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**NIUE TRUSTS ACT: A POTENTIAL TAX EVASION
MECHANISM?**

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The Niue Trusts Act: A Potential Tax Evasion Mechanism?

I Introduction

During the 1990s, Niue worked to establish itself as an offshore financial centre. Niue introduced a series of measures including a Trusts Act that had the capability of enabling foreign settlors to evade tax in their home country. At the time, New Zealand had similar legislation regarding its offshore trust industry. By the mid-2000s, much international pressure had been applied to Niue and the offshore centre was reportedly shut-down. Having close ties and a legal framework very similar to New Zealand, Niue was demanded to adopt exchange of information agreements with other countries and disclose information regarding its financial operations.

Since the 1990's, New Zealand has produced significant legal reform regarding disclosure of offshore trust information. The most recent change came about in 2017 after it came to New Zealand's attention that offshore trusts in New Zealand were being used as a means for foreign settlors to evade tax in their home countries. Before the legal reforms, the New Zealand offshore trust regimes regarding disclosure were similar to Niuean offshore trust regimes. Niue on the other hand, although has recently complied with certain international standards regarding information disclosure, still has the same offshore trusts legislation and has had very little legislative reform regarding trustee disclosure of information.

This paper will argue that the existence of the Niuean Trusts Act will enable the country to be used as a viable tax haven for foreign settlors. There are four main parts to this paper that will try to address and analyse this theory. First, the New Zealand legal regimes surrounding offshore trusts will be analysed for comparison and analogy. Secondly, the Niuean Trusts Act and measures that enable foreign trusts to be used in such a manner will be discussed. Thirdly, analysis will also be made to see the international pressure which subsequently made Niue conform to international standards of disclosure of information and the effects of these agreements. Lastly, it will then analyse the possible legal avenues available to Niue and legislative reforms regarding disclosure of trustee information that Niue should adopt in order to decrease the potential viability of it being a tax haven for foreign trusts.

II New Zealand Disclosure Measures

For purposes of analogy, it would be easier to understand the situation in Niue if the New Zealand legal regimes surrounding offshore trusts and its reform be analysed first. This first part will analyse these regimes before moving onto Niue trust regimes and disclosure.

A Disclosure Measures in New Zealand

New Zealand had very limited disclosure requirements for New Zealand-resident trustees of foreign trusts prior to the legislative reforms of 2017. Pre-2017, the lack of disclosure requirements on trustees made it possible for non-resident settlors to reduce their tax liabilities in their home country by setting up a New Zealand trust¹. By using New Zealand-resident trustees, foreign settlors could use New Zealand trusts and evade tax liability of their home country because of the limited disclosure requirements².

¹ See generally Michael Littlewood "Foreign Trusts, The Panama Papers and the Shewan Report" [2017] New Zealand Law Review 59 at 63-64.

² At 64.

The disclosure requirements set out for trustees were provided in s 59B(1)(a) of the Tax Administration Act 1994 and provided (emphasis added)³:

A resident foreign trustee for a foreign trust disclose to the Commissioner the name or other identifying particulars that relate to the foreign trust...*the name or other identifying particulars that relate to the trust.*

Although trustees were obliged to supply certain specified information to the Inland Revenue Department (IRD), these requirements were so limited that they offered no real information as to the particulars of the foreign trust⁴. Littlewood commented that the legislation was so badly drafted it was almost completely useless because the trustee was generally *not* required to supply any information at all as to any particulars of the trust⁵. Information such as the name and country of residence of the settlor, names of beneficiaries, nature of assets, country in which assets were situated, value of assets, amount of income derived from assets or how income was distributed were not required to be disclosed⁶. Furthermore, the disclosure requirement was generally a one-off obligation and there was no obligation for annual reporting except for if the name of the trust was changed⁷.

What this meant was there was very little information, if any, regarding the trusts in which New Zealand could exchange to foreign tax departments. These limited disclosure measures created further problems because of tax exemptions imposed on New Zealand-resident trustees as discussed below.

B Tax Exemptions for Foreign Trusts

Tax exemptions for foreign trusts with trustees in New Zealand is provided for in ss CW 54 and HC 26(1) of the Income Tax Act 2007 of New Zealand. Section CW 54 states:

To the extent to which [section HC 26](#) (Foreign-sourced amounts: resident trustees) applies to a foreign-sourced amount that a trustee who is resident in New Zealand derives in an income year, the amount is exempt income⁸.

Section HC 26(1) provides:

A foreign-sourced amount that a New Zealand resident trustee derives in an income year is exempt income under [section CW 54](#) (Foreign-sourced amounts derived by trustees) if—

- (a) no settlor of the trust is at any time in the income year a New Zealand resident who is not a transitional resident; and
- (b) the trust is not—
 - (i) a superannuation fund; or
 - (ii) a testamentary trust or an inter vivos trust of which a settlor died resident in New Zealand (whether or not they died in the income year)⁹

Basically, these provisions state that a New Zealand resident trustee's income is exempt from tax if three requirements are met¹⁰:

³ At 76; Tax Administrations Act 1994 (New Zealand), s 59B(1)(a).

⁴ See Littlewood, above n 1, at 76.

⁵ See Littlewood, above n 1, at 77.

⁶ See Littlewood, above n 1, at 77.

⁷ See Littlewood, above n 1, at 77; Tax Administration Act 1994, s 59B(2).

⁸ Income Tax Act 2007 (New Zealand), s CW 54.

⁹ See Income Tax Act 2007, s HC 26(1).

