



The New Zealand “Look Through Company” Regime

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Agenda

- A. Introduction
- B. New Zealand legal system
- C. Money laundering provisions
- D. New Zealand trust law
- E. New Zealand limited partnerships
- F. The “Look Through” regime



A. Introduction

Problems with Existing/Traditional Offshore Jurisdictions:

- OECD/FATF sanctions and blacklisting
- Pricing – traditional jurisdictions pricing themselves too rich for the emerging markets' appetite
- Reputation – for the client wanting to conduct business from a jurisdiction whose reputation does not hinder transactions – resulting in client wanting new jurisdictions

Problems with existing/traditional offshore jurisdictions:

- Demand for “fresh” solutions which will allow clients to take advantage of international tax arbitrage, allow for multi-jurisdictional family asset ownership rationalisation and perhaps most importantly, allow the high net worths’ the security that anonymity of ownership provides.
- New Zealand offers such solutions through three different types of vehicles which may be used in conjunction with another jurisdiction’s vehicles (such as Singapore or Hong Kong), or NZ alone.



B. New Zealand Legal System

Background

- Constitutional monarchy. Head of State is Queen Elizabeth II who rules through her personal representative in New Zealand who is the Governor-General.
- Within New Zealand ultimate constitutional power is for practical purposes held by the New Zealand Parliament which is democratically elected. It is made up of 120 members sitting as a single group known as the House of Representatives. This group effectively chooses which of their members will form the government of the country.

Background

- Executive arm of government is led by the Prime Minister who forms a cabinet which governs the country through ministers who head each government department.
- When New Zealand was settled by the British in the 1840s the British legal system was largely adopted. New Zealand continues to operate under a common law legal system where the sources of law are a mixture of legislation and precedents established by the decisions of various New Zealand courts.

Background

- Courts operate at four levels:
 - Supreme Court.
 - Court of Appeal.
 - High Court.
 - District Court.
- The Supreme Court is a recent introduction to succeed the judicial committee of the Privy Council as New Zealand's ultimate appellate court.

Sources of New Zealand Law

- New Zealand commercial and trust law is derived from a mixture of legislation and case law. The most relevant legislation comprises:
 - The Trustee Act 1956
 - The Perpetuities Act 1964
 - The Charitable Trusts Act 1957
 - The Trustee Companies Act 1967
 - The Trustee Companies Management Act 1975
 - The Property Law Act 2007.
 - The Limited Partnerships Act 2008.
 - The Companies Act 1993.
 - The Sale of Goods Act 1908.
 - The Income Tax Act 2007.
 - Goods and Services Act 1985.
 - Fair Trading Act 1986.
- In addition various other statutes are relevant to the mechanisms by which certain types of property can be made subject to a trust. These include the Land Transfer Act 1952 and the Securities Transfer Act 1991.



C. Money Laundering Provisions

Money Laundering Provisions

- Money laundering is defined by statute and involves dealing with property known or believed to be the proceeds of a serious offence for the purpose of concealing the property.
- The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and the Financial Transactions Reporting Act 1996 requires each financial institution (including any trustee) to verify the identity of facility holders and to maintain records of each transaction to a standard required to enable the Police to identify the beneficial owner of a facility or to reconstruct a transaction at any time.
- Failure to comply with obligations under the Act results in offences with potentially large penalties including imprisonment. Our legislation is very similar to the legislative obligations imposed here in Singapore/Hong Kong.



D. New Zealand Trust Law

Settlors & Trustees

- In all fundamental respects New Zealand trust law reflects English trust law but it differs from English trust law in many items of detail, largely as a result of various statutory interventions.
- Settlers:
 - Any legal entity which has capacity to hold property in New Zealand can be a settlor of a trust and this includes corporate entities such as companies (provided the constitution of the corporate entity permits it to do so).
- Trustees:
 - Trustees have a statutory power to appoint further trustees of the trust under the Trustee Act 1956. That statute also confers on them a statutory right of indemnity from the trust fund. Companies can be trustees.

Remote Controls

- NZ trust law provides a point of difference from many other jurisdictions in that sections 49 and 50 of the Trustee Act 1956 permit family advisors, settlors and beneficiaries to influence the exercise of powers by the trustees through the use of a mechanism which separates powers between:
 - (1) custodian trustees,
 - (2) managing trustees and
 - (3) advisory trustees.

