AIRA Submission

Response to Treasury Consultation Paper on increasing transparency of the beneficial ownership of Companies

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1 Introduction

The Australian Investor Relations Association (AIRA), as the peak body representing Investor Relations practitioners in Australia and New Zealand, welcomes the opportunity to respond to the consultation paper issued by Treasury in February 2017 (the **Consultation Paper**).

AIRA supports the Government's commitment to improving transparency around those who control and benefit from companies as a means of combatting illicit activities.

In response to the Consultation Paper, AIRA's main focus is to likely impact on those entities listed on the Australian Securities Exchange (**Listed Entities**), as well as other public entities.

In particular, AIRA agrees that the existing framework in place with respect to Listed Companies should operate to the exclusion of any new requirements to report on beneficial ownership.

In addition, however, the impact on non-listed companies is significant.

However, there are elements of the existing framework that could be improved as has been identified by the Consultation Paper.

AIRA has not endeavoured to answer each of the questions posed by Treasury, but rather this submission is structured based on the key themes reflecting the knowledge and experience of AIRA and the concerns of AIRA's members.

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2. Areas of primary concern

AIRA supports the notion that Listed Companies should be exempt from any new requirements to report on beneficial ownership (Q1)

Summary

There is an existing framework applicable to Listed Companies with the aim of providing transparency of ownership and control of those companies.

Imposing additional requirements on Listed Companies would unnecessarily increase the cost of compliance for those companies without providing any increase to the quality of information gathered regarding ownership and control.

Recommendation

The current framework imposed on Listed Companies in Australia is sufficient to address the primary concerns raised in the Consultation Paper with respect to transparency over those persons with ownership or controlling interests in Listed Companies.

AIRA believes some elements of this framework could be improved, for example:

Improving the definition of "relevant interest in securities" for the purposes of Chapter 6C of the Corporations Act to ensure that substance takes precedence over form; and

Addressing a number of deficiencies in the current provisions requiring compliance with tracing notices under Chapter 6C of the Corporations Act.

Discussion

As described in the Consultation Paper, Chapter 6C of the Corporations Act includes a number of mechanisms by which information regarding ownership and controlling interests in a Listed Company are collected and disclosed. These mechanisms are accurately described in the Consultation Paper and therefore we will not go into details in this Submission.

In AIRA's experience, there are some deficiencies in the operation of these Corporations Act provisions, which are discussed in the following section.

Due to the nature and scale of the ownership interests in Listed Companies, imposing additional obligations on the Listed Company to identify and report on beneficial ownership will result in significant additional compliance costs for the company without any benefit in increased transparency. This is because under both existing and the proposed changes, Listed Entities would be

entirely reliant upon the veracity and quality of information provided to them by the underlying beneficial owners in the company. In our members' experience, it is only if the underlying beneficial holders have a willingness to self-identify and report that the company will ever be in a position to have confidence with regard to their underlying beneficial ownership.

A useful comparison in this regard is the current provisions dealing with substantial holder notices. Inherent in those provisions is a recognition of the fact that the most appropriate person to identify and report on a substantial holding is the substantial holder themselves (and their associates).

Deficiencies in existing framework applicable to Listed Companies (Q2, Q35, Q36, Q37, Q38, Q39)

Summary

The definitions in the Corporations Act of "relevant interest in securities" and "associate" (for the purpose of grouping relevant interests) contain highly technical elements. This opens opportunities for ultimate beneficial holders to rely on technicalities and legal ambiguity to claim they have no disclosable relevant interest in securities.

The ability for a Listed Company to trace beneficial holders is hindered in a number of situations; ultimate beneficial owners may choose to delay and obfuscate responses to tracing notices, ignore notices, or interpret their replies in a manner which reflects their own policies or preferences rather than law.

Recommendation

It is important that those required to comply with obligations must adopt a "substance over form" approach. Otherwise, technical arguments will always be used as a means of delaying or preventing disclosure.

AIRA strongly agrees with points made in the Consultation Paper about introducing sanctions affecting relevant shares owned by beneficial owners who fail to self-identify or self-report (e.g. restrictions on voting and dividend rights). This should be extended to those beneficial owners who do not appropriately comply with tracing notices under the Corporations Act.

