Reporting New Zealand financial institution, and the account balance as of the end of the relevant calendar year: Agreement between the Government of New Zealand and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA (signed 12 June 2014, entered into force 3 July 2014), art 2(2).
[150] Tracy A. Kaye "Innovations in the War on Tax Evasion" (2014) Brigham Young University Law Review 363 at 364.
[151] LeVine, Schumacher and Zhou, above n 148, at 45.
[152] "NZ has no option but to co-operate with the controversial US FATCA tax law, PM John Key says" (5 February 2014) Interest <http://interest.co.nz>.
[153] "FATCA: The neutron Bomb of the Global Financial System" (December 2012) Minter Ellison Rudd Watts <www.minterellison.co.nz/>.
[154] "FATCA Attack" (28 May 2012) Economia <http://economia.icaew.com/>.

has been estimated to cost overseas participants approximately eight times more than the expected increase in tax revenue for the IRS.[155] Despite the cold international reception to FATCA, its enactment has had a "snowball effect" by motivating the OECD to target offshore tax evasion more expeditiously with a focus on deterrence as well as detection.[156] Pascal Saint Amans[157] indicated, "FATCA is a big catalyst toward an eventual multilateral platform for automatic information exchange".[158]

The United States has entered into bilateral agreements, in the form of Intergovernmental Agreements (IGA) under which participating jurisdictions agree to legislate the due diligence and reporting obligations into law.[159] The use of IGAs addresses the concerns that foreign financial institutions supplying the information directly to the IRS may breach confidentiality obligations in some countries "whereas, an intergovernmental approach to FATCA implementation would address legal impediments and reduce burdens for financial institutions".[160] This creates a network of international agreements that allow foreign governments to supply information to the United States. The IRS commissioner John Koskinen said:[161]

> This ground breaking effort has fundamentally altered our relationship with tax authorities around the world, giving us all a much stronger hand in fighting illegal tax avoidance and levelling the playing field.

If a country enters into an IGA with the United States, then the financial institutions in the partner country are regarded as being compliant under the FATCA regime. The United States has entered into various different types of IGAs depending on whether

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[155] "FATCA: The neutron Bomb of the Global Financial System" (December 2012) Minter Ellison Rudd Watts <www.minterellison.co.nz/>.
[156] Kaye, above n 150, at 366.
[157] Pascal Saint Amans is the Director of the OECD's Centre for Tax Policy and Administration and has played a key role in the advancement of the tax transparency agenda with the G20.
[158] Kaye, above n 150, at 384.
[159] Dirkis and Bondfield, above n 101, at 126.
[160] Agreement between the Government of New Zealand and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA (signed 12 June 2014, entered into force 3 July 2014).
[161] Laura Saunders "IRS Begins Sending Individual Account Information to Foreign Countries" *The Wall Street Journal* (online ed, New York, 2 October 2015).

the exchange of information is going to be on a reciprocal basis and whether there is a pre-existing DTA or TIEA with the partner country.[162] The New Zealand-United States IGA[163] is based on the "Treasury Model 1"[164] which operates on a reciprocal exchange basis.[165] The IRS has indicated that reciprocal exchange arrangements will only occur with jurisdictions if their domestic laws and infrastructure are sufficient enough to ensure the protection of taxpayer data and if the cyber security practices and procedures are adequate.[166] This excludes numerous non-European countries, and so far the United States' reciprocation has been described as "patchy".[167]

Despite the FATCA coming into force in New Zealand in 2014, practical difficulties persist, and the uncertain application of FATCA on trusts remains an issue in New Zealand.[168] This uncertainty has led to the IRD issuing Trust Guidance Notes, which provides direction on how FATCA will apply to common forms of trusts in New Zealand such as unit trusts, family trusts, trading trusts and charitable trusts.[169] The Guidance Notes excludes solicitor's trust accounts, and the IRD has indicated a separate guidance note would be issued on this specific category.[170] The uncertainty has generally been over whether a trust is a New Zealand financial institution[171]

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[162] For the list of countries with which the United States has entered into IGAs see, "Resource Centre: Foreign Account Tax Compliance Act (FATCA)" U.S Department of the Treasury <www.treasury.gov>.
[163] Agreement between the Government of New Zealand and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA (signed 12 June 2014, entered into force 3 July 2014).
[164] "Resource Centre: Foreign Account Tax Compliance Act (FATCA)" U.S Department of the Treasury <www.treasury.gov>.
[165] The New Zealand – United States IGA is based on art 25 of the Convention Between New Zealand and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (signed 23 July 1983, entered into force 2 November 1983). The legislative framework for FATCA obligations is provided for under pt 11B (foreign account information-sharing agreements) of the TAA. Part 11B was inserted into the Tax Administration Act 1994 by the Taxation (Annual Rates, Employee Allowances and Remedial Matters) Act 2014.
[166] Laura Saunders "IRS Begins Sending Individual Account Information to Foreign Countries" *The Wall Street Journal* (online ed, New York, 2 October 2015).
[167] "The Biggest Loophole of all" (20 February 2016) The Economist <www.economist.com/>.
[168] Inland Revenue *Foreign Account Tax Compliance Act: Trust Guidance Notes* (Inland Revenue, March 2016) at 3.
[169] At 4.
[170] At 4.
[171] A Financial Institution means a custodial institution, a depository institution, an investment entity, or a specified insurance company. A New Zealand Financial Institution means any Financial Institution

(NZFI) under the "investment entity" category,[172] or whether it is a non-financial foreign entity (NFFE).[173] The difference being that a NZFI must register with the IRS and will be subject to due diligence and reporting requirements under the IGA.[174] On the other hand, NFFEs do not have due diligence and reporting obligations but they may be account holders that are reported on by the financial institution that maintains that account.[175]

In essence, implementing FATCA has been a test drive for New Zealand in information exchange on an automatic basis. It has provided the legislative architecture for the new global standard, and to some extent the due diligence and reporting requirements between FATCA and the AEOI may overlap and ease the administrative burden.

2 Automatic Exchange of Information and the Common Reporting Standard

The AEOI is the OECD's latest body of work, which represents the next stage of intergovernmental cooperation for the "detection and prevention of tax evasion".[176] The AEOI is the OECD's international version of the FATCA that "draws extensively" on its intergovernmental approach.[177] The difference between the FATCA and the AEOI is that the FATCA was exclusively designed for the benefit of the United States, which used other states as "stewards" for information, whereas the

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resident in New Zealand, but excludes any branch of Financial Institution that is located outside New Zealand.

[172] An investment entity is any entity that conducts as a business or is managed by an entity that conducts a business of trading in money market instruments, individual and collective portfolio management, or otherwise investing, administering, or managing funds or money on behalf of other persons.

[173] A Non-Financial Foreign Entity is a foreign entity excluded from the definition of a Foreign Financial Institution.

[174] Inland Revenue *Foreign Account Tax Compliance Act: Trust Guidance Notes* (Inland Revenue, March 2016) at 3.

[175] Inland Revenue *Foreign Account Tax Compliance Act: Trust Guidance Notes* (Inland Revenue, March 2016) at 4.

[176] Inland Revenue *Regulatory Impact Statement: Implementing New Zealand's commitment to Automatic Exchange of Information (AEOI)* (13 May 2016) at 3.

[177] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014) at [5].

AEOI's benefit is hypothetically intended for all participating jurisdictions to verify the accurate reporting of offshore financial assets and income by their tax residents.[178]

The AEOI represents "soft" law, which is an international recommendation on "best practice" but essentially is mandatory.[179] Under the AEOI, financial institutions are obliged to carry out due diligence on their account holders and controlling persons to collect financial information on non-residents according to the CRS. The CRS provides the framework for the collection and maintenance of financial account information provided to tax authorities by financial institutions. The implementation and observance of the CRS is aimed at increasing the quality and predictability of information being shared between jurisdictions.

