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The Panama Papers have provided a small window on the world in which unethical high net worth individuals and multinational corporations use shell companies with concealed ownership to facilitate tax avoidance and tax evasion. Shell companies with concealed ownership are also used as vehicles to facilitate a range of serious criminal activity, from human trafficking, money laundering, financing terrorism, commercial online child sexual abuse, illicit arms trading, fraud, embezzlement and bribery.

The OECD had previously provided data on the use of special purpose entities (SPEs or shell companies) through jurisdictions that have assisted in profit shifting by multinational companies. In general terms, SPEs are entities with no or few employees, little or no physical presence in the host economy, whose assets and liabilities represent investments in or from other countries, and whose core business consists of group financing or holding activities.¹

Research by Findley, Nielson and Sharman also found Australian corporate service providers were near the top of corporate service providers in terms of being willing to set up an untraceable shell company even when there was significant risk the company in question would be used for illicit purposes.²

The ATO had publicly stated some time ago “Over a hundred Australians have already been identified involving tens of millions of dollars in suspected tax evasion through the use of ‘shell companies’ and ‘trusts’ around the world.” In October 2013, the Australian Federal Police charged three men with tax and money laundering offences involving \$30 million. It is alleged they used a complicated network of offshore companies to conduct business in Australia while hiding the profits offshore, untaxed. The profits were then transferred back to Australian companies controlled by the offenders and disguised as loans so the interest could be claimed as a tax deduction. The level of alleged criminal benefit was estimated at \$4.9 million.

The World Bank and UN Office on Drugs and Crime (UNODC) have previously conducted research showing how shell companies with concealed ownership are used to facilitate a range of criminal activity. They published a report reviewing some 150 cases of corruption where the money from laundered. In the majority of cases:³

- A corporate vehicle (usually a shell company) was misused to hide the money trail;

¹ OECD, ‘Addressing Base Erosion and Profit Shifting’, OECD Publishing, <http://dx.doi.org/10.1787/9789264192744-en>, 2013, p. 18.

² Michael Findley, Daniel Nielson and Jason Sharman, ‘Global Shell Games: Testing Money Launderers’ and Terrorist Financiers’ Access to Shell Companies’, Centre for Governance and Public Policy, Griffith University, 2012, p. 21.

³ Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, ‘The Puppet Masters’, The World Bank, 2011, p. 2.

- The corporate vehicle in question was a company or corporation;
- The proceeds and instruments of corruption consisted of funds in a bank account; and
- In cases where the ownership information was available, the corporate vehicle in question was established or managed by a professional intermediary to conceal the real ownership.

In two-thirds of the cases some form of surrogate, in ownership or management, was used to increase the opacity of the arrangement.⁴ In half the cases where a company was used to hide the proceeds of corruption, the company was a shell company.⁵ One in seven of the companies misused were operational companies, that is 'front companies'.⁶

As an example of a case where shell companies with concealed ownership were allegedly used to facilitate money laundering through Australia, US authorities sought to seize the assets in three Westpac accounts held by Technocash Ltd holding up to \$36.9 million.⁷ Technocash Limited was an Australian registered company. The funds are alleged to be connected to shell companies owned by the defendants in the case.⁸ It is unclear if Westpac had detected the connection between Technocash and key figures in Liberty Reserve and their alleged criminal activities, particularly money laundering. According to the case filled by the US Attorney for the Southern District of New York, Liberty Reserve SA operated one of the world's most widely used digital currencies. Through its website, the Costa Rican company provided its with what it described as "instant, real-time currency for international commerce", which could be used to "send and receive payments from anyone, anywhere on the globe". The US authorities allege that people behind Liberty Reserve:⁹

...intentionally created, structured, and operated Liberty Reserve as a criminal business venture, one designed to help criminals conduct illegal transactions and launder the proceeds of their crimes. Liberty Reserve was designed to attract and maintain a customer base of criminals by, among other things, enabling users to conduct anonymous and untraceable financial transactions.