Example

- A NZ resident custodian trustee (perhaps a private or managed trust company) could hold registered title to an investment portfolio comprising equities and bonds listed on major international exchanges.
- The client relationship management and day to day administration of the trust could be exercised by a managing trustee company based in Singapore. That managing trustee could delegate discretionary management over the investment portfolio to its investment division.
- Meanwhile, a trusted family advisor resident in the jurisdiction in which the settlor resides, say Italy, could hold office as advisory trustee.

Example

- Section 49 of the Trustee Act 1956 provides that where any advice is tendered or given by the advisory trustee, the managing trustee may follow the same and act thereon but, if it does do so, shall not be liable for anything done or omitted by reason of following that advice or direction.
- Binding directions in relation to the assets would then, from time to time, be given to the NZ resident custodian trustee by the Singapore managing trustee. All transactions would be implemented by the NZ resident custodian trustee on an "execution only" basis.
- The NZ resident custodian trustee would retain power to apply to the court for directions and retain certain core fiduciary duties. However, subject thereto, the NZ resident custodian trustee would not be liable for acting on properly given directions.
- As far as third parties are concerned the registered "owner" of the investment portfolio is the NZ resident custodian trustee. This may provide a solution for the "offshore" managing trustee company which worked hard to develop the relationship with a client only to be constrained by domestic policy.

Protectors & Beneficiaries

- Protectors:
 - As with English law it is possible for parties other than settlors and trustees to hold powers in relation to trust assets and their administration.
- Beneficiaries:
 - Any legal entity can be named as a beneficiary in relation to the trust assets. The trust can also be defined as being for a charitable purpose. What is a charitable purpose is largely determined by traditional English case law analysing the spirit and intent of the Elizabethan Statute of Charitable Uses 1601.

Trust Variation & Recognition

- The powers of variation of the trust permitted to trustees by case law apply in New Zealand together with various statutory additions.
- Recognition by New Zealand of the Law Applicable to Trusts
- Where a trust is created at a time when all or some of the relevant persons (settlor, trustee and beneficiaries) or assets are located in jurisdictions other than New Zealand it is important to clarify which system of law is to apply by using an express choice of law clause in the trust deed.

Keeping Financial Records

- New Zealand-resident trustees of foreign trusts are required to keep the following records:
 - Evidence of the creation of a trust (trust deed or similar);
 - Details of settlements and distributions;
 - List of the assets and liabilities of a trust, and sums of money expended and received by a trustee in relation to a trust; and
 - Description of accounting system used by a trust.

Keeping Financial Records

- A person who is required to keep records may apply to the Commissioner for permission to keep records offshore, or in a language other than English.
- Information will be provided to other double tax agreement signatory countries on a case-by-case request basis, when Inland Revenue considers that there are valid grounds for requesting the information. Inland Revenue will not entertain general “fishing expeditions” from tax treaty partners for information on foreign trusts, or satisfy requests for information from countries that do not have a double tax agreement or a tax information exchange agreement with New Zealand.
- Any information provided by a trustee will be subject to the existing tax secrecy laws.

Taxation of Off-shore Trusts

- In the years immediately prior to 1988 there was an increasing trend for New Zealanders directly and indirectly to defer and avoid tax by utilising trusts established in various international tax havens. As a consequence, the trust taxation regime which currently applies in New Zealand was introduced on 1 April 1988.
- The effect of that regime is that a trust:
 - Settled by a non-resident.
 - Having New Zealand resident trustees

will only be taxed in New Zealand on the income which it derives in New Zealand.

- The essential feature of the regime is that the tax treatment of the trust is determined by the tax residency of the settlor.