The CRS defines the scope of the three main components to the AEOI: the financial information to be reported; the account holders whose information is reportable; and the financial institutions that collect and report this information to tax authorities. Financial information includes information on a wide category of income such as dividends, interest, royalties, salaries and pensions.[180] Account holders from which information must be obtained are individuals, companies, trusts and foundations. Furthermore the CRS requires that financial institutions must look through certain passive entities and report on the relevant controlling persons.[181] Lastly, financial institutions that are subject to the reporting requirements include custodial institutions, depository institutions, investment entities, and specified insurance companies.[182]

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[178] Inland Revenue *Regulatory Impact Statement: Implementing New Zealand's commitment to Automatic Exchange of Information (AEOI)* (13 May 2016) at 5.
[179] Inland Revenue *Regulatory Impact Statement: Implementing New Zealand's commitment to Automatic Exchange of Information (AEOI)* (13 May 2016) 4.
[180] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014) at [20].
[181] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014) at [20].
[182] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014) at [20].

For the AEOI to take place, the regulatory framework provided under the CRS must be transferred into domestic legislation. Then, states must conclude a Competent Authority Agreement (CAA) on a bilateral or multilateral basis. The CAA is the operating mechanism for the AEOI between parties, and contains the rules and terms governing the exchange of information between them.[183] It will also contain the specific rules concerning confidentiality, safeguards and the necessary data protection infrastructure needed for an effective exchange system.[184] The CAA must be executed under the existing legal framework of a tax treaty that will provide the legal basis for the AEOI,[185] thus the CAA acts as the link between the CRS and the legal basis for the AEOI.[186] The legal basis for exchange in New Zealand will be art 6 of the CMAAT. With an increasing number of states joining the CMAAT it is likely to become the comprehensive legal basis for the AEOI.[187]

Next, states must put in place the required administrative infrastructure to collect and exchange information under the CRS and take the necessary precautions to protect the data that is being exchanged. This includes minimum standards for the encryption and safe transmission of information and legislation to protect the secrecy and proper use of taxpayers' financial records. These safeguards are essential in providing participating states with the confidence that other participating states have adequate legislative measures to address the security and privacy concerns. For these purposes the Global Forum will conduct peer reviews on the participating jurisdictions' information protection laws.[188]

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[183] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014) at [11].
[184] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014) at [12].
[185] For example a pre-existing DTA, TIEA, or CMAAT.
[186] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014) at [17].
[187] OECD *A Step Change in Tax Transparency: OECD Report for the G8 Summit* (OECD Publishing, 2013) at 4.
[188] Policy and Strategy, Inland Revenue *Implementing the Global Standard on Automatic Exchange of Information: An Officials' Issues Paper* (February 2016) at [1.20].

The Model Competent Authority Agreement (MCAA) stipulates that countries can use these reviews in order to limit exchanges with countries that have inadequate measures.[189] Information exchange may also be suspended under the MCAA if countries are in breach of confidentiality and data safeguards, or fail to provide timely or adequate information, or frustrate the purposes of the CRS by limiting its scope in terms of the entities and accounts covered by the CRS.[190] This presents an area of weakness in that countries are domestically responsible for providing the data safeguards and confidentiality measures, and countries can use this to justify the refusal to exchange of information.

The AEOI currently represents the high watermark for international tax information exchange, and to date, 101 jurisdictions have committed to exchanges by 2017 and 2018. In contrast to DTAs and TIEAs, under the AEOI the information flow between jurisdictions will be much more substantial, and tax authorities will not need pre-requisite information in order to make requests. Nevertheless it has come at a huge compliance cost for financial institutions and governments globally. The equitable distribution of the benefits is also questionable given that it is an OECD led initiative, purposed for the benefit of predominantly OECD member states, which may actually detriment capital importing countries. This makes it more difficult to rebut the assumption that the AEOI is a "revenue grab" for wealthy OECD countries.[191]

D Trends in Tax Information Exchange: Growing Pains

The AEOI signals a shift in the balance between the rights of taxpayers and tax authorities. Taxpayers have the right to keep their information private and maintain their financial affairs under the protection of bank secrecy laws, but on the other hand, tax authorities have the right to levy taxes on individuals and corporations in a fair

[189] Policy and Strategy, Inland Revenue *Implementing the Global Standard on Automatic Exchange of Information: An Officials' Issues Paper* (February 2016) at [4.2].
[190] Policy and Strategy, Inland Revenue *Implementing the Global Standard on Automatic Exchange of Information: An Officials' Issues Paper* (February 2016) at [4.3].
[191] David Russell and Toby Graham "The Panama Papers" (2016) 22(5) Trusts and Trustees 481 at 481.

and efficient manner for the purposes of raising public revenue. The Panama Papers scandal highlights that the latter right is warranting more protection and the degree of financial information accessibility is increasing. This could lead to an unchecked inroad into taxpayer privacy under the guise of greater transparency. The pendulum has swung in favour of protecting government tax bases and this is not surprising given the political pressure mounting against the fairness in treatment of the financial industry, MNEs and wealthy individuals since the GFC.

The transition to the AEOI has changed the dynamics between governments and private financial institutions, as they are now becoming necessary stewards of information exchange.[192] Financial institutions have repeatedly been accused of assisting clients to conceal their income and profits, and providing aggressive tax mitigation schemes. Conversely, requiring financial institutions to report directly to tax authorities on taxpayer information is rendering the traditional services of financial institutions inconsistent with their obligations under the law.

The growth of tax information is currently in a precarious position given that global exchanges have not yet taken place, and countries are currently either gearing up, or postponing the new international standard. There is a significant conflict between countries that stand to benefit from the AEOI, and those that will lose, so the question is not "if" they will circumvent their obligations in their favour, but really "how"? Thus it remains to be seen whether the AEOI will establish a new international order, or whether it is "full of sound and fury, signifying nothing".[193]

[192] Blum, above n 60, at 606.
[193] William Shakespeare *Macbeth* Act 5 Scene 5.

Chapter IV: New Zealand's Implementation of the AEOI

The Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill (the Bill) was introduced into Parliament on 8 August 2016 and contains the proposed legislative framework to implement the AEOI and the CRS into New Zealand law.[194] This chapter will outline the sections proposed by the Bill and assess how it will impact financial institutions and taxpayers. The domestic implementation of the AEOI will indicate how the cost of the AEOI is more than monetary, but there is also a cost to New Zealand's tax sovereignty, and a privacy cost to taxpayers. These additional considerations must not be omitted when accounting for the AEOI's worth to New Zealand.

A Establishing the legislative framework

The implementation of the CRS into domestic legislation will require amendment to the Income Tax Act 2007 (ITA) and the TAA. The changes not only facilitate the application of the CRS, but they also affect the legislation relating to FATCA in order to make the legislative framework more coherent between these two different standards. Under s YA 1 of the ITA, the definition of "foreign account information-sharing agreement" will be extended to include the CMAAT.[195] Currently the definition only includes the Agreement between the Government of the United States of America and the Government of New Zealand to Improve International Tax Compliance and to Implement FATCA.[196] The definition of a "foreign account information sharing agreement" will be updated to ensure that the AEOI exchanges under the CMAAT will be subject to the rules in pt 11B of the TAA. The majority of

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[194] After the first reading the Bill was referred to the Finance and Expenditure Select Committee on 11 August 2016. After the Bill receives Royal Assent in March 2017, it is estimated that reporting financial institutions can commence due diligence procedures by 1 July 2017. Financial institutions can then begin report to the IRD between 1 April 2018 and 30 June 2018: "Implementing Automatic Exchange of Information (AEOI)" (23 September 2016) Inland Revenue Topical Issues <http://taxpolicy.ird.govt.nz/publications>. For the relevant sections of the Bill, see Appendix 1.