Liberty Reserve emerged as one of the principal means by which cyber-criminals around the world distributed, stored and laundered the proceeds of their illegal activity. Indeed, Liberty Reserve became a financial hub of the cyber-crime world, facilitating a broad range of online criminal activity, including credit card fraud, identity theft, investment fraud, computer hacking, child pornography, and narcotics trafficking. Virtually all of Liberty Reserve's business derived from suspected criminal activity.

The scope of Liberty Reserve's criminal operations was staggering. Estimated to have had more than one million users worldwide, with more than 200,000 users in the United States, Liberty Reserve processed more than 12 million financial transactions annually, with a combined value of more than \$1.4 billion. Overall, from 2006 to May 2013, Liberty Reserve processed an estimated 55 million separate financial transactions and is believed to have laundered more than \$6 billion in criminal proceeds.

⁴ Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 58.

⁵ Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 34.

⁶ Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 39.

⁷ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 29, 43.

⁸ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 21.

⁹ US Attorney for the Southern District of New York, 13 Civ 3565, 28 May 2013, pp. 4-5.

It was further alleged by US authorities that for an additional “privacy fee” of 75 cents per transaction, a user could hide their own Liberty Reserve account number when transferring funds, effectively making the transfer completely untraceable, even within Liberty Reserve’s already opaque system.¹⁰

US authorities alleged defendant Arthur Budovsky used Technocash to receive funds from exchangers. Mr Budovsky, the alleged principal founder of Liberty Reserve,¹¹ allegedly used his bank to wire funds to Technocash bank accounts held by Westpac.¹² He is also alleged to be the registered agent for Webdata Inc which held an account with SunTrust. Technocash records allegedly showed deposits into the SunTrust account from Technocash accounts associated with Liberty Reserve between April 2010 and November 2012 of more than \$300,000.¹³

Arthur Budovsky is allegedly listed as the president for Worldwide E-commerce Business Sociedad Anonima (WEBSA) and defendant Maxim Chukharev as the secretary. Maxim Chukharev is alleged to have helped design and maintain Liberty Reserve’s technological infrastructure.¹⁴ WEBSA allegedly served to provide information technology support services to Liberty Reserve and to serve as a vehicle for distributing Liberty Reserve profits to Liberty Reserve principals and employees.¹⁵ It is alleged bank records showed that from July 2010 to January 2013, the WEBSA account in Costa Rica received more than \$590,000 from accounts at Technocash associated with Liberty Reserve.¹⁶

It is alleged Arthur Budovsky was the president of Grupo Lulu Limitada which was allegedly used to transfer and disguise Liberty Reserve Funds.¹⁷ Records from Technocash allegedly indicate that from August 2011 to November 2011 a Costa Rican bank account held by Grupo Lulu received more than \$83,000 from accounts at Technocash associated with Liberty Reserve.¹⁸

Further, defendant Azzeddine El Amine, manager of Liberty Reserve’s financial accounts,¹⁹ was the Technocash account holder for Swiftexchanger. It is alleged e-mails showed that exchangers wishing to purchase Liberty Reserve currency wired funds to Swiftexchanger. When Swiftexchanger received funds in its Technocash account, an e-mail alert was sent to El Amine, notifying him of the transfer. Based on these alerts, it is alleged between 12 June 2012 and 1 May 2013, exchangers doing business with Liberty Reserve send approximately \$36,919,884 to accounts held by Technocash at Westpac.²⁰

¹⁰ US Attorney for the Southern District of New York, 13 Civ 3565, 28 May 2013, p. 6.

¹¹ US Department of Justice, ‘One of the World’s Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged \$6 Billion Money Laundering Scheme’, 28 May 2013.

¹² USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 29.

¹³ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

¹⁴ US Department of Justice, ‘One of the World’s Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged \$6 Billion Money Laundering Scheme’, 28 May 2013.

¹⁵ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 37.

¹⁶ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

¹⁶ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 38.

¹⁷ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

¹⁷ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 40.

¹⁸ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

¹⁸ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 41.

¹⁹ US Department of Justice, ‘One of the World’s Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged \$6 Billion Money Laundering Scheme’, 28 May 2013.

²⁰ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 30.