Discussion

Definition of "relevant interest in securities"

While the definition of "relevant interest in securities" is intended to be broad in s 608 of the Corporations Act, underlying holders of shares are in practice able to rely on technical elements of the definition to develop a legal argument

that they have no relevant interest. This often taints the accuracy and reliability of both substantial holder notices and tracing notices, and yet the company is not really in a position to take any effective action because the cost and timeliness of existing enforcement mechanisms and in a minority of circumstances of the legal ambiguity and the lack of equal knowledge about the underlying circumstances.

The effectiveness of these provisions in practice would be greatly enhanced if the framework forced the underlying shareholder to adopt a "substance over form" approach in identifying their relevant interest, at risk of ASIC being empowered to impose sanctions where it considers that such an approach has not been adopted. That is, where in the circumstances it is clear that an underlying owner has a level of control not reflected in the relevant disclosure, ASIC and the company should be ready and willing to impose temporary sanctions on relevant securities until the underlying owner provides satisfactory evidence (either reflecting the relevant interest or evidence to the contrary).

AIRA is also concerned that the current regime, which relies on the concept of "relevant interest in securities" does not inherently capture alternative forms of ownership interests, which in practice can be equally important (for example, derivatives, convertible debt securities and equity swaps). Again, this leads to less accurate and reliable information regarding the ownership and controlling interests in Listed Companies, including shares held via an offshore listing or shares held via CDI's.

Deficiencies of tracing notices

The Consultation Paper already identifies a key deficiency of the existing tracing notice provisions; that ultimate beneficial owners can delay disclosure of relevant interests by means of the structure of their holding in that company.

The key example discussed in the Consultation Paper is where direct shareholders are able to delay the identification of ultimate beneficial owners by reporting only information that is known to them (as opposed to making additional reasonable enquiries).

AIRA shares the concerns expressed in the Consultation Paper, but for the reasons highlighted above, these deficiencies need to be addressed by empowering but not imposing obligations on the Listed Company.

As indicated in other sections of the Consultation Paper (and above), this could be enforced via the imposition of certain sanctions). Should there be any deficiency in the response to a tracing notice (either by the registered member, or by another party with a relevant interest in the 'chain' of ownership), either the company or the regulator should be able to impose these sanctions on the relevant shares (we also note that the regulator should also act on request by the company in circumstances where the issuer of securities may not be in a position to impose the sanctions, either because it is not certain that the

underlying beneficial holder is in breach of the provisions or for fear of recourse from that holder when casting votes at future general meetings).

Further, a registered holder of the shares and underlying beneficial holders claiming to rely on the laws or regulations of their home jurisdiction, internal policies, self-constructed practicalities, or instructions of the beneficial holder to withhold disclosing their relevant interests to the company or the regulator in response to a tracing notice should be seen as a 'deficient' response by the recipient of the tracing notice and be exposed to the imposition of sanctions.

Where the Listed Company acts in light of a clear failure by an underlying beneficial owner to comply (for example, a tracing notice is not responded to within the permitted timeframe) it should be made clear in the legislation that the company's imposition of sanctions (such as disenfranchisement or withholding of dividends) will not expose the company to any civil liability or claim from either the registered holder or any beneficial owner.

3. Other concerns

Use of a central register (Q16, Q18)

AIRA recognises that a robust framework for the identification of ownership and controlling interests in non-Listed Companies provides for reliable and accurate of information reported on regarding Listed Companies.

In AIRA's opinion, a robust framework for other entities can simply and easily be achieved by extending the powers of s.672 to those entities.

The key deficiencies of the use of a central register are:

- Cost on companies, their shareholders and government
- Red tape
- Discourages investment and therefore wealth creation
- No increase in transparency vs 672
- Distraction of board and management away from wealth creation
- Introduces new forms of transparency avoidance
- Likelihood of significant additional adverse unintended consequences

For example – there is no evidence the UK central register model has improved transparency or confidence in markets. However it absolutely has resulted in all above deficiencies and cost.