[195] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 6.

[196] Income tax Act 2007, s YA1.

the amendments that incorporate the CRS into New Zealand domestic law will occur in pt 11B of the TAA, which originally established the framework for FATCA obligations in New Zealand.[197]

The Commentary to the Bill makes it clear that an important aspect of implementing the CRS into domestic legislation is ensuring consistency with the OECD standards and procedures. Lack of consistency could risk inadvertent differences that make New Zealand laws incoherent with the international standard and this risk is exacerbated by the changes that the AEOI will undergo during its transitional period.[198] To address this risk, the implementing legislation will incorporate the AEOI by "direct reference" to the CRS and its Commentary.[199] As a result, the proposed changes in the Bill are less focused on detailing the specific obligations, but more geared toward carving out the legislative framework for the CRS. Implementation by reference will ensure that the CRS is accurately translated into New Zealand law and remains up to date.[200] The Bill proposes the addition of the terms, "CRS applied standard", "CRS publication", and "CRS standard" as defined by the OECD into s 3 of the TAA in order to incorporate the CRS by reference.[201]

The proposed s 185O(3) states that the CRS is to be interpreted and applied consistently with the OECD commentary on the CRS standard "as amended at the time".[202] The use of the phrase "as amended from time to time" indicates the ambulatory effect of the legislation and how changes to the CRS will translate into

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[197] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 95.
[198] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 97.
[199] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 8(2). The OECD Commentaries provide an "international currency" for the common interpretation of OECD treaties. Despite not being legally binding, they are a recommended and established source of information for the interpretation of OECD treaties and standards: *Commissioner of Inland Revenue v JFP Energy Inc* [1990] 3 NZLR 536 (CA); Elliffe, above n 9, at 634.
[200] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 92.
[201] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 8(2).
[202] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 24.

New Zealand legislation automatically.[203] In case of conflicts between CRS definitions and those in the Inland Revenue Acts, the proposed s 185O(4) states that the CRS definition is to be applied.[204] The Bill indicates repeatedly that the OECD standard in its most recent form is what is relevant to New Zealand laws. This legislative approach is practically beneficial given that it does not requires Parliamentary approval every time adjustments are made at the OECD level, which is highly likely during the initial transitioning stages.

1 Does State Sovereignty Still Have the Final Word?

The direct impact that the OECD has on New Zealand legislation vis-à-vis the AEOI indicates Parliament ceding sovereignty, albeit to a very limited extent, to the OECD. As mentioned earlier, countries are historically adverse to the notion of moving tax policy to an international level because the discourse surrounding tax policy is usually tethered to state sovereignty. However, in the realm of international tax information exchange, small concessions are being made that give institutions more influence in the domestic legal environment.[205] This is inevitable given that countries are calling for greater global cooperation in an increasingly challenging economic climate. Countries are increasingly going to be faced with the "trade off between autonomy and cooperation", and in the necessary circumstances, cooperation will be chosen.[206]

The OECD gaining institutional prominence as an international tax agenda setter reflects the increasing "interactions of nongovernmental actors in transnational settings".[207] The relationship between the OECD and the New Zealand legislation on the AEOI shows how a non-state actor is slowly redefining the state's monopoly over

[203] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 92.
[204] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 24.
[205] "A state might find that it requires the assistance or cooperation of other states to achieve its desired tax policy, although the very fact of cooperation might paradoxically jeopardise its own sovereignty. Such is the challenge of tax sovereignty for the modern state": Ring, above n 16, at 159.
[206] Allison Christians "Sovereignty, Taxation and Social Contract" (2009) 18 Minnesota Journal of International Law 99 at 107.
[207] Christians "Sovereignty, Taxation and Social Contract", above n 206, at 99.

tax policy. Absolute sovereignty is unmaintainable and contradictory to the calls for greater global coordination in taxation, and the level of interconnectedness between domestic law and international standards is only going to develop further. Increasingly, countries may have to prioritize its responsibility to the international community over its state sovereignty to autonomously enact tax laws.[208]

Even if international standards do not have a direct influence on domestic legislation by reference, customary international laws will develop in the international tax system and permeate into domestic legislation and its interpretation. Thus domestic tax legislation is an area that is becoming increasingly pervious to international decisions and institutionally driven policies. The discourse on tax policy in the future is likely to include more than just state actors. The implementation of the CRS by reference reflects New Zealand's amenability to any adjustments the OECD may make to the AEOI and CRS, and the Bill has not included any reservation on OECD amendments translating automatically into New Zealand law. It recognises that for global tax transparency via information collaboration, New Zealand is following the technical direction provided by the OECD. These nascent developments hint at the beginning of an ultimately greater change in the international tax system and reflect on "the pervasiveness of international law in our national law".[209]

B The "Wider Approach"

The Bill proposes to implement the "wider approach to due diligence" on a mandatory basis.[210] The wider approach to due diligence allows financial institutions to collect and retain information on all non-resident account holders as opposed to just those non-residents belonging to reportable jurisdictions.[211] The list of reportable

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[208] Christians "Sovereignty, Taxation and Social Contract", above n 206, at 100.
[209] Kenneth Keith "The Impact of International Law on New Zealand Law" (1998) 6 Wai L Rev 1 at 13.
[210] The modification to the CRS is made at item 2 of the new schedule 2: Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 104.
[211] Policy and Strategy, Inland Revenue *Implementing the Global Standard on Automatic Exchange of Information: An Officials' Issues Paper* (February 2016) at [2.28].

jurisdictions that New Zealand has obligations toward will change over time, and as a result, financial institutions will have to update due diligence procedures based on these inevitable changes. To reduce the administrative burden and decrease compliance costs associated with the constant widening breadth of due diligence, the wider approach is a legislative method that allows financial institutions to undertake due diligence procedures on all non-resident account holders and treat them as being reportable persons of reportable jurisdictions.[212] The Bill then proposes the option of financial institutions adopting the "wider approach to reporting".[213] This gives financial institutions the option of reporting all the information to the IRD or only the information pertinent to the reporting jurisdictions. The "wider approach to reporting" under the proposed ss 185N(7) and (8) allows financial institutions to pass the burden of sorting and filtering the collected data onto the IRD.[214]

C Participating Jurisdictions and Reporting Jurisdictions

The Determination making power relating to which jurisdictions are participating jurisdictions[215] is given to the Commissioner of Inland Revenue (the Commissioner) under the proposed s 91AAU.[216] The Determination making power of the Commissioner includes the ability to change, extend, limit, suspend or cancel earlier determinations.[217] During the initial transitional period, New Zealand will tentatively

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[212] Policy and Strategy, Inland Revenue *Implementing the Global Standard on Automatic Exchange of Information: An Officials' Issues Paper* (February 2016) at [2.28].
[213] This option will be set out in ss 185N(7) and (8): Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 104.
[214] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 24.
[215] Participating jurisdictions are those that have implemented AEOI and have indicated that they will provide AEOI information to other jurisdictions. For New Zealand, a participating jurisdiction will be those with which there is an agreement for that jurisdiction to provide information to New Zealand: Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 105.
[216] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 11.
[217] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 12.

treat all committed jurisdictions as participating jurisdictions before it can be verified whether the AEOI requirements have been implemented correctly.[218]

An important condition for the New Zealand government is that it maintains strict oversight and control over the list of reportable jurisdictions.[219] The information exchanged between jurisdictions consists of sensitive personal and financial information; therefore it is imperative that the New Zealand government can control and limit the flow of information to those countries that can ensure adequate data protection standards. The proposed s 226D states that the Governor General may by Order in Council make regulations providing that a territory outside New Zealand is a reportable jurisdiction.[220] It is also crucial that where there has been a breach of the CRS, the exchange of information with particular jurisdictions can be suspended immediately. Proposed s 91AAV states that the effect of a regulation providing that a territory outside New Zealand is a reportable jurisdiction may be suspended by a determination made by the Commissioner.[221] This is an important backstop in the legislation that prevents the exchange of information in circumstances where the application of the CRS has been compromised, and data security and privacy may be threatened.