¹⁰ See Littlewood, above n 1, at 65.

- (i) the settlor of the trust is not a resident in New Zealand;
- (ii) the income is derived from an asset situated somewhere other than New Zealand;
and
- (iii) the beneficiaries are not resident in New Zealand.

New Zealand's justification for these provisions is that legislation taxes New Zealand settlors due to the "resident-settlor" rule¹¹. Even if trustees are not resident in New Zealand, since the income is derived in New Zealand, it will still be subject to tax. Understandably, the principle is that New Zealand does not have any justification for taxing income derived outside of New Zealand¹².

These provisions allowed foreigners to view New Zealand as a functional tax haven¹³. Foreign settlors would set up New Zealand trusts and use resident trustees as a means for them to avoid tax in their home countries because of the tax exemption given to New Zealand-resident trustees. This income would be classified as income derived from assets outside New Zealand with non-resident beneficiaries and therefore be exempt from New Zealand tax.

In summary, the home country of the settlor would not know that the settlor was liable to pay tax because New Zealand law did not require the trustee of the trust to disclose the information on the trust. Simply, a foreign settlor could place assets in a New Zealand trust and the home country would not even know because of the lack of disclosure requirements on trustees. The settlors could then in turn evade tax due in their home country.

C Legislative Reform on Disclosure

The leaks of the *Panama Papers* led to much legislative reform regarding disclosure of trust information in New Zealand. Although the Government initially denied that foreign trust rules were in any way unsatisfactory¹⁴, they quickly changed their approach and announced the establishment of a formal enquiry leading to the *Shewan Report*. The *Shewan Report* was conducted in response to the International Consortium of Investigative Journalists ("ICIJ") release of the *Panama Papers* which surprisingly mentioned New Zealand over 60,000 times in their database¹⁵. The reasonable likelihood that the foreign trust regime was facilitating the hiding of funds or evasion of tax gave the conclusion to the enquiry that reform needed to be taken¹⁶.

Almost all the recommendations of the *Shewan Report* were considered and adopted by the Government¹⁷. As a result, New Zealand now has stricter disclosure laws which it adopted in s 11 of the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017 which amended provisions in the Tax Administration Act 1994. These new amendments require that the IRD maintain a register of foreign trusts and that foreign trusts be required to register¹⁸. Along with

¹¹ See Income Tax Act 2007, s HC 25(1).

¹² John Prebble "The Panama Papers and Foreign Trusts: what should be done?" (2016) 12 PQ 82 at 86.

¹³ See Littlewood, above n 1, at 66.

¹⁴ Jane Patterson "NZ's 'world-class' tax system defended" (4 April 2016) Radio New Zealand <www.radionz.co.nz> (quoting the Prime Minister, John Key); see also Littlewood, above n 1, at 81.

¹⁵ See John Shewan *Government Inquiry into Foreign Trust Disclosure Rules* (New Zealand Government, June 2016) [*Shewan Report*] at 3.12 – although this figure was not verified by the enquiry.

¹⁶ See Shewan, above n 15, at [8.31].

¹⁷ See Littlewood, above n 1, at 65; the only recommendation the legislature did not adopt was the initial and annual fees the *Shewan Report* recommended.

¹⁸ See Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017 (New Zealand), s 11 which amended Tax Administration Act 1994 ss 59B-59E; see also Littlewood, above n 1, at 83.

this registration, stricter rules are applied to New Zealand-resident trustees which requires them to provide the details of the parties to the trust agreement and to file with the IRD an annual return to keep them updated on the trust¹⁹. Trustees must also submit a declaration of compliance to adhere to anti-money laundering and countering financing of terrorism obligations²⁰. These changes now ensure that more information regarding the trust is disclosed to the IRD.

In effect, the more stringent disclosure measures on foreign trusts makes it harder for foreigners to use trusts in New Zealand as a means to evade tax in their home country. The effect that these disclosure measures has had on the offshore trust industry is still uncertain because the reforms had been made quite recently. However, the legislation has enabled the New Zealand government to claim that as far foreign trusts are concerned, New Zealand can no longer be considered a tax haven²¹.

III *Niuean Trust Regime and Disclosure*

A *Niuean Legal Regime*

Niue became ‘self-governing in free association’ with New Zealand in 1974 ending its non-self-governing status. Simply, Niue stopped being a colony of New Zealand. This agreement of free association with New Zealand however means that New Zealand still supports Niue through “necessary economic and administrative assistance” and “external affairs and defence”²². So even though Niue is now a self-governing country, it is arguable that New Zealand still has little negotiation power and influence with its external affairs. As a common law jurisdiction, Niue inherited the English concept of trusts²³ and adopted some New Zealand legislation, namely, the Trustee Act 1956 of New Zealand and the Charitable Trusts Act 1957.

In 1994, Niue introduced a series of measures that were designed to promote the island as an offshore financial centre²⁴. The main pieces of legislation dealing with trusts were the Niue Trusts Act 1994 and the Trustee Companies Act 1995²⁵.

The Trusts Act 1994 is the most substantial piece of legislation that deals with trusts. The Act deals with domestic trusts but interestingly *does not* apply to trusts which provide benefits to individuals who are Niuean residents or companies and entities owned by residents of Niue or domiciled in Niue²⁶. Simply, if you are a Niue resident or company from Niue, then trusts under this Act do not apply to you. The Act was essentially aimed at providing avenues for foreign trusts to be created in Niue with the purpose of boosting their offshore industry.