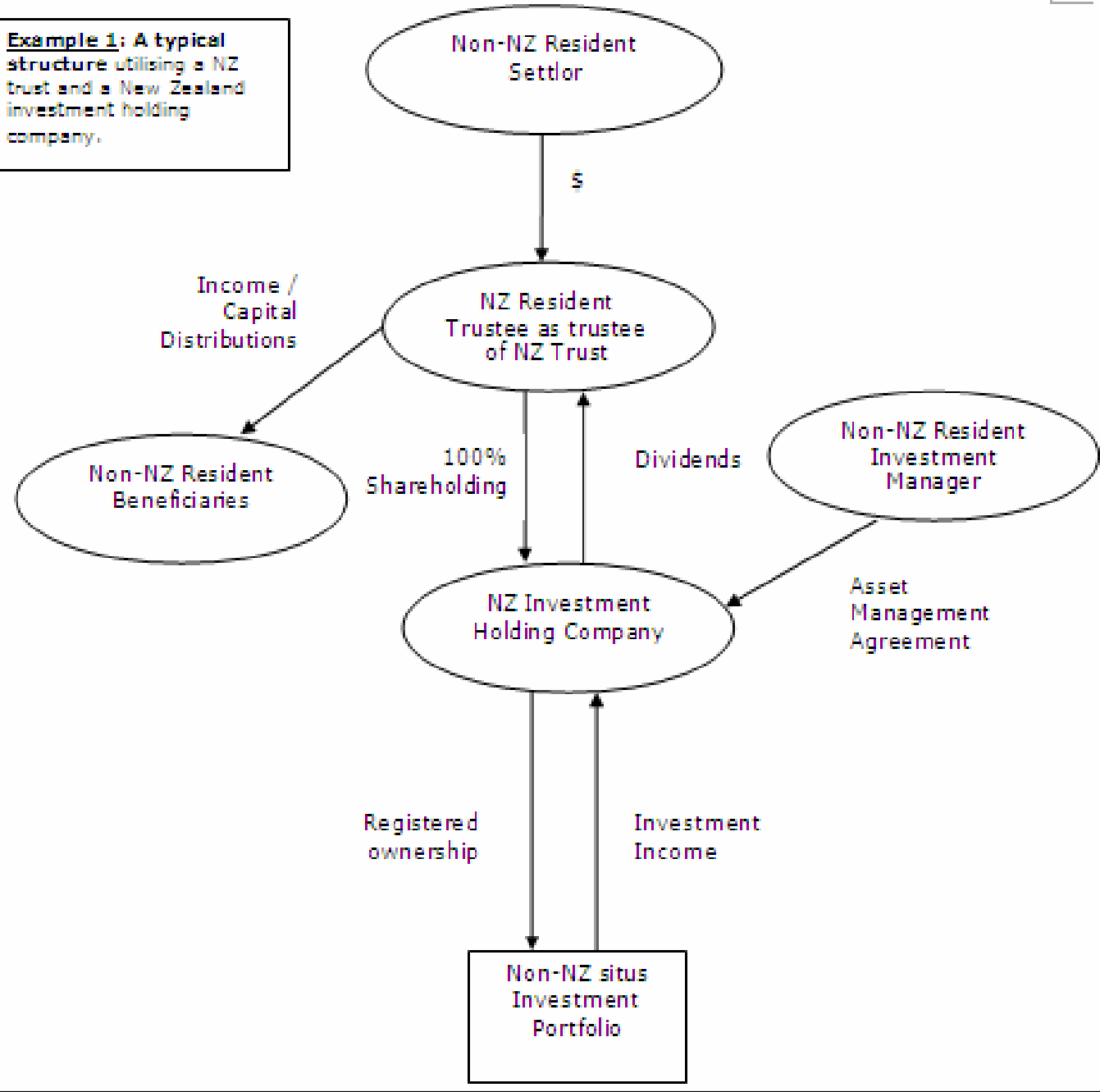
Disclosure of Trust Information to Inland Revenue

- New Zealand-resident trustees are required to provide limited information to New Zealand Inland Revenue as follows:
 - The name or other identifying features of each trust (such as the date of settlement);
 - The name and contact details of the New Zealand-resident trustee(s);
 - Whether a settlor is resident in Australia; and
 - The name of the approved organisation to which the New Zealand-resident trustee belongs.

Disclosure of Trust Information to Inland Revenue

- A New Zealand-resident trustee who becomes aware that any of the information provided has changed is required to advise Inland Revenue of the change within 30 days.
- Australia is the only country to which New Zealand will provide information on an automatic basis.

Example 1: A typical structure utilising a NZ trust and a New Zealand investment holding company.





E. NZ Limited Partnerships

Background

- The Limited Partnerships Act 2008 established a regime for limited partnerships in NZ.
- NZ Limited Partnerships can be used for international wealth structuring purposes in a number of different ways.
- Because a NZ Limited Partnership is a separate legal entity it can be used as a direct "offshore" asset holding vehicle in the same way as a BVI or Jersey company might be used.
- Such a limited partnership can be beneficially owned by a trust, company or an individual outside of NZ.

Background

- Another method is to use a Limited Partnership to structure family wealth as an alternative to a trust.
- This type of structure might be known as a "Family Limited Partnership".
- Limited Partnerships are flexible enough to be created so they take on many of the same characteristics and confer many of the same benefits as a trust – arguably without attracting the same level of scrutiny from revenue authorities.
- In this regard they are not unlike the civil law foundation.

Some Key Features

- NZ Limited Partnerships can be used as vehicles for collective investment arrangements such as small, closely held, open ended funds.
- NZ Limited Partnerships are useful as trading entities.
- A NZ Limited Partnership is an incorporated and separate legal person and has the legal capacity to exercise all the powers of a natural person or company.