The Commissioner's control over the participating jurisdictions and reporting jurisdictions is a crucial counterbalance to the wholesale implementation of the AEOI into domestic legislation.[222] The Bill proposes that the CRS is adopted by reference into domestic law and is ambulatory in nature, but New Zealand maintains control

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[218] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 105.
[219] Reportable jurisdictions are those to which New Zealand will provide AEOI information to. Thus not all participating jurisdictions are reportable jurisdictions. Countries that present concerns about confidentiality and data security will not be reportable jurisdictions because they may compromise sensitive personal and financial information: Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 106.
[220] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill), pt 1 cl 25.
[221] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 25.
[222] The IRD estimates that an initial list of reportable jurisdictions and participating jurisdictions will be made available early to mid 2017: "Implementing Automatic Exchange of Information (AEOI)" (23 September 2016) Inland Revenue Topical Issues <http://taxpolicy.ird.govt.nz/publications>.

over which countries it shares information with. This is an important protection for the rights of taxpayers, which may be compromised when information exchange partners do not have the requisite administrative and technological capacity to ensure that the information is maintained safely and only used for proper purposes. On the contrary, this protective measure may also be used by other countries to impede the exchange of information, as will be further discussed in Chapter V.

D Domestic Enforcement of the CRS: Some Reasonable "Sticks"

The main enforcement mechanism against financial institutions in the Bill is the penalty sanctions proposed under s 142H. If a financial institution fails to meet the CRS due diligence and reporting requirements or they do not obtain the relevant self certification when opening a new account,[223] they face a general civil penalty of $300 per each failure under proposed ss 142H(1) and (2).[224] This penalty is waived in the transition period prior to 1 April 2019 if the Commissioner is satisfied that "reasonable efforts" were made by the financial institution to comply.[225] Furthermore, if a financial institution fails to take reasonable care in complying with its CRS obligations, according to proposed ss 142H(5)(a) and (b) a $20,000 specific civil penalty will be applied in the first instance, followed by a $40,000 for any subsequent offence.[226]

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[223] Financial institutions are required to obtain self-certifications for new accounts as part of their account opening process. Self-certification determines the account holder's residence for tax purposes: OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014).
[224] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 13.
[225] This "reasonableness" requirement was suggested by the New Zealand Bankers Association in light of the complexity and scope of the AEOI that places an onerous burden on New Zealand financial institutions. A strict liability regime would be unrealistic burden in such circumstances. "The timing challenges, and the resulting uncertainty, that the industry was faced with for the FATCA implementation must be avoided": New Zealand Bankers Association *Submission to the Inland Revenue Department on the Automatic Exchange of Information Common Reporting Standard* (NZBA 25 September 2014) at 7.
[226] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 1 cl 13.

The Bill proposes the inclusion of provisions that will apply to both the AEOI and FATCA for streamlining purposes.[227] It recommends the alignment of the FATCA anti-avoidance rule with the AEOI anti-avoidance rule under proposed s 185R, and provides for the imposition of the same obligations and penalties on persons other than financial institutions under proposed ss 185P and 185Q.[228] Accommodating for both the FATCA and the AEOI reduces the compliance complexity for New Zealand financial institutions that will be inundated with new collecting and reporting obligations under two information sharing regimes. This legislative arrangement is reflective of the relationship between the FATCA and the AEOI, in that they rely on the same transparency intuition and require the same information from financial institutions and account holders, yet they are distinct systems, which require domestic tax systems to reconcile the differences in the legislative framework. The overlap of different information exchange regimes is a consequence of the informal global governance framework that lacks institutional leadership. The relationship between the United States and the OECD in this context is discussed further in Chapter V.

E The Erosion of Taxpayer Rights: A Necessary Evil?

Whether being holders of information, or subject to the payment of tax, taxpayers are protected by a host of rights found in both domestic legislation or in international instruments. [229] Under these sources, taxpayers have the right to equality of treatment, the right to privacy and procedural rights.[230] The Supreme Court stated in *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* that "the rights of taxpayers to have their affairs treated as confidential becomes a *fundamental principle* in tax law, recognising that protection of the integrity of the tax system encompasses

[227] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1) (Commentary on the Bill) at 109.
[228] Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016 (149-1), pt 2 cl 24.
[229] New Zealand Bill of Rights Act 1990, s 21; Privacy Act 1993, s 6; Tax Administration Act 1994, s 81.
[230] Oberson, above n 17, at 209.

those rights".[231] Taxpayer rights form part of the broader area of human rights, and they are a subset that deal with the relationship between taxpayers, tax administrations and government.[232] Taxpayer privacy can generally be described as the limitation of others, and the right to keep confidential the facts concerning the taxpayer's income, expenditures, investment and wealth.[233]

In the context of international exchange of information, the extent to which taxpayer rights apply are more controversial given that they are contingent on the type of legal instrument used for the exchange of information, and the domestic law of the states involved.[234] Recently, the effect of tax treaties between governments has been to modify and override domestic privacy laws.[235] In the movement toward tax transparency and global cooperation, unavoidable concessions are being made to taxpayers' rights to privacy in relation to their financial account information. The precarious balance between the right to privacy and the state's interest in enforcing its tax laws is undergoing readjustment in light of the growing offshore industry that necessitates the "invasion" of privacy.[236]

Without the legislative authority to implement the AEOI it would be considered a breach of the privacy principles 3, 10 and 11 under the Privacy Act 1993 to disclose such information without the consent of the account holder.[237] The AEOI is essentially an "impairment" of taxpayer rights to privacy that is legislatively permitted on the grounds that it is necessary to combat international tax evasion and

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[231] *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* [2008] NZSC 24 at [33] (emphasis added).
[232] Adrian J. Sawyer "A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries - Have New Zealand Taxpayers Been 'Short-Changed'?" (1999) 32 Vanderbilt Journal of Transnational Law 1345 at 1347.
[233] Blum, above n 60, at 603.
[234] Oberson, above n 17, at 209.
[235] Robert Stephen Hawkshaw "Tax Information Exchange and the Erosion of Taxpayer Privacy Rights" (LLM Thesis, University of British Columbia, 2014) at ii.
[236] Hawkshaw, above n 235, at ii.
[237] Privacy Act 1993, s 6; "FATCA: The neutron Bomb of the Global Financial System" (December 2012) Minter Ellison Rudd Watts <www.minterellison.co.nz/>.

protect state tax bases.[238] This government sanctioned privacy breach is a significant change in the status quo because traditionally, taxpayer privacy is the cornerstone of taxation given the sensitive personal information it conveys. However, taxpayer privacy is being overshadowed by the growing extra-territorial reach of tax authorities. This creates an inherent policy tension between enhanced information exchange and the protection of taxpayer privacy.[239] Furthermore under the AEOI, the global movement of bulk data significantly increases the risk of breaches in confidentiality, privacy and abuse of data. There may also be accountability and responsibility issues between governments when transferred information is accessed or used improperly.[240] Therefore, the existence of substantive rights to ensure that taxpayer information is kept secret and put to limited and lawful use is of utmost importance. The increased capability for governments to collect information must be met with a corresponding duty to protect it.