The Niue Trusts Act, although containing multiple provisions for the creation of trusts and its management, is not as substantial as most offshore trust legislations though. For example,

¹⁹ See Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, above n 18, s 11; See also *Shewan Report* at [12.7]; See also Littlewood, above n 1, at 85.

²⁰ See Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, above n 18, s 11.

²¹ See Littlewood, above n 1, at 90.

²² See Caroline Jenny McDonald “Decolonisation and Free Association: The Relationship of the Cook Islands and Niue with New Zealand” (Doctor of Philosophy (PhD) Thesis, Victoria University of Wellington, 2018) at 158 and 206.

²³ Niue Act 1966 (Niue), s 674.

²⁴ *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, OECD Publishing, <file:///H:/LAWS542%20OST/Paper/paper%20readings/Niue%20OECD%20Book%202.pdf>, at [3].

²⁵ At [89] and [126]; the Trustee Companies Act has since been repealed.

²⁶ Trusts Act 1994 (Niue), s 5(7).

regarding settlor control, the International Trusts Act 1984 of the neighbouring Cook Islands contains multiple provisions for retention of control and benefits by settlors listing numerous ways in which settlors may change the conditions of an existing trust instrument to suit their intentions without this invalidating the trust²⁷. The Niue Trusts Act contains no such provisions. Although there are provisions which provide for settlor control and even indirect settlor control through the use of protectors²⁸, these provisions are not as clearly expressed as provisions in the Cook Islands International Trust Act. The same can be said for other provisions within the Niue Trusts Act. Basically, in comparison to other offshore jurisdictions' legislation, the Niue Trusts Act's provisions are brief and do not substantially address all the issues it could have.

A Disclosure Measures of Trusts in Niue

New Zealand common law is highly influential to Niue. There is very limited case law regarding the duties of trustees and disclosure prior to the Trusts Act 1994. Because of the very limited precedents, and because judges in the superior courts were recruited from the New Zealand judiciary, development of the Niuean common law has been heavily influenced by highly persuasive case law of New Zealand²⁹. However, in New Zealand before 1974, case law regarding the fiduciary duties of trustees on keeping and maintaining information identifying settlor(s) and beneficiaries of a trust was very limited. Since the Trust Act was enacted 20 years later, this left little jurisprudence on what Niue should do on such matters³⁰.

The Trust Act 1994 enacted provisions dealing with disclosure of information. However, it establishes very limited duties on trustees to supply information. Section 29 states³¹:

- (1) A trustee shall so far as reasonable and within a reasonable time of receiving a request in writing to that effect, provide full and accurate information as to the state and amount of the trust property and the conduct of the trust administration to –
 - (a) The Court;
 - (b) The settlor or protector of the trust;
 - (c) In the case of a trust established for a charitable purpose, the Minister;
 - (d) Subject to the terms of the trust, any beneficiary of the trust who is of full age and capacity; and
 - (e) Subject to the terms of the trust, any charity for the benefit of which the trust was established.
- (2) Subject to this Act and to the terms of the trust, and except as is necessary for the proper administration of the trust or by reason of any other Act, the trustee of a trust shall keep confidential all information regarding the state and amount of the trust property or the conduct of the trust administration.
- (3) A trustee is not (subject to the terms of the trust and to any order of the Court) obliged to disclose documents which reveal –
 - (a) His deliberations as to how he should exercise his functions as trustee;
 - (b) The reasons for any decision made in the exercise of those functions;
 - (c) Any material upon which such a decision was or might have been based.

²⁷ International Trusts Act 1984 (Cook Islands), s 13C.

²⁸ Trusts Act 1994, s 10(2).

²⁹ *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2012: Phase 1: Legal and Regulatory Framework*, above n 24, at [96].

³⁰ At [97].

³¹ Trusts Act 1994 (Niue), s 29.

From the above provisions, there are three points that should be noted regarding the disclosure requirements of the trustees:

1. A trustee shall disclose information only if received in writing and if it is reasonable to the trustee.
2. The trustee is only obligated to disclose information 'subject to the terms of the trust'.
3. A trustee is required to keep all information regarding the trust confidential and is not obliged to disclose documents that reveal the nature of the dealings of the trust.

These three points show the limited disclosure duties placed on the trustee. Firstly, a trustee will only disclose information if they see it as *reasonable* to do so. However, the standard of what is reasonable to disclose information is not set out in the legislation which gives the trustee significant discretion as it is subjective on the trustee's judgement.

Secondly, trustees are only obligated to disclose information 'subject to the terms of the trust'. This means that if the trust instrument states that no information regarding the trust is to be disclosed, then the trustee is bound to do so and not disclose information. Practically, trust instruments would rarely have provisions that would provide or put obligations on trustees to disclose information on the trust. Trusts are usually secretive in nature and the last thing they would do is provide clauses that make it possible for trustees to disclose information. This being the case, this would therefore nullify the disclosure obligation of a trustee which the Act asserts since the Act itself also supports non-disclosure by providing that disclosure only be on the basis that it is 'subject to the terms of the trust'. Simply, the trust instruments will have provisions to keep the particulars of the trust confidential. Based on the Act, these provisions within the trust are enough to ensure that the trustee does not disclose information.

Thirdly, the Trusts Act places obligations on the trustee to keep all information within the trust confidential³². The confidentiality obligations of a trustee in s 29(3) even go as far as providing that trustees are not obliged to disclose any documents to a Court order regarding the deliberations and decision making of a trustee. So any information given or disclosed by a trustee is wholly discretionary and there are no obligations to disclose confidentiality.

