



Précis Paper

Offshore Tax Havens

A discussion of the use of offshore tax havens and the impact of the introduction of Common Reporting Standards (CRS).

Discussion Includes

- Common Reporting Standard (CRS)
- Who is using tax havens?
- Challenges relating to offshore accounts
- Is there still interest in the tax haven model?
- Incentives for Australian companies to keep operating in Australia
- Using offshore structures
- Potential impact of cryptocurrency

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Offshore Tax Havens

In this edition of BenchTV, Ben Sewell (Principal, Sewell and Kettle Lawyers, Sydney) and Mark Davis (Principal, Mark Davis Legal, Sydney) discuss the use of offshore tax havens and the impact of the introduction of Common Reporting Standard (CRS) in 2017 by the G20 countries.

Common Reporting Standard (CRS)

1. In 2017, G20 countries including Australia, but excluding the United States, implemented the Common Reporting Standard (CRS). This requires offshore tax havens to disclose information about bank accounts and assets that are held on behalf of tax payers from across the G20, including Australia. These tax havens have voluntarily agreed to take on compliance requirements for assets and for bank accounts.
2. A few years ago there was a voluntary compliance code introduced called 'KYC – Know Your Customer'. This was implemented by the offshore world that required anyone that set up a company or bank account to disclose their name, address and any other relevant information about themselves.
3. The CRS provides tax authorities around the G20 an avenue of information from the offshore world and from banks around the world. It is more of a compliance process where the financial institution itself needs to comply with a set of disclosure requirements.
4. This may not be the end of tax havens because there is continuous change in the methodology and the instruments that they use to maintain the secrecy and the business that they have. For example, different types of structures have been created over the years such as trust structures, quasi trust structures and various instruments that have been invented.
5. Tax rulings on worldwide income can be found on the ATO website. If you are an Australian with a permanent place of abode in Australia, and the Tax Office finds that you are an Australian tax payer for the purposes of worldwide income, then you would be required to disclose any foreign income. Failure to disclose may mean you are going into an area of fraud.
6. An Australian professional adviser could probably not with any confidence advise on historical accounts. In the circumstance where the overseas bank account was set up years ago before KYC and CRS requirements, it would be difficult for the overseas institution or agent to trace the account back given the lack of requirement for details to be given..

Who is using tax havens?

7. The Paradise Papers released in 2017 were focused on large corporates and showed that large corporates often use low tax zones or low tax jurisdictions to divert income.
8. The democratization of this space is changing. Previously you would have had to, for example, flown and met your Swiss banker and set up your arrangements directly. Now with the online world, you are able to set up an offshore structure from Australia without any tax advice or advice from a lawyer.
9. The analysis from the Panama Papers and the Paradise Papers is that there is two major players in setting up offshore accounts.
 - 1) Intermediaries – these are the people that set up the structure and do the thinking.
 - 2) Registered agent – someone who is an accountant or lawyer in the jurisdiction to actually be the registered office, and to set up the documents and put the structures and accounts into play.
10. If you are an Australian professional adviser, you may engage agents in the offshore world to do the work. In terms of international tax structuring, there is some work in Australia but there is not anyone that puts themselves forward publicly as an intermediary. If you were an intermediary in Australia and you were setting up a structure, you would have to be very careful that you knew the counter party that was involved.
11. One element of the CRS and the KYC is the identification of the beneficial owner. This is a requirement that the party that sets up bank accounts or companies identifies the beneficial owner/the ultimate owner.
12. Linking beneficial ownership to a foundation or a trust, or trust like structure, is an obvious way to evade disclosure of who is the ultimate owner, or you could have someone who is a trusted associate to actually be the beneficial owner and director of the entity, and the holder of your account. .

Challenges relating to offshore accounts

13. There is no publicly available register of directors or the owners of shares in the offshore world. This is usually the first point to consider, but unless that information as to who the directors and shareholders of the company are is disclosed, or you get a subpoena in the relevant jurisdiction, you are not going to know.

14. Attempting to get subpoenas in foreign jurisdictions can be a very expensive process where you need to have a timely action. In attempting to help your clients you could approach ASIC or the police and attempt to get the authorities involved. Alternatively you could commence injunction proceedings and related subpoenas around the world at the same time, otherwise you may miss the money and the trail may go cold.
15. In places like the Cayman Islands that pride themselves on its secrecy, there is not just institutional resistance but there is also a structure of law, in terms of insolvency, that is structurally obtuse. For example, there is no administration, there is often only one court you can go to, the courts are often closed, and there is no urgency or law of shadow directorship. Therefore, if you did try to implement action you would be looking at a process that could be delayed a long time.

Is there still interest in the tax haven model?

16. Australia has a system of worldwide taxation so this means that if you are a company or an individual that has a permanent place abode, or a centre of control in Australia, you will be taxed in Australia.
17. In Hong Kong, on the other hand, they have a territorial system of taxation which means that if you are in Hong Kong and you have income that arises, or income that is derived from a non-Hong Kong source, you do not have to pay tax on it. In Ras al-Khaimah of the United Arab Emirates, you can live there completely tax free. There is no corporate tax and no income tax but you do have to be a resident there to obtain this benefit.
18. Where someone wishes to stay in Australia and have a corporate headquarters somewhere else, you may be battling with the ATO. If you have no territorial link to Australia, then it would be a very attractive proposition for you to have your accounts set up in an offshore structure.
19. Nomadic capitalists have an enormous amount of information online about how you should hand in your passport and get a few different passports from different regions, and live somewhere that will not charge you any taxation, therefore avoiding your American or Australian tax obligations.