The Model Competent Authority Agreement states under s 5.1 that all information exchanged is subject to the confidentiality rules and other safeguards provided for in the legal instrument implementing the AEOI.[241] For New Zealand, and the majority of the AEOI participating jurisdictions, CMAAT is the legal basis for the AEOI. Article 22 of CMAAT states any information obtained under it shall be treated as secret and protected in the same manner as information obtained under the domestic law of that requested state, or under the conditions of the requesting state if such conditions are more restrictive.[242] Therefore the more restrictive standard that exists in the domestic law as between the requesting state and the requested state will prevail.[243]

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[238] Inland Revenue *Regulatory Impact Statement: Legislation to enable compliance with an intergovernmental agreement between the United States and New Zealand* (13 September 2013) at 2.
[239] Cockfield "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights", above n 76, at 420.
[240] Cockfield "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights", above n 76, at 441.
[241] OECD Model Competent Authority Agreement on Automatic Exchange of Financial Account Information (2014), s 5.1.
[242] OECD and Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters Amended by the 2010 Protocol (2010), art 22.
[243] Oberson, above n 17, at 218.

Under New Zealand laws, the IRD considers that there is already a clear legislative framework for ensuring the secrecy of the information received under the AEOI and limiting the permissible use of that information.[244] This is provided for in s 81 of the TAA, which states that an Inland Revenue officer must maintain, and must assist in maintaining the secrecy of all matters relating to Inland Revenue Acts, and must not communicate any such matter except for the purpose of carrying into effect that legislation.[245] According to s 81, privacy rights of the taxpayer are conditional on what is stipulated by the "Inland Revenue Acts" and its need for taxpayer information. Given that Parliament has previously "impaired" taxpayer rights to facilitate developments in information exchange, s 81 does not provide much certainty on the extent of the right to have information kept secret.

Furthermore s 88 of the TAA states, "notwithstanding any obligation of secrecy imposed by any enactment", the Commissioner may disclose such information as is required under a double tax agreement.[246] This illustrates the prioritisation of international tax agreements over domestic taxpayer privacy rights, and it does not limit the amount of taxpayer information that may be "required". There is even less certainty about the ambit of s 88 given that in *Avowal*, the Court did not need to decide whether s 88 would permit the Commissioner to "voluntarily" disclose information under a DTA.[247] Thus taxpayer rights to secrecy are essentially "precarious rights", which are rights that can be enjoyed at the pleasure of another, and are susceptible to erosion.[248] Given the current global crusade against offshore tax evasion, the extent to which further inroads will be made into taxpayer rights remains uncertain. Given the current momentum in eliminating international tax evasion it is difficult to determine how far governments should properly be permitted to pursue information.[249] Protecting the integrity of the tax system not only includes the

[244] "Implementing the global standard on automatic exchange of information: Data confidentiality and safeguards" Inland Revenue Publications <http://taxpolicy.ird.govt.nz/publications>.
[245] Tax Administration Act 1994, s 81.
[246] Tax Administration Act 1994, s 88.
[247] *Avowal Administrative Attorneys,* above n 116, at [60].
[248] Bryan Garner and Henry Campbell Black *Black's law dictionary* (10th ed, Thomson Reuters, St Paul Minnesota, 2014).
[249] Branson, above n 44, at 72.

elimination of tax evasion but also "maintaining confidentiality in the affairs of taxpayers" therefore the pursuit of combating tax evasion must be conscientiously balanced with the preservation of taxpayer rights.[250]

[250] *Westpac Banking Corporation* Ltd, above n 231, at [52]. The Tax Administration Act 1994, s 6 states "Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system."

Chapter V: International Implementation of the AEOI

This chapter adjusts the focus from the previous chapter and zooms out to assess the AEOI on a global scale and the challenges to its global implementation. It will examine the macro concerns facing the AEOI as it seeks to consolidate its place on the international stage. Reflecting on the impediments to the AEOI on a global scale is relevant to New Zealand because it affects the efficacy of the information-sharing network that it has become committed to. Given that New Zealand public and private institutions have incurred substantial administrative costs, Parliament has yielded some sovereignty to the OECD, albeit a small amount, and Parliament has made concessions on taxpayer rights to privacy, the likelihood of the AEOI's international success will determine whether this has been a price worth paying for New Zealand. If the AEOI fails to assert itself as a truly global standard, the offshore tax evasion issue will simply relocate to the non-compliant areas in the world. Thus it will not be a valuable means of reducing tax evasion in New Zealand or slowing down the offshore industry. Ultimately, the global prospects for the AEOI are equally as important as New Zealand's commitment in determining whether the AEOI will achieve its raison d'être.

A Difficulties Facing the Global Implementation of the AEOI

Many challenges arising from the global implementation of the AEOI stem from the inadequate global governance architecture in international tax matters. States remain predominantly driven by domestic interests, and given that many states stand to lose from the AEOI, the lack of coercion is a significant vulnerability of the AEOI. This chapter will cover implementation concerns, the position of the United States and FATCA, and lastly the innate bilateralism of the AEOI that undermines the global need for multilateralism.

1 Global Enforcement

Global enforcement presents a major weakness of the AEOI because the OECD does not possess authoritative mechanisms to penalise countries for non-compliance.[251] The OECD acts as an informal "world tax organisation" that focuses on non-binding mechanisms being implemented through the coercive power of its member states.[252] Because of its lack of compulsion, implementation has always been considered the "Achilles heel of global cooperation".[253] The lack of any "sticks" is what differentiates the AEOI from the FATCA, and this critical difference is likely to contribute significantly to the differences in their global success.[254] This institutional weakness of the OECD is an inevitable outcome of the current tax paradigm given that countries are unwilling to cede sovereignty to an authoritative international tax body.

The concern about the lack of enforcement mechanisms would be amplified if countries were to fall into a state of complacency and other agendas come to the political forefront. If the momentum on these international tax issues dies down, then it is unlikely that states will face the same incentives to follow the OECD's leadership. Especially those countries whose financial services sector would be disadvantaged by increased transparency. This highlights the weakness of the institutional architecture in international tax matters, and the uncertainty associated with informal modes of governance.[255] Furthermore, the OECD's current position as an "informal world tax organisation" is vulnerable to the fact that its members are predominantly developed countries and it does not include countries such as China and India that are emerging economic superpowers with significant influence over

[251] The OECD states, "neither the Global Forum nor the OECD has the power to impose sanctions on countries that do not implement the standard. Individual countries whether OECD or non-OECD will decide for themselves what actions they consider necessary to ensure the effective enforcement of their tax laws": "Global Forum on Transparency and Exchange of Information for Tax Purposes - Frequently Asked Questions" OECD <http://www.oecd.org/>.
[252] Cockfield "The Rise of the OECD as Informal 'World Tax Organisation' through National Responses to E-commerce Tax Challenges", above n 26, at 136.
[253] Eccleston, above n 35, at 41.
[254] LeVine, Schumacher and Zhou, above n 148, at 46.
[255] Eccleston, above n 35, at 11.

global financial services.[256] Only time will tell how the international tax environment will change and whether its changes will have a waning impact on the OECD's global influence.

2 The United States: Marching to the Beat of its Own FATCA

A poignant example of the global governance issue in international tax is the United States not participating in the AEOI. The United States has indicated that it will not be implementing the AEOI because it already receives such information under its IGA network.[257] This reflects the global governance reality where cooperation hinges on the satisfaction of domestic interests, and the United States derives no benefit from participating in the AEOI. Despite the increasing influence of institutional agenda setters on international tax policy, as discussed in Chapter IV, the United States' non-compliance is a reminder of the "primacy of the nation-state".[258]Arguably one of the largest economies and most influential governments in the world is not taking part in what the OECD claims is a global solution to international tax evasion. Despite the AEOI being modelled on the FATCA, the United States has turned out to be a significant barrier to its global realisation. The lack of United States involvement has stymied the AEOI's credibility as an international standard, as well as undermined the OECD's ability to lead international tax reform when it fails to obtain the commitment of one of its own members. Many nations that are reluctant to accede to the AEOI may see this as a double standard, reducing the impetus for cooperation.