Some Key Features

- Unlike a trust a NZ Limited Partnership may exist in perpetuity.
- NZ Limited Partnerships are fiscally transparent for NZ tax purposes and are not taxed in NZ at the partnership level. Generally, the NZ Limited Partnership will be structured so that only the LPs are entitled to receive income. LPs who are not resident in NZ will not be subject to tax in NZ on their share of the income generated by the NZ Limited Partnership - provided that the income does not have an NZ source.
- For the income not to have a NZ source it is normal for the NZ Limited Partnership's assets to solely comprise investments held outside of NZ. Such investments might consist of financial instruments, commercial buildings, farms, factories or up market residential dwellings in any jurisdiction.

Partners

- A NZ Limited Partnership is separate from its partners and has a general partner ("GP") and at least one limited partner ("LP"). Any person or company can be a partner, and there is no limit on the number of partners.
- A partner does not need to be a NZ resident. Note that a general partner can be a company with only \$1 capitalisation.

Partners

- The GP is responsible for the management and administration of the NZ Limited Partnership and is jointly and severally liable with the NZ Limited Partnership for all the debts and liabilities of the NZ Limited Partnership.
- A GP is normally a limited liability company with no significant capital of its own and is not required to make a capital contribution to the NZ Limited Partnership. The GP owes specific fiduciary obligations to the NZ Limited Partnership.

Partners

- The LP's liability is similar to that of a company shareholder in that it is limited to its capital contribution.
- A LP that participates in the day to day management may lose its limited liability status and become jointly and severally liable for the debts and liabilities of the NZ Limited Partnership.

