

# Peek into workings of offshore havens



## Summary of discussion

- What is the terminology of offshore havens?
- What does the Mossack Fonseca information tell us?
- What are the differences between Australian law and the law of the offshore havens?
- What are the take-aways for Australian professional advisers?

## Terminology

### Declaration of worldwide income

Taxation Ruling TR 98/17 specifically provides for the interpretation of income tax of the residency status of individuals. The Commissioner refers to precedent cases and the four tests for determining whether an individual is a resident for tax purposes. 3 key tests are:

- Residence according to ordinary concepts
- The domicile and permanent place of abode test
- The 183 day test

## Terminology

### What is an offshore haven?

There is no single accepted definition of 'offshore haven' but any general definition would include the following elements:

- Foreign jurisdiction: Grant of incorporation under local law without any requirement to hold assets within the jurisdiction or have a locally resident director
- Secrecy protections: No publicly available register of shareholders or directors and the right to secrecy of ultimate ownership
- Tax exempt status: Tax free status for any business that is conducted out of the jurisdiction and no requirements to file tax returns

## Terminology

- **International business company** means an offshore company formed under the laws of a jurisdiction where the company's activities are limited to international business. Also known as an international business corporation.
- **Registered agent:** International business companies are required to have an address within the jurisdiction through a certified professional agent (usually a lawyer or accountant). The registered agent holds the register of shareholders and directors. When the international business company is incorporated the registered agent attends to KYC on behalf of the offshore haven's regulators.
- **Intermediaries:** The lawyers, accountants and 'fixers' who set up offshore corporate structures with layering, nominee directorships and bearer shares to ensure secrecy whilst keeping their client in control of the assets held. The intermediaries may not necessarily be the registered agents in the offshore haven.

## Terminology

- **KYC:** 'Know Your Customer' is the process of verifying the identity of a customer by a banker or registered agent.
- **Layering:** ultimate ownership is made more opaque by adding multiple layers of corporate ownership and corporate directorships.
- **Nominee directorship:** where a person who is the validly appointed director is acting on behalf of another person and following their instructions.
- **Bearer shares:** means share in a company that is owned by the person who holds the physical certificate.

## Terminology

- **CRS** means Common Reporting Standard, a new single global standard for collection, reporting and exchange of financial information on foreign tax residents.
- **FATCA compliance:** means complying with a Federal United States statute, the *Foreign Account Tax Compliance Act* ('*FATCA*').

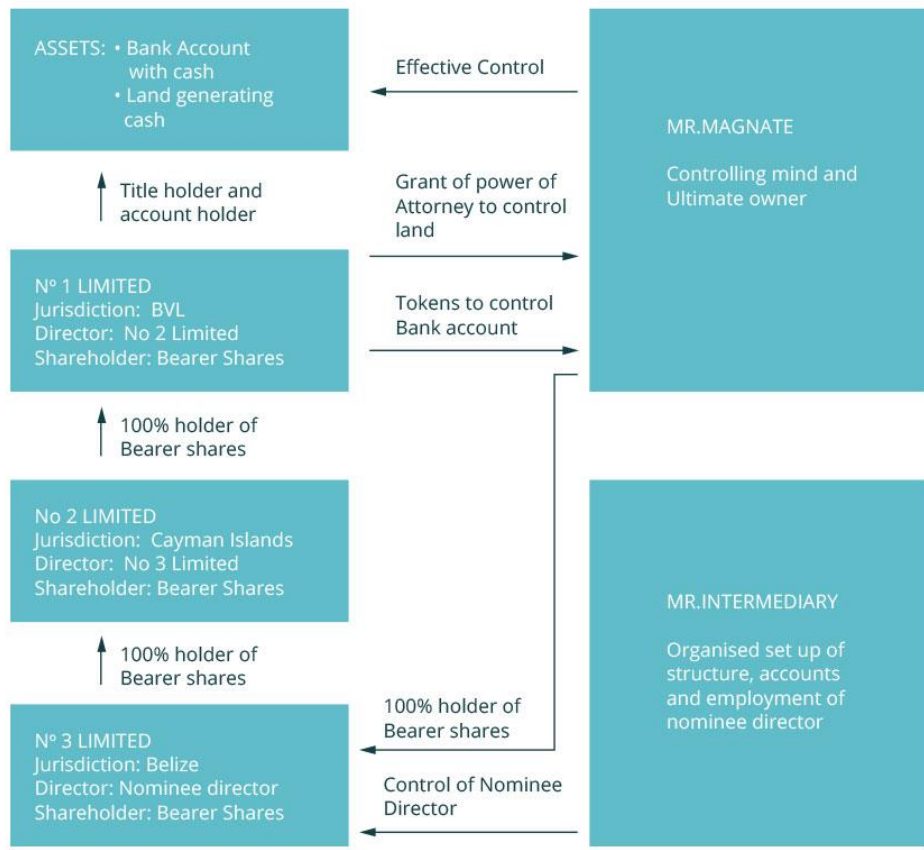
## How do you set up an offshore company?