As a consequence, the United States may inadvertently act as a tax haven itself for non-United States residents, as it becomes the "big black hole" in the international tax transparency network.[259] The accusation that "the United States is a tax haven" has

[256] Cockfield "The Rise of the OECD as Informal 'World Tax Organisation' through National Responses to E-commerce Tax Challenges" above n 26. "Can and should the principles and standards articulated by a relatively small and elite group of individuals frame the taxing rights of sovereign nations?": Christians "Sovereignty, Taxation and Social Contract", above n 206, at 101.
[257] LeVine, Schumacher and Zhou, above n 148, at 43.
[258] Insop Pak "International Finance and State Sovereignty: Global Governance in the International Tax Regime" (2004) 10 Annual Survey of International and Competition Law 165 at 166.
[259] LeVine, Schumacher and Zhou, above n 148, at 43.

thus become a common one.[260] Under FATCA, the United States only provides a select few countries with information through reciprocal IGAs. Generally, information flows under the FATCA are a one-way street toward the US,[261] and the information that the United States has given out has been "scant" despite promises of reciprocation.[262] Currently, United States law does not require United States financial institutions to collect the kind of information from account holders that would be necessary to fulfil FATCA obligations.[263] The United States does not provide its reciprocal FATCA partners with information on depository accounts held by entities; non-cash accounts held by individuals or entities unless the accounts earn United States source income; or controlling persons of entities even if those entities are owned and controlled by the residents of the reciprocal FATCA partner.[264] These exclusions create exploitable loopholes, and exhibits how the prima facie reciprocity of the IGAs is not matched in substance. It is estimated that offshore funds are increasingly being directed to the United States given the scrutiny of financial institutions in Europe and the Caribbean.[265]

3 Spot the Bilateralism

Traditionally, globally concerted efforts in international taxation have been characterised by the proliferation of bilateral tax treaties.[266] Bilateralism has resulted in a multitude of international standards that ultimately increases the complexity and administrative burden for tax authorities, as can be seen with the overlap of the FATCA and the AEOI. For the purposes of ensuring global consistency

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[260] See for example, Jesse Drucker "The World's Favourite New Tax Haven is the United States" *Bloomberg* (online ed, New York, 27 January 2016); Jana Kasperkevic "Forget Panama: its easier to hide your money in the US than almost anywhere" *The Guardian* (online ed, London 6 April 2016); "How the U.S is a Tax Haven for Mexico's Wealthy" (24 August 2009) Tax Analysts <http://www.taxanalysts.org/>.
[261] LeVine, Schumacher and Zhou, above n 148, at 46.
[262] Peter A. Cotorceanu "Hiding in Plain Sight: How Non-US Persons can Legally Avoid Reporting Under Both FATCA and GATCA" (2015) Trusts & Trustees 1 at 1.
[263] LeVine, Schumacher and Zhou, above n 148, at 46.
[264] Cotorceanu, above n 262, at 3.
[265] "The Biggest Loophole of all" (20 February 2016) The Economist <www.economist.com/>.
[266] Lyne Latulippe "The Expansion of the Bilateral Tax Treaty Network in the 1990s: the OECD's Role in International Tax Coordination" (2012) 27 ATF 851 at 853.

"multilateralism may provide a way for a nation to implement positive policies for its citizens that it cannot implement acting alone". [267] This goes to the core of international tax issues that require equally international solutions.

The legal basis for the majority of the AEOI agreements is the CMAAT, which requires an additional agreement between countries in the form of a CAA that activates the exchange of information. CAAs come in a bilateral form or a multilateral form, and currently there are 84 signatories including New Zealand to the Multilateral Competent Authority Agreement (the multilateral CAA).[268] Despite the use of the world "multilateral", exchanges of information will only occur bilaterally amongst the signatories that file subsequent notifications vis-à-vis s 7 of the Multilateral CAA.[269] The approval and signing of the Multilateral CAA does not in itself oblige countries to automatically exchange information with other signatories. Countries are still able to choose among the signatory parties who it will actually engage in automatic exchange with, "if any".[270]

This shows that there is still considerable room for unilateral discretion under the Multilateral CAA, which fundamentally undermines its multilateral nature. In 2014 when Switzerland joined the Multilateral CAA, it announced in a press release that "the question regarding the countries with which Switzerland should introduce this exchange of data is not affected by the signing of the multilateral agreement" and the countries with which it will share information are "countries with which there are close economic and political ties".[271] Information exchange is therefore more likely to take place between developed countries with similar levels of economic power and

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[267] Ring, above n 16, at 171.
[268] "The CRS Multilateral Competent Authority Agreement (MCAA)" OECD <www.oecd.org/>.
[269] "The CRS Multilateral Competent Authority Agreement (MCAA)" OECD <www.oecd.org/>. Section 7 "Term of Agreement" states countries must provide "a list of the jurisdictions of the Competent Authorities with respect to which it intends to have this Agreement in effect, following national legislative procedures (if any): OECD Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (2015), s 7.
[270] OECD Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (2015), s 7.
[271] Vokhid Urinov "Developing Country Perspectives on Automatic Exchange of Tax Information" (2015) 1 Law, Social Justice & Global Development Journal at 11.

leverage. Conversely there will be reluctance between developed and developing countries to exchange information between each other.[272] As between these parties, there is unlikely to be a pre-existing relationship and there will be significant power imbalances that will impact bilateral negotiations.[273] This frustrates the aim of the AEOI when a strong trend in tax evasion is the movement of income and profits from high tax developed countries to tax havens in the Caribbean and the Pacific. Limiting information exchange to those countries with pre-existing close relationships is unlikely to uncover substantially new information for the purposes of detecting and deterring tax evasion.

The inherent bilateralism beneath the façade of multilateralism threatens the scope of the AEOI by politicising the information exchange process. Given that offshore tax evasion is not generally a phenomenon that occurs between two economically and politically interconnected countries, the bilateral exchanges of information will not be significantly more productive in eliminating secrecy in the international tax paradigm than the other international instruments discussed in Chapter III have been.

[272] Kerrie Sadiq and Adrian Sawyer "Developing Countries and the Automatic Exchange of Information Standard - a 'One-Size-Fits-All' Solution?" (2016) 31 ATF 99 at 109.
[273] Urinov, above n 271, at 10.

Conclusion

According to the Tax Justice Network, there is an estimated $21 to $32 trillion in tax havens and secrecy jurisdictions worldwide beyond the reach of tax authorities.[274] This figure was reported in 2013, and it was described as a "conservative estimate".[275] The issue of international tax evasion is paradoxical because of its known prevalence in the international financial industry, yet enigmatic due to the secrecy and uncertainty that surrounds it. With tax evasion constituting the raison d'être of the AEOI, it will begin to uncover the extent of the problem, as governments are given the means to obtain information about their residents' financial accounts held offshore. Given that globalisation and digitisation have created a global economy of taxpayers without borders, perhaps the AEOI will signal a new era of tax information without borders.