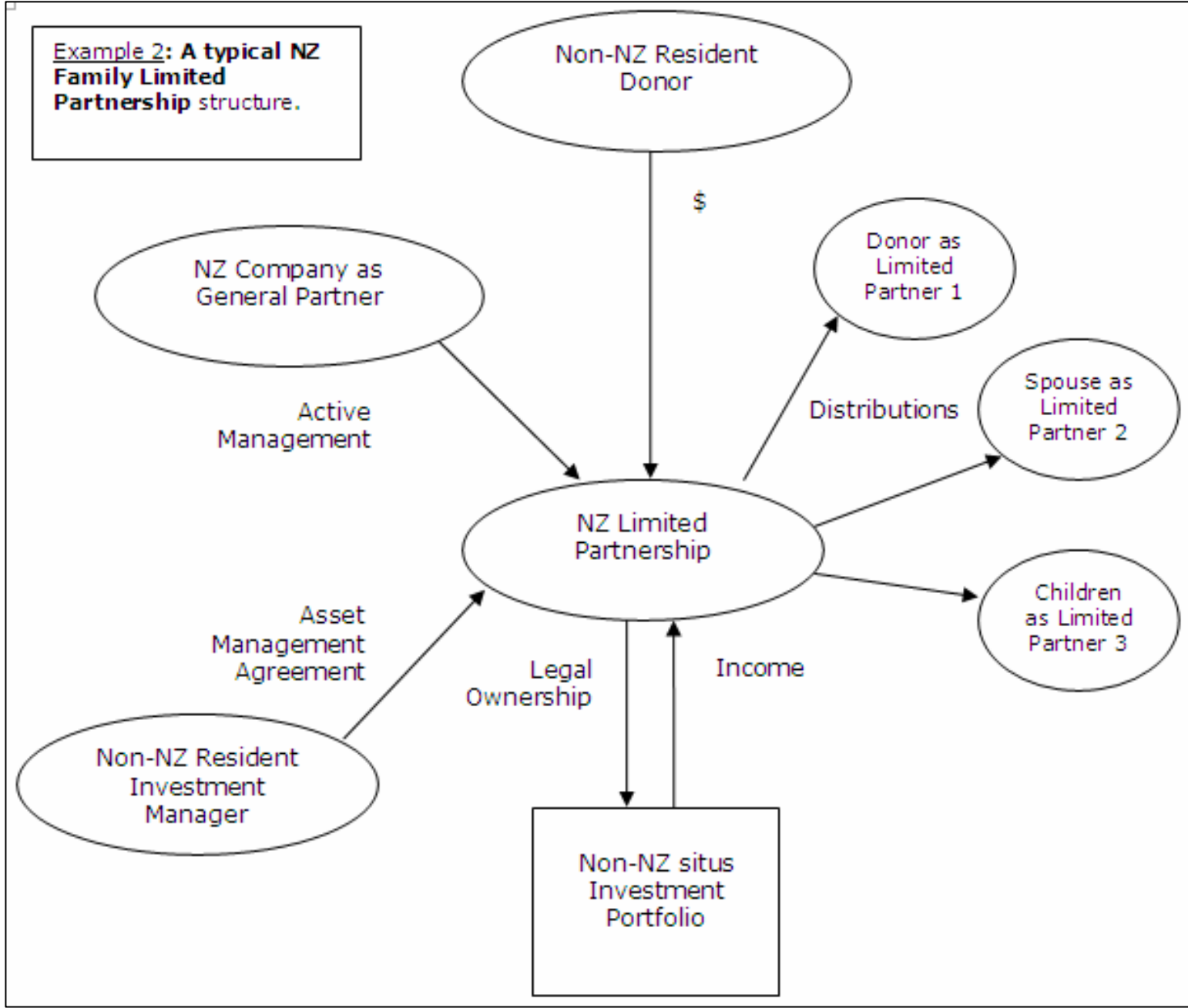
Partners

- There are, however, certain specified "safe harbour" activities in which an LP may participate without losing its limited liability.
- These activities are similar to those actions which normally require a special resolution by shareholders of a company.
- LPs do not owe fiduciary obligations unless specifically imposed by the partnership agreement.