Furthermore, it should also be noted that there is no obligation to register a trust. Section 64 of the Trusts Act does provide for the Registrar of the Court to maintain a register of trusts where settlors or trustees may apply to register the trust, but registration is not compulsory³³.

In summary, the disclosure duties set out under s 29 of the Trusts Act set out obligations for disclosure of trust information on trustees. However, further analysis of the disclosure requirements show that trustees are not really bound to disclose information as initially thought. The legislation gives trustees layers of ways in which they don't need to disclose information of the trust. Generally, there are almost no obligations on trustees to disclose information on the trust.

B Tax Exemption of Trustees in Niue

Trustees are required to furnish a return of income if the trust derives taxable income³⁴. Trustees are seen as agents of beneficiaries and if income is attributed to the beneficiary of the trust, liability is on the trustee to furnish tax returns of the attributed beneficiary income³⁵.

³² Trusts Act 1994, s 29(2).

³³ Trusts Act 1994, s 64.

³⁴ Income Tax Act 1961 (Niue), s 86.

³⁵ Section 86(a).

Trustees are generally required to file tax returns of the whole income derived and separate them accordingly if in separate individual trusts³⁶.

However, there is no requirement for a trustee to furnish returns if the trust meets the requirement to be an exempted trust. Niuean trustees are exempt under the Trusts Act if the following requirements are met³⁷:

- (i) The settlor is not resident in Niue during that year;
- (ii) None of the beneficiaries are resident in Niue during that year; and
- (iii) The trust property does not include any land situated in Niue.

Section 65(1) therefore gives a tax exemption to trustees that have foreign settlors and beneficiaries. Trustees of foreign trusts would then be exempt from all provisions of Niue's Income Tax Act and all assets within the trust would be exempt from any tax³⁸. This regime is similar to the tax exemptions given to New Zealand-resident trustees.

C Similarity of Disclosure Regimes in Niue and New Zealand

Niue has very similar regimes to New Zealand regarding exemption of tax for trustees of foreign trusts and disclosure of trustee information. Prior to the disclosure amendments of 2017 in New Zealand, it can be said that the disclosure requirements of trustees in Niue under the Trusts Act and the disclosure requirements of New Zealand-resident trustees under the Trust Administrations Act 1994 were almost identical. Both countries had regimes exempting tax from trustees of foreign trusts and both countries had very limited information disclosure requirements for trustees.

With that being said, New Zealand has made substantial legal reforms because of the international attention it gained after its links with the *Panama Papers*. Although New Zealand did not appear to infringe any of its international treaty obligations³⁹, the disclosure measures were promptly fixed to avoid further criticism from the international community. Niue on the other hand, still has the Trusts Act 1994 meaning disclosure measures relating to trustee information is still the same. Because of the limited disclosure mechanisms of the Trusts Act and other offshore measures in Niue, much international pressure was applied to Niue which led to reforms that forced Niue to be more transparent.

IV Niue and International Pressure

During the late 1990s and early 2000s, Niue was involved in a number of serious allegations from the international community. These included the involvement and facilitation of money-laundering schemes involving Russian organised crime, Columbian cocaine trafficking and other offshore entities involving 'letters of guarantee' frauds⁴⁰. In 2001, the Bank of New York and JP Morgan Chase targeted Niue and refused to have financial dealings with it because of increasing internal pressure within the United States criticising both these banks of inadequate measures against laundering⁴¹.

³⁶ Section 86(c).

³⁷ Trusts Act 1994, s 65(1).

³⁸ Section 65(2).

³⁹ See Shewan, above n 15, at [8.31].

⁴⁰ See Anthony Van Fossen *Tax Havens and Sovereignty in the Pacific Islands* (University of Queensland Press, St Lucia (QLD), 2013) at 281; these allegations were merely media reports and had been "suggested" by the international media.

⁴¹ At 281.

Along with other Pacific island countries, Niue attained serial offender status from the Organisation for Economic Cooperation and Development (OECD) in 2001⁴². In the same year, Niue also appeared on the Financial Action Task Force (FATF) money laundering blacklist and was also labelled by the Financial Stability Forum (FSF) as among some of the worst offending *Group III* regimes and weak links to an increasingly globalised system⁴³.

Eventually, the Niuean Government reportedly decided to shut off its entire offshore centre because of international pressure and sanctions imposed on it. This happened through a series of legislation being repealed and meant the downfall of offshore operations in Niue in 2006⁴⁴. Also because of the international scrutiny being placed on Niue, Niue entered into a series of exchange of information agreements with other countries.

A Closure of the Offshore Centre

The repeal of the International Banking Act 1997 in 2002 and the subsequent closure of the International Banking Registry in 2002 meant the revocation of all licenses under the Act. In 2006, the repeal of the International Business Companies Act 1994 meant that all international business companies registered thereunder were effectively dissolved⁴⁵. What this meant was that any international company registered in Niue under these Acts was de-registered.

However, reregistration was made possible in 2006 also with the enactment of the Companies Act. The Companies Act subsequently offered reregistration to existing companies that were constituted under the repealed International Business Companies Act 1994. Upon reregistration under the new Act, a company's property, rights or obligations which they initially had under the old Act were not affected upon reregistration⁴⁶. This meant that deregistered companies who re-registered were not affected by the repeal of the International Banking Act and reinstated if they re-registered with the Companies Act.