The AEOI has the potential to offer governments "a trove of useful new data" given that tax authorities are no longer restrained by the limitations faced under information exchange based on request.[276] The analysis of how the CRS will impact New Zealand at a domestic level shows an incrementally shifting attitude toward the limits of fiscal sovereignty that tentatively indicates a change in the governance of the international tax system. The introduction of the AEOI has illustrated the shifting dynamics between different states and international organisations such as the OECD. These new dynamics indicate that international tax coordination is not necessarily seen as a fetter to fiscal sovereignty, but a necessary compromise. The approach taken in New Zealand shows the responsiveness of domestic law to international standards and the willingness to align its tax policy with the OECD agenda. Institutionally led tax policy

[274] "Oxfam: Tax on $18.5 offshore trillions could end world poverty" (22 May 2013) Tax Justice Network <http://taxjustice.blogspot.co.nz/>.
[275] "Oxfam: Tax on $18.5 offshore trillions could end world poverty" (22 May 2013) Tax Justice Network <http://taxjustice.blogspot.co.nz/>.
[276] "Automatic Information Exchange: a trove of useful new data. Here's a template for using it" (5 January 2016) Tax Justice Network <www.taxjustice.net/>.

may lead to a convergence of tax systems, albeit state heterogeneity will limit this to the OECD member states.[277]

The AEOI will have a significant impact on the volume of data that moves between jurisdictions and will be powerful instrument for detecting and deterring tax evasion, notwithstanding its limitation to bilateral agreements between countries. The increase in the amount of information exchanged alone makes the AEOI a transparency breakthrough. The periodic nature of the AEOI has the potential to strengthen and maintain relationships between tax authorities. One could tentatively harbour hopes that this will eventually "level the playing field" between taxpayers and tax authorities.[278]

But "the road to global tax transparency is not all smooth".[279] The value of the information being exchanged remains dependent on adequate information processing systems in place to manage the "deluge" of tax information.[280] Furthermore, reservations should still be made on the vigour with which tax transparency will be pursued if the issue of international tax evasion fails to maintain priority on the international agenda. If the commitment to tax transparency were to jeopardise the financial services sector and domestic interests of the world's most dominant states, it is unlikely that the pursuit of tax transparency would remain prioritised. International tax regulation is characterised by "reciprocal bargaining in the national interest", thus the elimination of offshore tax evasion remains acutely dependent on serving the interests of nations.[281] This is a major hindrance to the long-term development of the AEOI.

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[277] Johannes Becker and May Elsayyad "The evolution and convergence of OECD tax systems" (2009) 44(2) Intereconomics 105 at 105.
[278] Inland Revenue *Regulatory Impact Statement: Implementing New Zealand's commitment to Automatic Exchange of Information (AEOI)* (13 May 2016).
[279] "Tackling tax evasion: follow the money" (7 February 2015) The Economist <www.economist.com/>.
[280] "The Data Revolution" (10 May 2014) The Economist <www.economist.com/>.
[281] Kaye, above n 150, at 366.

The concern also remains that the tax evasion issue could merely shift from one part of the world to another, and as the popular saying goes – "out with the old and in with the new". Given that the AEOI is yet to secure comprehensive global participation, the potential for this is possible if not probable. The implication for New Zealand is that the AEOI will be less beneficial as an instrument for targeting tax evasion, and the worth in the AEOI for New Zealand will largely be reputational. As John Key says "we're just doing what everyone else in the world is doing".[282] From this perspective it is asserted that the benefits of the AEOI do not outweigh what it has cost New Zealand in terms of sovereignty, taxpayer rights, and the millions of dollars in administrative expenses for financial institutions and the IRD. However this has been the price to pay to maintain New Zealand's status as an upstanding citizen of the global tax community. Only time will tell how the global crusade against tax evasion will unfold and what part the AEOI had to play in it.

Alluding back to the title of this dissertation, if international tax evasion is a complicated game of hide and seek, prior to the AEOI the seekers have been playing with blindfolds on. Under the new standard of the AEOI, seekers now have the gift of sight and it remains up to them to continue the search. But suffice it to say the game is far from over, as there will always be new places to hide.[283] In the game of hide and seek, it is not over until everyone is found.

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[282] "NZ has no option but to co-operate with the controversial US FATCA tax law, PM John Key says" (5 February 2014) Interest <http://interest.co.nz>.

[283] See for example: "Tax evasion: Leaks on tap" (28 February 2015) The Economist <www.economist.com/>. Some taxpayers are exploiting loopholes in the new international standard by concealing their bank accounts beneath other financial products such as insurance and pensions.

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Appendix 1

Relevant parts of the Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016

Part 1

Exchange of information

Subpart 1 – Amendments to Income Tax Act 2007

6 Section YA 1 amended

foreign account information-sharing agreement means a double tax agreement that facilitates the automatic exchange by parties of information relating to financial accounts including

(a) the *Agreement between the Government of New Zealand and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA* brought into force for New Zealand by the Double Tax Agreements (United States of America – FATCA) Order 2014 (LI 2014/209), as amended from time to time:

(b) the multilateral *Convention on Mutual Administrative Assistance in Tax Matters, as amended by 2010 Protocol* which was brought into force for New Zealand by the Double Tax Agreements (Mutual Administrative Assistance) Order 2013 (SR 2013/437), as amended from time to time.

Subpart 2 – Amendments to Tax Administration Act 1994

8 Section 3 amended (Interpretation)

(1) This section amends section 3(1).

(2) Insert, in appropriate alphabetical order:

CRS applied standard means the CRS standard as modified by **section 185O** for the determination of requirements under this Act

CRS publication means the *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, published by the Organisation for Economic and Cultural Development

CRS standard means the *Common Standard on Reporting and Due Diligence for Financial Account Information*, as amended from time to time, which is a standard –

(a) developed by the Organisation for Economic and Cultural Development and the Group of Twenty countries, to govern the application of the MCMAA convention and the MCA agreement to accounts that are financial accounts as defined; and

(b) agreed by the Council for the Organisation for Economic and Cultural Development on 15 July 2014; and

(c) contained in Part IIB of the CRS publication

(5) Insert, in appropriate alphabetical order:

MCMAA convention means the multilateral *Convention on Mutual Administrative Assistance in Tax Matters, as amended by 2010 Protocol,* which was brought into force for New Zealand by the Double Tax Agreements (Mutual Administrative Assistance) Order 2013 (SR 2013/437), as amended from time to time

(9) Insert, in appropriate alphabetical order:

taxpayer identification number, for a person who is (without taking into account any double tax agreement that would otherwise apply) treated as tax resident in a jurisdiction other than New Zealand, means the equivalent of the person's tax file number in that jurisdiction.

59B Foreign trust with resident trustee: registration and disclosure

(1) The Commissioner may register a foreign trust if the foreign trust has a resident trustee and a trust deed and a trustee pays the prescribed fee.

(2) Resident trustees of a foreign trust having a trust deed must apply to the Commissioner for registration of the foreign trust and pay the prescribed fee.

(3) A trustee applying for registration of a foreign trust (the **applicant trustee**) must provide, with the application and fee, all that is relevant to the trust of-

(a) the name and other identifying particulars of the trust:

(b) the date and detail of each settlement on the trust:

(c) the name, email address, residential address, country of tax residence, and taxpayer identification number of:

(i) each settlor:

(ii) each person with a power under the trust deed to control the dismissal or appointment of a trustee, to amend the trust deed, or to add or remove a beneficiary:

(iii) each person with a power under the trust deed to control a trustee in the administration of the trust:

(iv) each trustee:

(v) for a fixed trust, each beneficiary and nominee for an underlying beneficiary:

(d) for a discretionary trust, details of each class of beneficiary sufficient for the Commissioner to determine, when a distribution is made under the trust or when rights apparently vested under the trust are exercised, whether a person is a member of the class:

(e) a copy of the trust deed

(4) The applicant trustee must provide with the application a signed declaration that each person referred to in **subsection (3)(c)(i) to (iv)** has been informed of, and has agreed to provide the information necessary for compliance with, the requirements relating to the provision of information imposed by all of-

(a) the Tax Administration Act 1994:

(b) the Anti-Money Laundering and Countering Financing of Terrorism Act 2009:

(c) the regulations made under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

(5) A resident trustee must provide to the Commissioner the details of an alteration to a particular to which **subsection (3)** refers.