The defendants are alleged to have used Technocash services to transfer funds to nine Liberty Reserve controlled accounts in Cyprus.²¹

Technocash Limited is reported to have been forced out of business in Australia following the action by US authorities, when it was denied the ability to establish accounts in Australia by financial institutions.²² Technocash stated that it “complied with Australia’s comprehensive AML regime, verified customers and has an AFSL licence since 2003. Technocash denies any wrong doing.”²³

Recommendations that flow from the Panama Papers

Register of beneficial ownership

The Australian Government should update the ASIC company register so that it publicly discloses the ultimate beneficial ownership of companies registered in Australia. It could be extended to companies operating in Australia as well.

Beneficial ownership is defined in the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (see: <https://www.legislation.gov.au/Details/F2015C00917>).

Under the provisions of the rule a beneficial owner is someone (a natural person, not a legal entity) who owns or controls (directly or indirectly) a business where:

- (a) In this definition: control includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights, and includes exercising control through the capacity to determine decisions about financial and operating policies; and
- (b) In this definition: owns means ownership (either directly or indirectly) of 25% or more of a company.

This measure would need the current ASIC database to remain in public hands. Given that shell companies with hidden ownership are present in facilitating a wide range of serious criminal activity (human trafficking, money laundering, financing terrorism, commercial online child sexual abuse, illicit arms trading, fraud, embezzlement, bribery and tax evasion), it is not appropriate that the database of company ownership would be placed in private hands. This should be seen as one of the vital tools for law enforcement and therefore should remain under government control.

With a public register it would need to be an offence:

- To be the director of a company where you have not disclosed all the beneficial owners of the company. This could include being the director of a foreign owned company where all the beneficial owners are not disclosed (to stop Australian residents acting as front people for shell companies registered overseas);
- To be a beneficial owner and not have disclosed that to the Australian Taxation Office and to not have disclosed that to ASIC for Australian registered companies; and
- To be a corporate service provider (the companies that set up companies) and to not have taken all reasonable steps to ensure a company being set up has disclosed all beneficial owners.

²¹ USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 31.

²² Technocash, ‘Opportunity: Own the Technocash Payment Platform’, Media Release, 5 July 2013.

²³ <http://www.technocash.com/pages/press-release.cfm>

The above would seek to deter Australians from acting as front people for shell companies with hidden ownership and being the owner or controller of a shell company and not having disclosed the fact.

Through the G20 the Australian Government has already promised to deliver on beneficial ownership transparency:

<https://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/G20High-LevelPrinciplesOnBeneficialOwnershipTransparency.pdf>

Public Country-by-Country Reporting

Make the high level report under the OECD country-by-country reporting initiative for multinational corporations with over €750 million public. At the moment it is only shared between tax authorities. Australia has introduced country-by-country reporting to the ATO through the *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015*.

Private sector whistleblower legislation

The Panama Paper, and the Luxembourg Leaks before them, highlight the important role whistleblowers play in combating tax evasion and tax avoidance. Australia has good laws to protect whistleblowers in the public sector. The Australian Government should introduce private sector whistleblower protection and reward legislation. The Senate Economics Committee report on ASIC recommended (Recommendation 15):

...protections for corporate whistleblowers be updated so that they are general consistent with and complement the protections afforded to public sector whistleblowers under the Public Interest Disclosure Act 2013. Specifically, the corporate whistleblower framework should be updated so that:

- *Anonymous disclosures are protected;*
- *The requirement that a whistleblower must be acting in 'good faith' in disclosing information is removed, and replaced with a requirement that a disclosure:*
 - *Is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or*
 - *Shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes;*
- *Remedies available to whistleblowers if they are disadvantaged as a result of making a disclosure are clearly set out in legislation, as are the processes through which a whistleblower might seek such remedy;*
- *It is a criminal offence to take or threaten to take a reprisal against a person (such as discriminatory treatment, termination of employment or injury) because they have made or propose to make a disclosure; and*
- *In limited circumstances, protections are extended to cover external disclosures to third parties, such as the media.*

Legislation should also be introduced to reward private sector whistleblowers based on the US *False Claims Act*, where the ability to obtain a reward should be dependent on the ability of the Commonwealth Government to recover funds due to it, be it the result of tax evasion, tax avoidance or fraud, and it should apply to the private sector generally.