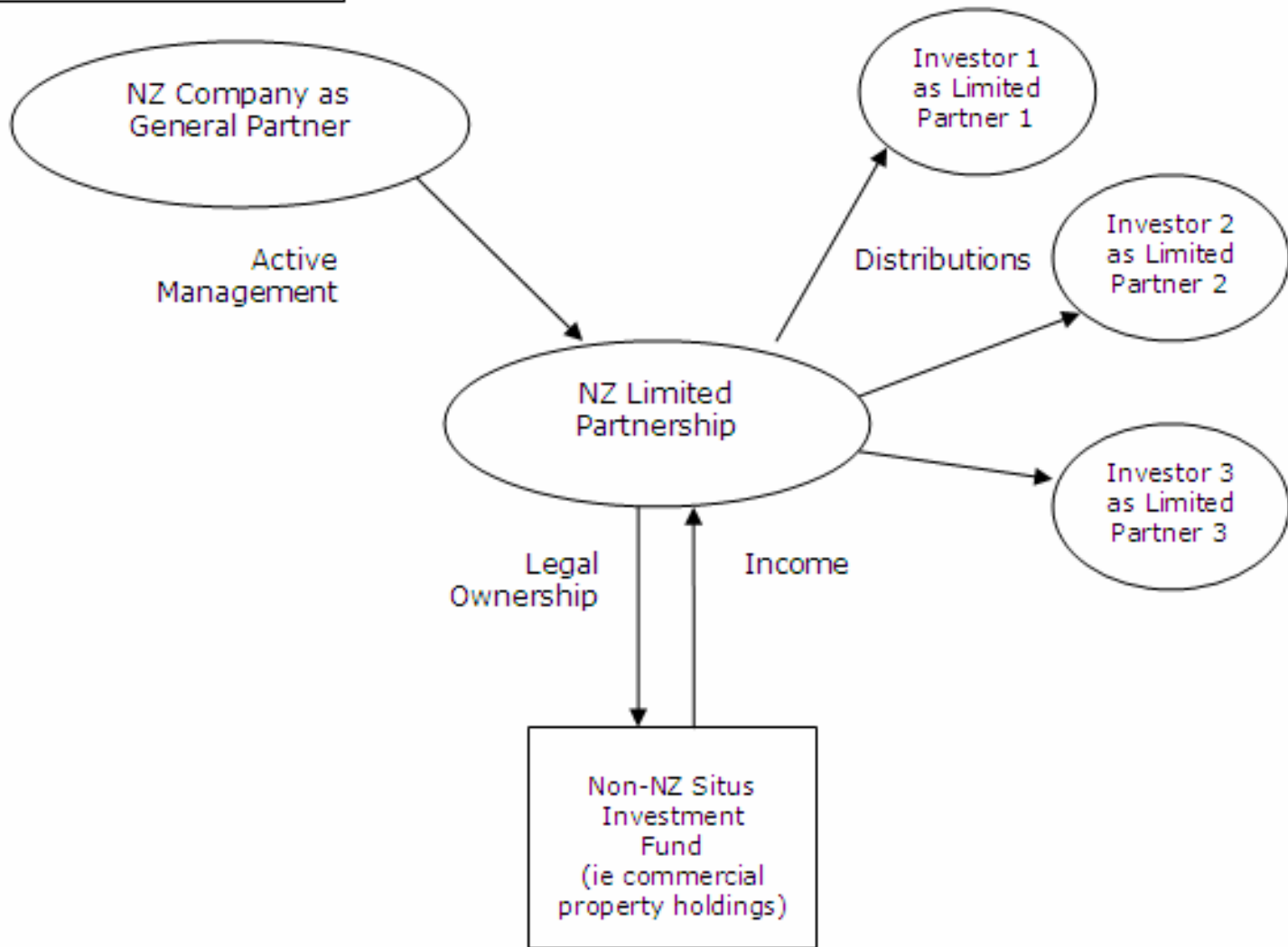
Partners

- NZ Limited Partnerships must have a written partnership agreement which is similar to a contract made between the GP and each LP. The partnership agreement is not publicly registered. The Limited Partnership does not come into existence until it is registered.
- Both the GP and the LP can contribute to the NZ Limited Partnership. Capital contributions can take any form (including services) but loans are excluded as capital contributions. Partners who have made capital contributions are entitled to receive distributions.
- Registration details (ie the Certificate of Incorporation and General Partner details) for the NZ Limited Partnership and the GP are publicly available from the Registrar of Companies. However, information about the LPs is confidential and cannot be publicly accessed.

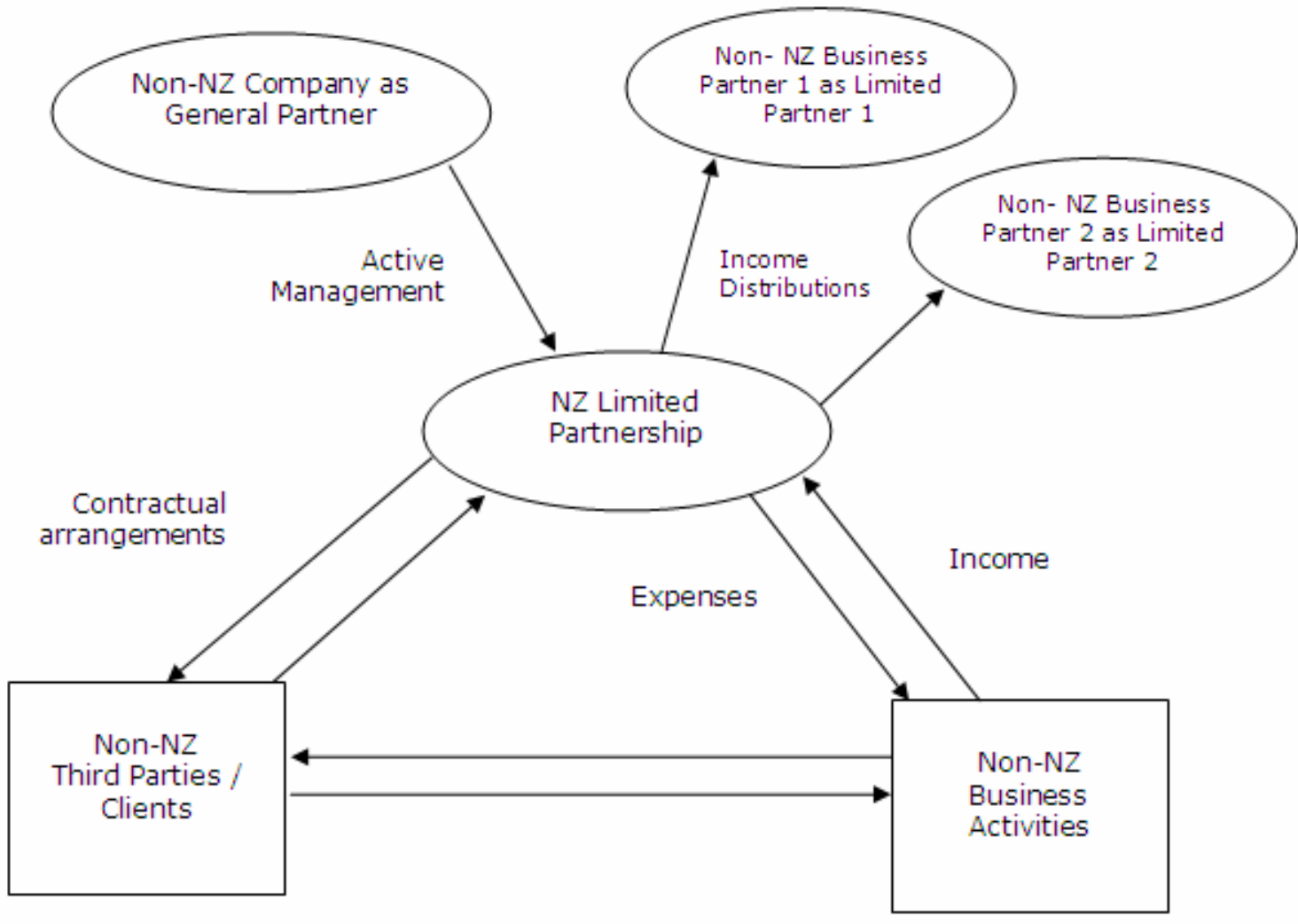
Example 2: A typical NZ Family Limited Partnership structure.