But even with the introduction of this Act, Niue's capabilities as a functioning international centre or capacity to establish such a centre was substantially diminished⁴⁷. The repeal of Niue's offshore legislation regarding international companies and the its effects on the banking system drastically hindered the country's ability to properly operate as an offshore financial centre. An example of this is how 10 former companies, who initially re-registered under the Companies Act 2006, had all been dissolved as of 2015⁴⁸. Niue's current financial sector and its operations even prove the current status of the country's inability to act as an offshore centre with only one bank operating for mainly domestic services. Money that goes in and out of the country is mostly conducted by a handful of remittance businesses which only purposely serve small amounts of money to and from overseas, mainly from relatives living in Niue and New Zealand⁴⁹.

B Exchange of Information Treaties and Effects

⁴² Jackie Johnson "Money Laundering & Tax Evasion" *Journal of Banking and Financial Services* (Sydney, April 2001) at 16.

⁴³ See Van Fossen, above n 40, at 292.

⁴⁴ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, OECD Publishing, <file:///H:/LAWS542%20OST/Paper/paper%20readings/Niue%20OECD%20Book%202.pdf> at [39].

⁴⁵ At [39].

⁴⁶ Companies Act 2006 (Niue), s 334(3).

⁴⁷ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, above n 45, at [41].

⁴⁸ At [40].

⁴⁹ At [43].

As a result of international pressure to disclose information, Niue committed to the international standards for exchange of information in 2002 and became a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes in 2010⁵⁰. In 2012, Niue signed its first Tax and Information Exchange Agreement (TIEA) with New Zealand and has since gone on to sign TIEAs with seven other jurisdictions⁵¹. The TIEAs Niue has signed generally follow OECD Models⁵² and contain confidentiality provisions that meet international standards⁵³.

The exchange mechanisms generally require exchange of information regarding all tax-related matters. However, information can only be requested if ‘foreseeably relevant’ to the contracting States⁵⁴. This means there has to be some sort of nexus between the States involved for information to be exchanged and states cannot just request information for speculative reasons. The balance for these two competing notions is seen in the “foreseeable relevance” provision included in Article 26(1) of the *OECD Model Taxation Convention*⁵⁵:

The competent authorities of the contracting states shall exchange such information as is foreseeably relevant to the carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the contracting states ... so far as the taxation thereunder is not contrary to the Convention...

All eight TIEAs signed by Niue provide for exchange of information upon request and meet the “foreseeably relevant” standard set out above⁵⁶. The standard can be seen in Article 5(5) of Niue’s TIEA with New Zealand which establishes that in order for information to be exchanged, an applicant party is required to provide a list of information to the requested party to demonstrate the foreseeable relevance of the information. This list includes the identity of the person under examination or investigation, the tax purpose for which the information is sought, and, to the extent known, the name and address of any person believed to be in possession or control of the requested information⁵⁷. So if a party to a TIEA, for example New Zealand, requests tax information from Niue, then according to the agreement, New Zealand has to provide all the relevant information provided for under Article 5(5) in order for it to meet the “foreseeably relevant” standard required in the TIEA. Niue has these same provisions in all TIEAs it has adopted with other countries⁵⁸.

As a result of the exchange of information agreements, Niue amended its Income Tax Act and entered provisions that would enable its government to exchange information with other countries⁵⁹. These amendments were made primarily in response to the adoption of the TIEAs

⁵⁰ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, above n 45, at [249].

⁵¹ At [252].

⁵² At [259].

⁵³ At [254].

⁵⁴ At [262].

⁵⁵ *OECD Model Tax Convention on Income and on Capital: Condensed Version 2017* (OECD Publishing, 2017) Art 26(1).

⁵⁶ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, above n 45, at [263].

⁵⁷ See Agreement Between the Government of New Zealand and the Government of Niue on The Exchange of Information With Respect to Taxes, New Zealand-Niue, NZTS (signed 29 August 2012, entered into force 31 October 2013), art 5(5).

⁵⁸ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, above n 45, at [264].

⁵⁹ Income Tax Amendment Act 2012 (Niue), s 4-6.

signed. The new amendments provide regulations for the exchange of tax information between Niue and other countries to prohibit numerous issues including relief from double taxation and evasion of tax⁶⁰.

Niue further signed the Convention on Mutual Administrative Assistance in Tax Matters in 2015. This is a multilateral convention which allows Niue to exchange information with all relevant parties signatory to the agreement. Niue ratified the agreement in June 2006 and it entered into force later the same year⁶¹. Currently, there are 121 participating jurisdictions in this convention which also includes New Zealand. The convention is the most comprehensive multilateral instrument available for tax co-operation and is purposed to tackle tax evasion and avoidance⁶².

But with the signing of all these disclosure requirements, there have been close to no requests for exchange of information from Niue⁶³. New Zealand, Niue's main trading partner, advised the OECD that there has been no need to request information from Niue due to Niue's specific circumstances and the fact that Niue's international finance centre closed down in 2006⁶⁴.

According to the OECD report of 2016, it seems that the offshore financial threat of Niue has been substantially decreased. This is because of the international pressure applied onto Niue and Niue subsequently shutting down its offshore centre and introducing measures that would enable more disclosure with outside countries.

C OECD measures of Exchange of Information

In a way, it could be argued that Niue was forced to sign its exchange of information agreements. With all the allegations surrounding the offshore trust industry of countries in the Pacific islands, Niue had no choice but to sign these agreements or risk being financially frozen out. During the 1990s, Pacific island countries were perceived as a place to facilitate money laundering schemes. Even if Niue had a legitimate offshore industry, it would not matter since the international community had their mind set on totally eradicating small Pacific island nation OFCs because of their perceived vulnerability to international money laundering.