- Online search and engage a registered agent or an intermediary
- It is more likely that you'll come across an intermediary online than a registered agent
- The obligation upon the registered agent is now to comply with the minimum identity checking requirements of the jurisdiction (*know your customer or KYC*)



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DIAGRAM 1 - LAYERING EXAMPLE



## **Mossack Fonseca Leaks: background**

- Law firm founded in Panama but with offices in all offshore jurisdictions
- Leak of 2.6 terabytes of data containing 11.5 million client records
- International Consortium of Investigative Journalists has custody of data and is farming out information for publication by journalists across the world
- Offshore leaks database only gives you relationship information not substantive legal documents
- Both founders have been arrested for money laundering

## **Mossack Fonseca Leaks: background**

### Exotic stories

- Vladimir Putin, Russian President
- Best friend is a violinist, Sergei Roldugin, who even introduced Putin to his wife and is godfather of his eldest child
- Roldugin has links to Swiss lawyers and Bank Rossiya
- Roldugin became a 3.9% owner of the bank
- Swathe of offshore international business companies linked to Roldugin is the recipient of monies from various Russian conglomerates linked including Bank Rossiya

## **Mossack Fonseca Leaks: background**

More mundane stories: Steve's Guided Safaries Africa Inc

- John Stevens is client of Mossack Fonseca with a Zimbabwean safari business
- The law firm's files list the business's income as USD\$250,000
- Company trades through an IBC registered in the British Virgin Islands
- Bank account for IBC in the Isle of Man

## Comparison with Australia

### **Taxation**

Offshore haven characteristic: No income tax or other direct taxes, no requirements to file tax returns for income

Comparison with Australia: Corporate tax on profits and capital gains tax, requirement to declare worldwide income

Take-aways for professional advisers: It may be tempting for some clients to send assets to be held by international business companies to avoid tax. Clients can set up their own structures without Australian professional advice.

## Comparison with Australia

### **Directorships**

Offshore haven characteristic: Nominee directorships and corporate directorships, no law of shadow directorship

Comparison with Australia: In Australia, companies cannot be directors of other companies and shadow directors have fiduciary responsibilities. The controlling mind of a shadow director can be sued as if they were a director.

Take-aways for professional advisers: Shadow directors not liable and layering through nominee and corporate directorship makes true ownership opaque

## Comparison with Australia

### **Secrecy**

Offshore haven characteristic: No public register of share holders or directors of IBCs, bearer shares permitted

Comparison with Australia: Public register of shareholders (small companies and substantial holders in public companies) and directors (public and small companies)

Takeaways for professional advisers: Frustration in asset tracing likely for claimants. Secrecy as a value of offshore havens may be challenged by tax disclosure rules being implemented.

## What can you get in the British Virgin Islands you can't get in Australia?

- Incorporation within two business days provided KYC is completed
- No tax generally, including income tax, corporate tax, capital gains tax, inheritance tax, gift tax, wealth tax or other form of direct taxation
- Corporate directors permitted
- No nationality or residency restriction on directors or shareholders
- Appointment of nominee directors permitted and no law of shadow directorship



## What can you get in the British Virgin Islands you can't get in Australia?

- Identity of shareholders and directors not publicly available unless volunteered or subject to Court order
- Bearer shares permitted
- No requirements to lodge annual corporate returns or tax returns
- The country is a British overseas territory and its highest Court is the Judicial Committee of the Privy Council in London
- No law of *ultra vires* so there is no limit on usage of the company

## Take-aways for professional advisers

- It is likely that the use of international business companies will grow as these vehicles become more accessible and cheaper for Australians
- The differences between the corporate law of offshore havens and Australia are irreconcilable. If acting for Australian creditors of international business companies you will face a difficult task in any asset recovery action.
- Australian professional advisors should be aware of CRS and that their clients may have information about their offshore bank accounts disclosed to the Australian Taxation Office without their knowledge

## Questions and comments?

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