Example 3: A typical NZ Limited Partnership structure as a vehicle for a collective investment scheme



Example 4: A typical NZ Limited Partnership used as a trading entity





The “Look Through” Regime

Background

- The New Zealand Government has recently introduced a new company regime that took effect from 1 April 2011.
- Officially the new type of company is referred in the legislation as a "look through company". The name is a reference to the fiscal transparency of the entity.
- New Zealand company law is derived from English common law and statute. Historically, companies registered in New Zealand have been taxed in New Zealand on their worldwide income at the prevailing tax rate of the time.
- The company tax rate for income in New Zealand is currently set at 28%.

Basic Features

- A "look through company" will be an orthodox New Zealand limited liability company established and constituted pursuant to the Companies Act 1993.
- However, the new legislation allows companies which meet certain criteria to be treated differently for tax purposes than previously. Such companies are available for registration and use by both residents and non-residents of New Zealand.

Basic Features

- Shareholders of existing and newly established New Zealand registered companies can elect to become a "look through company". The company must:
 1. have 5 or fewer shareholders – note where it is a trust, the associated persons rule applies and therefore those that are associated are counted as one person;
 2. be New Zealand resident for tax purposes;
 3. issue only shares that have the same voting and participation rights; and
 4. have only natural persons or trustees (including corporate) as shareholders.

Basic Features

- New Zealand resident shareholders of "look through companies" will pay tax on the company's profits and use losses at their marginal tax rate.
- The highest marginal rate of income tax applicable to New Zealand resident individuals is 33%.

Basic Features

- The income, expenses, tax credits, rebates, gains and losses of a "look through company" will be passed on to its shareholders pro rata with their shareholdings in the company. This creates a fiscally transparent vehicle identical in its tax treatment to the New Zealand limited partnership. Like a limited partnership, a "look through company" retains its identity as a registered entity and keeps the benefits of limited liability and separate legal personality. The existing corporate obligations and benefits under New Zealand company law are preserved.
- 3.2.5 The look through treatment applies for income tax purposes only. There is no general capital gains tax in New Zealand nor are there any inheritance or estate taxes or stamp duty land taxes.
- 3.2.6 For NZ tax purposes only, the shareholders of the "look through company" are regarded as holding company assets directly and carrying on the activities of the company personally. Therefore, in the normal course of events, a sale of shares in a "look through company" is treated as a sale of the underlying asset.

Uses for International Wealth Structuring

- The new "look through company" regime will provide significant benefits to non-residents of New Zealand who use New Zealand vehicles for international wealth structuring purposes.
- Section BD 1(5)(c) of the Income Tax Act 2007 provides an exemption from tax in New Zealand on income derived by a non-resident provided that income does not have its source in New Zealand.
- This means that a foreign shareholder of a "look through company" that only receives foreign sourced income will not be subject to tax in New Zealand.

Uses for International Wealth Structuring

- Whilst the new regime offers most of the same tax benefits of a limited partnership it also provides the widely recognised legal form of a company and will complement the New Zealand limited partnership and "foreign" trust for international wealth structuring.
- In some cases will be used in conjunction with either or both of those vehicles rather than as an alternative.