59D Annual return for foreign trust

(1) A resident trustee of a foreign trust must provide to the Commissioner a return for the foreign trust, and the prescribed fee, for each year that -

(a) includes a period during which the foreign trust is registered or **section 59B** requires a resident trustee to register the foreign trust; and

(b) ends with –

(i) a date (the **balance date**) for which the foreign trust prepares financial statements; or

(ii) a 31 March if the foreign trust does not prepare financial statements; and

(c) begins after 31 March 2017, if a resident trustee is liable to register the foreign trust on the date of enactment of this section; and

(d) if the resident trustee has a grace period referred to in **section 59C(3)**, ends after the grace period.

(2) A return must be in the prescribed form and include –

(a) each change during the year to information that is required to be provided when the trust is registered:

(b) the financial statements for the trust and the year:

(c) the date and nature of each settlement made on the trust in the year:

(d) the name, email address, residential address, country of tax residence, and taxpayer identification number of each settlor making the settlement:

(e) the date and amount of each distribution made by the trustee of the trust in the year:

(f) the name, email address, residential address, country of tax residence, and taxpayer identification number of each beneficiary to which the distribution is made.

11 Section 81 amended (Officers to maintain secrecy)

After section 81(4)(y), insert:

(z) communicating to a person who is a member of the New Zealand Police or an officer, employee, or agent of the Department of Internal Affairs any information relating to a registration, or absence of registration, for a foreign trust that the person is authorised by the Commissioner of Police or the chief executive of the Department of Internal Affairs to receive.

12 New heading and sections 91AAU to 91AAW inserted

After section 91AAT, insert:

Determinations relating to foreign account information-sharing agreements

91AAU Participating jurisdictions for CRS applied standard

(1) The Commissioner may determine that a territory outside New Zealand is a participating jurisdiction for the purposes of the CRS applied standard and Part 11B.

(2) The determination may set out the period for which it is to apply, which must begin after 31 March 2017.

(3) The determination may provide for the change, extension, limitation, suspension, or cancellation of an earlier determination.

(4) Within 30 days of issuing, changing, extending, limiting, suspending, or cancelling a determination under this section, the Commissioner must publish in a publication chosen by the Commissioner-

(a) the determination:

(b) details of a changed, extended, limited, suspended, or cancelled determination.

91AAV Suspension of reportable jurisdictions for CRS applied standard

(1) The Commissioner may make a determination, relating to a territory outside New Zealand that has been provided by an Order in Council to be a reportable jurisdiction for the purposes of the CRS applied standard and requirements imposed by Part 11B, that the territory is not to be treated as a reportable jurisdiction.

(2) The determination must set out the period for which it is to apply, which must begin after 31 March 2017 and end no more than 3 months after the date of the determination.

(3) Within 30 days of issuing a determination under this section, the Commissioner must publish the determination in a publication chosen by the Commissioner.

13 New sections 142H and 142I inserted

After section 142G, insert:

142H Failures of financial institutions to meet requirements under Part 11B and CRS applied standard

(1) If a financial institution fails to meet a requirement under Part 11B and the CRS applied standard for financial accounts maintained by the financial institution, other than a requirement referred to in subsection (3), the financial institution is liable to pay a penalty of $300 for each failure to which **subsection (2)** does not apply.

(2) A financial institution is not liable to pay a penalty under **subsection (1)** for a failure that occurs before 1 April 2019 if the Commissioner is satisfied that the financial institution makes reasonable efforts to meet the requirement and reasonable efforts to correct the failure within a reasonable period after the financial institution becomes aware of the failure.

(3) If a financial institution fails to meet a requirement under Part 11B and the CRS applied standard to obtain a self-certification when opening a financial account, the financial institution is liable to pay a penalty of $300 for each account is **subsection (4)** does not apply to the failure.

(4) A financial institution is not liable to pay a penalty under **subsection (3)** for a failure that occurs before 1 April 2019 for an account if the Commissioner is satisfied that the financial institution makes reasonable efforts to meet the requirement and makes reasonable efforts to correct the failure for the account within a reasonable period after the financial institution becomes aware of the failure.

(5) If a financial institution fails to take reasonable care to meet a requirement of a financial institution under Part 11B and the CRS applied standard for financial accounts, the financial institution is liable to pay a penalty of-

(a) $20,000 for the firs failure:

(b) $40,00 for each further failure:

142I Failure to meet requirements under Part 11B to provide information or self-certifications

(1) This section applies to a person or entity (the **information provider)** required under Part 11B to provide information, or a self-certification, relating to a person or entity for a financial account.

(2) The information provider is liable to pay a penalty of $1,000 if the information provider-

(a) provides false information relating to the information provider:

(b) signs or otherwise affirms a false self-certification for the information provider:

(c) provides false information relating to another person or entity:

(d) provides a false self certification for another person or entity:

(e) fails to provide information relating to the information provider within a reasonable time after receiving a request for which the information is required to be provided:

(f) fails to sign, or otherwise affirm, and provide a self-certification relating to the information provider within a reasonable time after receiving a request for which the self-certification is required to be provided:

(g) fails to provide information relating to another person or entity within a reasonable time after receiving a request for which the information is required to be provided:

(h) fails to provide a self certification relating to another person or entity within a reasonable time after receiving a request obliging the self certifications to be provided:

(i) after providing a person or entity with a self-certification or information, fails to inform the person or entity of a material change in the circumstances relating to the self-certification or information within a reasonable time after the information provider becomes aware of the change.

(3) An information provider is not liable to pay a penalty under **subsection (2)** for a failure to provide information, or a self-certification, within the control of the information provider, if the Commissioner is satisfied that the failure occurred through no fault of the information provider.

(4) An information provider is not liable to pay a penalty under **subsection (2)** for a failure to provide information, or a self certification, relating to another person or entity and not within the control of the information provider, if the Commissioner is satisfied that the information provider makes reasonable efforts to meet the requirement.

Multilateral convention and CRS standard

185N Requirements for financial institutions

(7) The financial institution may choose that the reporting requirements given by the CRS applied standard for financial accounts held or controlled by a resident of a reportable jurisdiction apply to all financial accounts maintained by the financial institution and held or controlled by a resident of a foreign jurisdiction.

(8) A financial institution that makes the election referred to in **subsection (7)** must make reports that are consistent with the chosen reporting requirements.

185O Application of Common Reporting Standard

(1) This section provides for the application of the CRS standard in determining the requirements for a person or entity under the Inland Revenue Acts.

(2) The CRS standard is modified for the purposes of determining the requirements for a person or entity under the Inland Revenue Acts in the ways specified in **schedule 2.**

(3) The CRS standard is treated as applying at the time-

(a) as modified by **subsection (2)**; and

(b) consistently with the Commentary on the CRS standard contained in Part IIIB of the CRS publication, as amended at the time.

(4) In the application of the CRS standard at a time, a term defined in the CRS standard or the MCMAA convention and used in the Inland Revenue Acts has the meaning that it ahs at the time under the CRS standard or the MCMAA convention, as modified by **subsection (2).**

(5) A person or entity may make an election that is expressed as being available to a person or entity if the election is not contrary to this Act and not otherwise contrary to the law of New Zealand.

Foreign account information-sharing agreements generally

185P Requirements for persons to provide information to financial institution

(1) This section applies to a person or entity associated with a financial account if the financial institution that maintains the financial account is required under the FATCA agreement or CRS applied standard (the **account requirements**) to perform due diligence for the financial account.

185R Foreign account information-sharing agreements: anti-avoidance

(1) If a main purpose of a person in entering an arrangement is to avoid a requirement under this Part, the arrangement is treated as having no effect in relation to the person's requirements under this Part.

(2) The person has the requirements under this Part that the Commissioner considers to be appropriate in the absence of the arrangement.