Protection of whistleblowers in both the public and private sector was a commitment made by G20 countries in 2010 and 2012. See for example:

<https://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/G20AntiCorruptionActionPlan.pdf>

Reform Australia's anti-money laundering laws

The Panama Papers highlight the role unethical lawyers and corporate service providers can play in facilitating the establishment of shell companies with concealed ownership, which become vehicles for all sorts of serious criminal activity, including tax evasion. Therefore, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* should be reformed to include lawyers, accountants, corporate service providers and real estate agents. This is a requirement of the Financial Action Task Force recommendations for dealing with money laundering and the financing of terrorism. The Financial Action Task Force is the global, multilateral standard setting body for dealing with money laundering and financing of terrorism. The Financial Action Task Force assessment of Australia in 2015 recommended that lawyers, accountants, real estate agents and corporate service providers be included in Australia's anti-money laundering legislation: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

Introduce a 'Disclosure of Tax Avoidance Scheme'

The Australian Government should follow the example of the UK and introduce a 'Disclosure of Tax Avoidance Schemes' requirement. The requirement is explained in the attached document. The arrangement has been in place since 2004. Section 7 of the attached document covers how a tax avoidance scheme is defined. The maximum penalty for failing to disclose a scheme is £1 million. An Australian scheme should cover businesses using the scheme, promoters of schemes, providers of schemes and designers of schemes.

It is the understanding of TJN-Aus that this requirement in the UK has resulted in billions of dollars of extra tax revenue being collected and has deterred the promotion of aggressive tax schemes.

Measures to increase transparency over subsidiaries

The Australian Government should require companies to have to disclose all their subsidiaries, not just those that the company assesses are 'material' to its operations. It should be an offence to have undisclosed subsidiaries. In this way companies face increased legal risks in having shell companies with concealed ownership in order to facilitate tax avoidance or tax evasion.

Measures to penalise non-co-operative secrecy jurisdictions

Given the role secrecy jurisdictions play in facilitating tax avoidance and tax evasion, further measures are warranted to pressure such jurisdictions to end playing that role and to fully co-operate with tax authorities and other law enforcement bodies globally. The Australian Government should grant the Commissioner of Taxation the power to deny any claimed deduction for a transaction with a jurisdiction that the Commissioner deems is non-cooperative in sharing information with the Australian Taxation Office (which is already used by Argentina, Brazil, Germany, India and Italy).

The Australian Government could also implement measures that seek to penalise secrecy jurisdictions that refuse to provide effective information exchange to encourage them to comply with automatic information exchange and other global standards addressing money laundering, tax avoidance and tax evasion. Such measures should include:

- Applying higher rates of withholding taxes on all transfers of funds to jurisdictions that do not engage in effective information exchange (which is already used by Argentina, France, Mexico and the Slovak Republic); and
- The application of administrative measures which discourage companies from using non-co-operative jurisdictions, such as reversing the burden of proof, higher audit requirements and requiring records to be kept for 20 years rather than the standard five years for records involving the use of secrecy jurisdictions that do not commit to automatic information exchange.

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Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:

- (a) promote sustainable finance for development;
- (b) promote international co-operation on tax regulation and tax related crimes;
- (c) oppose tax havens;
- (d) promote progressive and equitable taxation;
- (e) promote corporate responsibility and accountability; and
- (f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Australian Council for International Development (ACFID)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union
- Anglican Overseas Aid
- Baptist World Aid
- Caritas Australia
- Columban Mission Institute, Centre for Peace Ecology and Justice
- Community and Public Service Union
- Friends of the Earth
- GetUp!
- Global Poverty Project
- Greenpeace Australia Pacific
- International Transport Workers Federation
- Jubilee Australia
- Maritime Union of Australia
- National Tertiary Education Union
- New South Wales Nurses and Midwives' Association
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- Synod of Victoria and Tasmania, Uniting Church in Australia
- TEAR Australia
- Union Aid Abroad – APHEDA
- UnitedVoice
- UnitingWorld
- UnitingJustice
- Victorian Trades Hall Council
- World Vision Australia