The most notorious case that started off this trend of perception on Pacific island countries was the Bank of New York's so-called 'Russiagate' scandal involving Nauru in 1999. The news broke on the *New York Times* in August 1999 when it was reported that Russia was using offshore intermediary countries like Nauru to launder money. Law enforcement agencies alleged that large amounts of money were being transferred electronically and totalled in billions of dollars. There was also criticism of the little cooperation from the offshore jurisdictions allegedly involved, most notably accusing Nauru⁶⁵. A Nauruan bank had reportedly deposited \$3 billion at the Bank of New York (BoNY) and half of BoNY's funds coming from Russia had allegedly passed through Nauru. Nauru's position was further damaged when Russia's Central Bank claimed that \$70 billion had been transferred to Nauru

⁶⁰ Section 5(1)(b).

⁶¹ See "Jurisdiction Participating in the Convention on Mutual Administrative Assistance in Tax Matters Status – 31 May 2018" (31 May 2018) OECD <http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf> at 4.

⁶² "Convention on Mutual Administrative Assistance in Tax Matters" (June 2018) OECD: Better Policies for Better Lives <<http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>>

⁶³ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, above n 45, at [10].

⁶⁴ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, above n 45, at [11].

⁶⁵ See generally Van Fossen, above n 41, at 278

from Russia which led to much media attention from the United States. As Van Fossen noted in his book⁶⁶:

The notion of \$70b of Russian money sent to the Nauru 'laundry' in one year simplified the complex issue of Pacific Islands OFCs into an easily understood form that attracted public and political attention and elevated it on the international policy agenda.

This event triggered the international community to act and created the general perception of vulnerability of Pacific island countries as offshore financial centres. Soon other Pacific Island OFCs such as Palau and Vanuatu were implicated and put under increased surveillance by Russia and the United States. Russia became highly involved because of the increased flight of money out of their country which affected their economy⁶⁷. In 1999, the BoNY, the Republic Bank of New York, Deutsche Bank reportedly suspended all US dollar transactions with Nauru, Palau and Vanuatu because of these countries having insufficient laundering-prevention measures. JP Morgan and BoNY followed suit and targeted Niue in 2001 refusing to have any financial dealings with the country⁶⁸.

Understandably, there were mixed reactions from the countries implicated in these allegations. Vanuatu's Financial Services Commission stated that it requested information from these major banks to clarify the reasons for the bans but did not receive responses⁶⁹. Vanuatu therefore led delegations to the United States conducting meetings with the sanctioning banks, the Federal Reserve, the US State Department and the IMF to contend that Vanuatu had measures criminalising laundering. The delegation also tried to emphasise the misleading negative publicity which it created for the country and subsequently invited a US delegation to visit the country to inspect the offshore banks and its subsequent Russian connections. As a result, all the banks eventually dropped their sanctions⁷⁰.

However, not all the Pacific island states scrutinised and implicated during this period reacted as diplomatically as Vanuatu. The Nauruan President at the time totally rebuked reporters asking questions relating to the Russian scandal while Ministers stated that most money laundering connected with Nauru banks were actually performed in the US and Europe⁷¹. Palau also followed suit and strongly denied the involvement in laundering and claimed confusion about why it was cited. Niue on the other hand, had a more confrontational approach and accused the international community of bullying tactics⁷².

As a result of these activities surrounding OFCs in the Pacific and other subsequent revelations linking European banks to Pacific island countries, reports in media outlets worldwide painted the negative picture that the Pacific island countries were safe havens for the facilitation of money laundering and tax evasion. Van Fossen claims⁷³:

Reporters habitually denigrated Pacific Islands OFCs, presenting them as deviant and obstructing the expanding battle against money laundering. The Nauru story was repeated and embellished over time...The media's aura of independence and impartiality legitimated attacks on Pacific Islands' offshore centres.

⁶⁶ At 278.

⁶⁷ At 280.

⁶⁸ At 280.

⁶⁹ See generally Van Fossen, above n 41, at 281.

⁷⁰ At 281-282.

⁷¹ At 283.

⁷² At 284.

⁷³ At 286.

Pacific island countries offering any sort of offshore financial opportunities were therefore demanded to disclose information or comply with international standards. Niue being implicated in some of the international scandals was therefore placed on several blacklists from the FSF, FATF, OECD and several private banks⁷⁴. Niue's ability to function economically was hindered and therefore forced to sign internationally recognised disclosure agreements with the international community.

D Fairness of Disclosure Measures on Niue

Although Niue has a reasonable argument that the disclosure measures that they signed were somewhat forced and unfair, this argument would have more substance if Niue were subject to disclosure measures that were outrageously exclusive to them.

However, it is evident that the TIEAs that Niue has entered into with other countries were modelled after the standard 2002 OECD Model Agreement on exchange of tax information⁷⁵. Other countries in the Pacific like Vanuatu⁷⁶ and the Cook Islands⁷⁷ have signed similar standard OECD TIEAs with other countries. Even the Convention on Mutual Administrative Assistance in Tax Matters which is in force in Niue has other Pacific island countries such as the Cook Islands, Nauru and Samoa. Island jurisdictions party to this agreement who are also notorious for their offshore financial sectors include the British Virgin Islands, Cayman Islands, Bermuda, Guernsey and so forth⁷⁸. So the argument that Niue is subject to excessively unfair disclosure or exchange of information measures demanded of them by the international community has little weight. Niue is subject to similar disclosure and exchange of information treaties and agreements that other island nations with similar circumstances are subject to.