Incentives for Australian companies to keep operating in Australia

20. The battle the Australian Tax Office (ATO) has is that the more internationalised we become, the more mobile our capital is. It is unclear how this battle will play out because there has

been a lot of work by the ATO in terms of transfer pricing and there is always new policies that are being introduced.

21. As a business, the ultimate way to deal with this issue with the ATO would be to sever ties with Australia. However, if you want maintain ties with Australia, and have Australians who work for you, Australian clients, Australian operations, and so on, then that will be the challenge.
22. The law firms based in the offshore world that offer these offshore accounting services provide justifications for doing their work that include things such as protecting people from being kidnapped, protecting people's legitimate right to not have their affairs aired, and to help people internationalise.
23. Historically the ATO has not been as active as some other tax collectors around the world. For example in the UK, the tax collection system has gotten to the point of going to cafes and counting the number of coffees that are made. In the past the ATO has relied mostly on a passive approach, but now relies more so on a data matching approach. The data matching approach means that they are trying to automate the way that they analyse and collect taxes.
24. Vanuatu used to operate as a tax haven, but it appears this has been shut down. Australian authorities have difficulty retrieving information related to bank accounts and corporate affairs in places such as Vanuatu. However, there is a plethora of other jurisdictions in the Pacific such as the Cook Islands where you can do things such as set up your own insurance company, highlighting the fact that if one tax haven shuts down, then it is possible that two more havens will appear in their place.
25. The progress of Australia through the development of ABN's, GST and so on has made the use of the offshore world by small to medium enterprises more difficult. The Panama Papers which was a leak of tax haven documents did not reveal many Australians. Recently the ATO disclosed that they had recovered \$50 million from 470 Australians. In the scheme of things this figure is not that high, but this figure relates only to one law firm in Panama.

Using offshore structures

26. To set up these offshore structures, you need an intermediary or a registered agent who is in the offshore jurisdiction. You can find either of these through a quick Google search.
27. There is an enormous checklist of different things you could ask an intermediary or registered agent to do. You can ask them to do things such as: set up your bank account,

for a power of attorney so you can open accounts in the name of the company, for a related trust, related foundation and so on.

28. The bank that you have the accounts set up with would send you the information that you need to be able to send the money to that account. Most of the more exotic banks in places such as Belize or third world locations, often have a relay with an American bank. Just because the bank account is set up in an exotic location does not mean that is an inhibition on Australian funds being sent over there as they relay to other compliant jurisdictions.
29. There is no need to have an ongoing relationship with the intermediary or the registered agent.
30. A lot of the structures have what is called a bearer share. As there is no publicly available register of shareholders, the bearer share is an instrument which entitles the person who has physical possession of the share at the time they hold the share to be the owner of the share. This means that you could have the owner of a company where there is no disclosed owner, and even the registered agent in the offshore jurisdiction does not know who the true owner is.
31. Once you have set up the power of attorney, the bank accounts, the title and the asset has been secured, you would then keep the bearer share. If you were setting up this structure for nefarious means, you would not want to have a paper trail in Australia.

Potential impact of cryptocurrency

32. Australian's potential access to the offshore world has increased; it has democratized because of the internet.
33. The growth of cryptocurrency and interaction with the offshore world is something that is potentially going to increase the complexity of offshore accounts. With increasing regulations in many parts of the world, cryptocurrency is starting to become more attractive if you are wanting to remain under the radar.
34. If the particular cryptocurrency is a reliable form of asset transfer and a reliable method of holding wealth, then you have a means of holding and transferring wealth that is completely reliable in terms of the network effect. It is also untraceable as you do not need to disclose your name, or any identification, meaning the information cannot come back to the ATO.
35. Cryptocurrency allows you to transfer wealth anywhere in the world at any time to anyone who is a counter party. Also, there is no bank that can hold you accountable or provide

information to the ATO because the cryptocurrency model is a network, meaning there is no central control.

36. Attempting to track cryptocurrency may present some significant challenges. To track cryptocurrency you would probably need the support of a very capable forensic professional who could get a hold of the computer itself that was used. This focus on computers would be to get a hold of the actual device to trace the hard drive, and trace the recording of information on that particular computer.

BIOGRAPHY

Ben Sewell

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Ben is an expert in commercial litigation and insolvency law and has developed this expertise from 15 years of experience as a specialist solicitor. Ben is also a leading expert in personal property securities law. He has advised hirers, lenders, creditors and insolvency practitioners about this evolving area. Ben also drafts security documentation and advises lenders about how to take security over personal property including debt factoring and discounting. Over the past 2 years Ben has acted for the principal defendant in shadow directorship proceedings run out of the Cayman Islands by the liquidators of the Centaur Litigation Fund.

Mark Davis

Principal, Mark Davis Legal, Sydney

Mark Davis was admitted to practice in the Supreme Court of Victoria in 1993. He has worked principally in commercial law with a particular focus on dispute resolution, capital raisings and investment trusts. He has won Australia's premiere journalism prize, the Walkley Award, five times. As well as working on an array of investigative reports in Asia, the Pacific and the Middle East he was a regular host and principal interviewer for Dateline, on SBS TV.

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