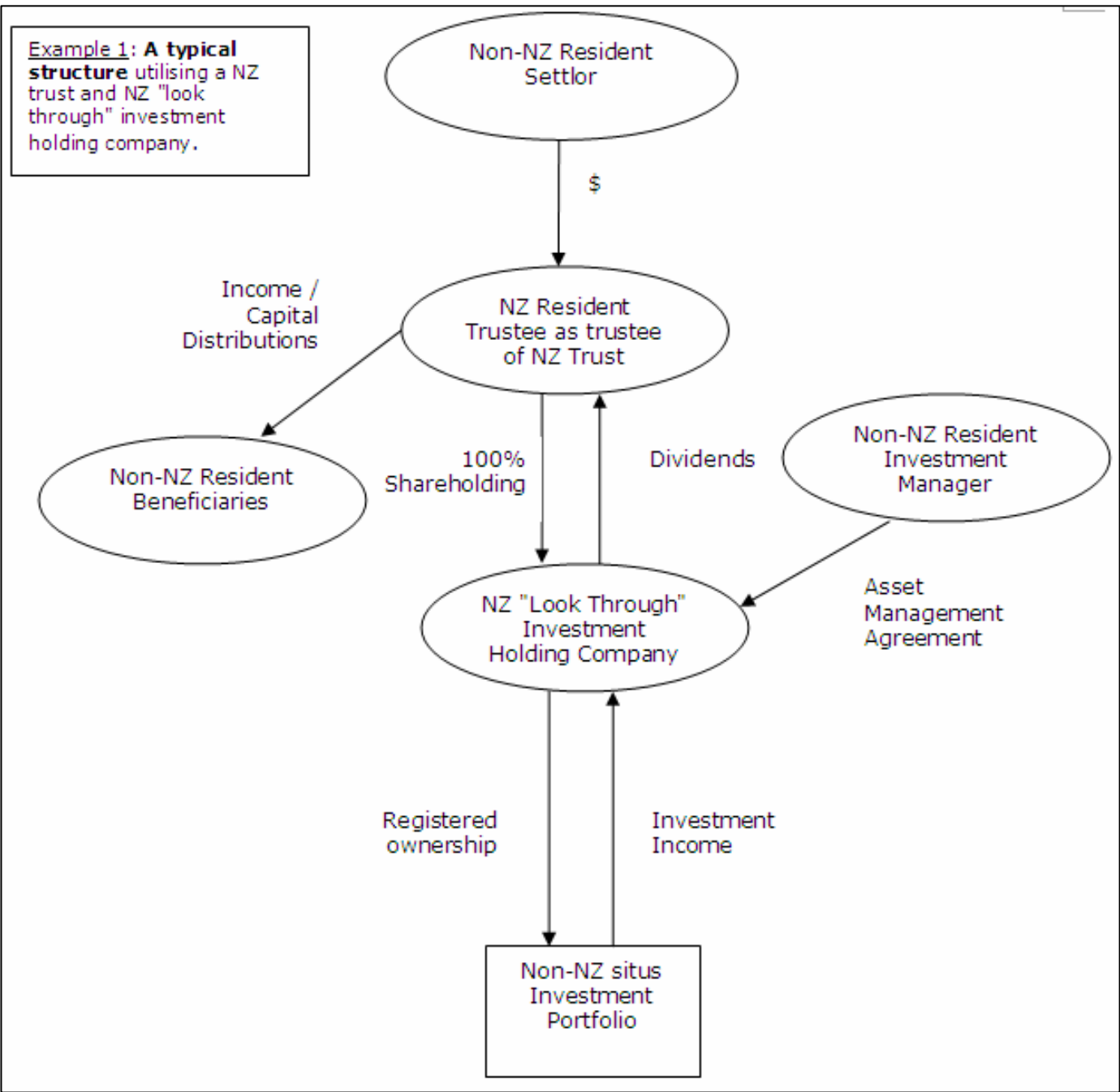
Uses for International Wealth Structuring

- For example, where the entire issued share capital of a "look through company" is owned by the trustees of a New Zealand "foreign" trust (or a Jersey, Cayman or Singapore trust) then the company could hold assets or trade or otherwise earn income outside New Zealand without any withholding for tax in New Zealand.
- Similarly, a New Zealand "look through company" could be the limited partner of a New Zealand limited partnership. Provided the limited partnership does not derive New Zealand sourced income and the "look through company" as limited partner does not have any New Zealand resident shareholders or other New Zealand sourced income then there will be no withholding for tax in New Zealand.

Uses for International Wealth Structuring

- The "look through company" regime also presents the international market with an OECD alternative to the more well known but stigmatised "offshore" companies, "international business companies" or "IBCs" provided by Jersey, British Virgin Islands, Cayman and so forth.
- In practice, a New Zealand "look through company" is more in the style of a Hong Kong Company than an IBC but the likely uses will be similar – trading, investment holding, captive insurance, introducing brokering and perhaps even closely held, closed ended collective investment funds.
- Note: where structured correctly there is no need to file accounts or audit accounts. The identity of the beneficial owner of shares where the shareholder listed is a trustee does not need to be disclosed to the Inland Revenue (see the section on foreign trusts above).

Example 1: A typical structure utilising a NZ trust and NZ "look through" investment holding company.





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