However, it should be noted that even with all these disclosure measures, the repeal of legislation, the supposed shutting down of the offshore centre and signing of agreements with foreign countries, it still does not solve the potential problem of the offshore trust industry of Niue. This is because the Trusts Act 1994 still exists – along with all its limited disclosure requirements. When other Acts linking Niue as a viable offshore industry were repealed to meet international requirements, the Trusts Act was never touched. The issue is does the current existence of the Trusts Act still enable the viability of Niue as a tax haven to for foreign settlors even with all these disclosure agreements?

V The existence of the Trusts Act 1994

The presence of the Trusts Act even after all the disclosure and exchange of information agreements Niue has entered into is problematic. Although Niue and New Zealand initially had the same legal framework around its offshore trust centre, New Zealand has since made

⁷⁴ At 292.

⁷⁵ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Niue 2016: Phase 2: Implementation of the Standard in Practice*, above n 45, at [259].

⁷⁶ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews Report: Vanuatu 2011 Phase 1*, OECD Publishing, < <https://www.oecd-ilibrary.org/docserver/9789264126695-en.pdf?expires=1528193198&id=id&accname=oid006392&checksum=9D4A14634672EC22DDB9AA2AA934CF3E>> at [197].

⁷⁷ See *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews Report: Cook Islands 2012 Phase 1*, OECD Publishing, < <https://www.oecd-ilibrary.org/docserver/9789264178120-en.pdf?expires=1528192759&id=id&accname=oid006392&checksum=C8ECC9304E236A43628FC7F7A589D6D1>> at [199].

⁷⁸ See “Jurisdiction Participating in the Convention on Mutual Administrative Assistance in Tax Matters Status – 31 May 2018”, above n 67, at 1-5.

substantial progress to ensure that it avoids international scrutiny. The recent legal reforms in New Zealand have ensured that disclosure on foreign trust information is increased. Although New Zealand has no interest in levying tax on foreigners' foreign-sourced income and does not intend to do so⁷⁹, it also has had no issue with foreign countries taxing the income of their own settlors in New Zealand. The problem was that there was no way for these countries to issue taxes because of the unavailability of the information in New Zealand. Usually, the nation state of foreign settlors did not even know of the existence of these trusts and hence did not tax them accordingly. The new measures recommended and adopted by New Zealand sets a regime that ensures that such information is available to revenue authorities in the country. This would be efficient for situations where a foreign settlor's country comes seeking information on trusts settled by their residents, and since New Zealand is a party to multilateral conventions on assistance of tax matters, this will make exchange of information very fluent.

The same cannot be said about foreign trusts information in Niue. The lack of legal reform with the Trusts Act and its disclosure measures is a major reason for this. With the same legal framework still in place in Niue since 1994, and with registration of trusts non-obligatory, it would be very difficult to obtain and exchange information on Niuean trusts. New Zealand's legislation regarding disclosure prior to their reforms were more substantive than Niue's, and even this was used by foreign settlors to evade tax in their home country. The limited provisions within the Trusts Act surrounding disclosure makes it close to impossible for authorities to know anything about the offshore trust industry. Niue would find it difficult to obtain the correct information and provide it to countries seeking information on their resident settlors with Niuean trusts.

However, in the short-term, it seems that Niue could potentially benefit economically from functioning as a tax haven. Littlewood argued this for New Zealand when its offshore trust regime was reportedly generating up to around \$24 million to \$40 million dollars per year in fees⁸⁰. Although it is unclear to fully realise the value of the assets held on the trusts, the economic benefits in New Zealand's case was unquestionable because of the amount of money being generated from the foreign trust industry through its administration. The foreign trust industry at the time stimulated economic benefits for the community and it did not hinder the tax collection of New Zealand residents. It was essentially tax of other countries that were being avoided and evaded, so the New Zealand government was not losing out on any of its taxes⁸¹. The same could be argued for Niue, having these regimes which stimulate economic activity and creates jobs is primarily one of the reasons the country possibly set up such offshore trust regimes in the first place. Although there is limited data to show how much Niue makes through its foreign trust sector, it is unquestionable that a thriving offshore trust industry in Niue will be hugely beneficial to its economy. Also, it is not as if Niue is the only country that is possibly providing such services, there are numerous jurisdictions around the world which offer similar services and possibly do it more openly. Even if Niue were to get rid of these disclosure measures and adopt disclosure laws that would discourage foreign settlors settling trusts in Niue like New Zealand did, this would be insignificant to the offshore industry worldwide. Settlor's would just opt to move elsewhere and the potential economic benefits of Niue through this industry would be lost.

On the other hand, Niue's reputation would be seriously questioned with the availability of these measures which provide for tax evasion and avoidance for foreign settlors. With Niue

⁷⁹ Prebble, above n 12, at 86.

⁸⁰ See generally Littlewood, above n 1, at 66.

⁸¹ At 67.

recently conforming to a lot of international agreements regarding exchange of information for tax purposes, it would make no sense to enter these agreements and yet have domestic legislation that almost directly contradict them. It is safe to presume that the signing of TIEAs and the multilateral convention on tax information by Niue is the country's portrayal of itself as a responsible member towards the international community. But Niue obviously cannot deny its tax haven status because of the availability of the trusts mechanisms that its country offers. In that case, the potential short-term benefits it would gain from the offshore industry could potentially be nullified in the longer-term if its reputation as a tax haven is more widely consolidated. What New Zealand did in response to the allegations of it being seen as a tax haven was they rapidly sought to fix the problems of disclosure – this resulted in legislative reforms being seen within a year. The eagerness of New Zealand and rapid response showed New Zealand's willingness to cooperate with the international community and show other countries that it does not want to be perceived negatively as a tax haven. If New Zealand had kept its former approach of casting a blind eye towards the loopholes of foreign trust tax evasion its legislation created, then this would give the international community more reason to negatively look at its offshore trust regimes. This would essentially have a detrimental effect on its reputation and therefore confirm its status as a tax haven.

Niue's lack of reform could have the opposite effect on how countries respond or perceive Niue. In principle, it is wrong that a country would allow itself to be used as a medium to undermine other countries' tax systems; worse yet if the enacted legislation was intended for such a purpose⁸². The increase in assistance among the international community is a big factor that Niue should consider. As Prebble argues⁸³:

Historically countries did not help one another collect tax, but globalisation, international concern about tax avoidance and increasing international cooperation in general have brought about major changes in this policy.

Niue needs to seriously consider its reputation should it continue to leave its Trusts Act unattended to. The result could be that international pressure could be once again heaped onto this little island nation as was the case during the 2000s when United States, private institutions, the OECD and others imposed sanctions which lead to Niue losing its IBC registry.

VI What Niue should do to the Trusts Act

The most obvious option Niue should consider is the amendment of the disclosure provisions within its Trusts Act similar to those of New Zealand. Firstly, Niue should make registration of trusts in Niue compulsory and create a register that would provide for all relevant information surrounding trust information. Although a register is maintained by the Courts, the Trusts Act does not impose any compulsory requirements that foreign trusts be registered by trustees⁸⁴. Amendments should require that the revenue department of Niue, instead of the Court, maintain a registry of trusts being set up in Niue. This will put legal obligations upon the revenue department, who should be more capable than the Court, to keep a registry of trusts registered in Niue. At the bare minimum at least, legislation should enact that the registration of trusts should be made compulsory.

⁸² See Littlewood, above n 1, at 67.

⁸³ See Prebble, above n 12, at 87.

⁸⁴ Trusts Act 1994, s 64.

Secondly, disclosure measures need to be strengthened. What New Zealand did is that upon registration, most particulars of the trust needed to be disclosed to the IRD⁸⁵. Settlers, trustees and beneficiaries' names, email addresses, physical addresses, jurisdiction of tax residence, taxpayer identification numbers all had to be disclosed⁸⁶. Furthermore, trustees were responsible to provide the IRD with details of changes to information to the trust, the trusts annual returns and how the money was distributed to beneficiaries⁸⁷. These disclosure measures should be used as a blueprint for Niue. Niue should at least consider adopting disclosure laws that require settlors, trustees and beneficiaries to disclose information about themselves. Information on the financial affairs of the trust should be included as well since revenue authorities of the concerned countries will be interested in them and there is no need for this information to be withheld – this is also New Zealand's approach⁸⁸.

Thirdly, Niue could also just consider repealing the section in the Trusts Act that gives tax exemptions to trustees of foreign trusts. This would solve the whole problem and was also considered by the *Shewan Report* but disregarded because of the fact that it could harm legitimate offshore trusts in New Zealand⁸⁹. In Niue however, since this tax exemption for trustees of foreign trusts could potentially be causing more harm than good for the country, repealing this section could be a more viable option applicable to the country.

Other than reforms to the Act, another option Niue could consider altogether is totally repealing the Trusts Act. The reason is simple, Niue does not really need an offshore trusts industry. There are roughly over 1,500 residents living on the island⁹⁰ and it receives large amounts of financial aid from New Zealand. A third of Niue's operational revenue is direct assistance from the New Zealand budget, while half of Niue's total expenditure is funded by New Zealand⁹¹. With a very small economy that is enormously reliant on New Zealand's financial assistance, there should not be a need for Niue to want to have a controversial foreign trust industry. Furthermore, since New Zealand has such close ties to Niue, anything controversial regarding the trusts industry coming out of Niue would be a hindrance and almost a reflection of New Zealand because of the perceived influence New Zealand has over Niue.

VI Conclusion

Niue has already done tremendously in the eyes of the international community by signing TIEAs with numerous countries and a multilateral convention on exchange of tax information. But their limited disclosure measures surrounding trusts is somewhat problematic. When New Zealand had these regimes, they were deemed by others as a tax haven for trusts and rightly so. Since their legal reforms, this claim can no longer be made towards New Zealand.

Niue on the other hand has not made any legal reforms to their Trusts Act. Niue still has the same disclosure measures surrounding foreign trusts and these disclosure measures impose very limited disclosure requirements on trustees. Because of this, there is still a much viable possibility that foreign settlors can potentially create trusts in Niue to avoid taxes in their home countries. The presence of the Trusts Act makes this potential very realistic so Niue has

⁸⁵ See Littlewood, above n 1, at 89.

⁸⁶ See Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, above n 18, s 11.

⁸⁷ See Littlewood, above n 1, at 84.

⁸⁸ At 86.

⁸⁹ See *Shewan Report* at [1.8]; see also Littlewood, above n 1, at 87.

⁹⁰ "Statistics for Prosperity" (2011) Statistics Niue < <http://niue.prism.spc.int/>>

⁹¹ See McDonald, above n 22, at 167.

to seriously consider enacting legislative reforms on disclosure of information of foreign trusts. If Niue, just leave the Trusts Act as it is, foreign settlors seeking to evade tax in their home countries could use Niue as a potential destination to do so and this could place further unwanted scrutiny on Niue which will be detrimental for Niue's international reputation.