

23 March 2017

Ms Jodi Keall
Senior advisor
Financial System Division
Department of Treasury
100 Market Street
Sydney NSW 2000

Email: beneficialownership@treasury.gov.au

Dear Ms Keall

Increasing Transparency of the Beneficial Ownership of Companies

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies. They are frequently those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC), and in listed companies they have primary responsibility to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our members have a thorough working knowledge of the operations of the markets and the needs of investors, as well as compliance with the *Corporations Act 2001* (the Act). We have drawn on their experience in our submission.

Governance Institute of Australia welcomes the opportunity to comment on *Increasing Transparency of the Beneficial Ownership of Companies* (the consultation paper) and we thank Treasury for allowing us an extension of time in which to lodge our submission. We have not responded to the detailed questions set out in the consultation paper but provide our general comments.

General comments

a) Listed companies

We note that the consultation paper summarises the existing requirements under the Act which results in the market, including the general public, being informed as to the persons who have a significant level of control or ownership of listed companies. We also note that in the UK companies which are comparable to Australian listed companies are excluded from the obligations to report on people of significant control because of other transparency requirements which apply to them already.

Australian listed companies are already subject to a disclosure regime which appears to meet the G20 objectives, namely:

- Substantial holding provisions which require the holders and associates of holders of a 'relevant interest' in voting shares to report those interests to the company and to the ASX. This relates to voting power of 5% or more in a company, held individually or when aggregated with associates' voting power. The substantial shareholder notices are publicly available.
- The requirement for a company to maintain a share register.
- The requirement of a company to maintain a register of responses to tracing notices in accordance with section 672DA of the Act. As noted in the consultation paper, the tracing notice regime requires disclosure of all relevant interests, whether or not the beneficial owner has a holding of five percent or more. Since the substantial holding provisions cover disclosures of relevant interests of 5% or more, the tracing provisions are more commonly used to ascertain the interests of those holding less than 5% of a listed company.

There are significant penalties for non-compliance with these obligations. A person who does not disclose their substantial holding or does not respond to tracing notices is liable for any loss or damage suffered as a result of their contravention (sections 671C and 672F of the Act). A company which does not correctly maintain a share register may be liable to pay a penalty of up to \$9,000, and individuals may be liable for payment of a fine or imprisonment.

In addition to the substantial holding provisions, listed companies are also subject to the Takeover provisions contained in Chapter 6 of the Act which strictly regulate acquisitions of interests exceeding 20%.

Governance Institute recommends that listed companies should be exempt from any new requirements to report on their beneficial owners in light of their existing obligations under the Act to maintain shareholder records, details of substantial holders and responses to tracing notices. This information is currently publicly available and does not need to be recorded on a central register.

b) Unlisted companies

Governance Institute notes that under the Act, companies are required to establish and maintain a register of members which amongst other things must record the specific details of the shares held by each member and whether those shares are held beneficially or not. Details of company members must be lodged with ASIC on registration of the company and proprietary companies must report to ASIC any subsequent changes to members details (with proprietary companies with more than 20 members having to inform ASIC of changes affecting the top 20 members in each class or share).

As noted in the consultation paper, companies may not be aware of the identity of their beneficial owners. We consider that beneficial owners are in the best position to provide and verify information concerning their interests. On a practical level, shareholders are unlikely to respond to an enquiry from the company requesting details of beneficial ownership unless required to do so by law. Governance Institute considers that the cost of any additional legal obligation of companies to make enquiries of their shareholders to ascertain the identity of their beneficial owners is likely to exceed any benefit which could come from the information without any corresponding requirement on the holder to comply and that any additional legal obligation to report beneficial ownership information should be imposed on the holder. This would align the obligations of holders in unlisted companies with those in the listed environment where holders and associates are required to report their interests.

Introducing increased reporting obligations for unlisted companies concerning beneficial owners will necessarily result in additional work having to be undertaken by them. Governance Institute considers that in order to increase the effectiveness of disclosures of beneficial owners and to

avoid duplication and additional work being imposed on companies, owners should be required to notify ASIC directly of interests which they hold when they reach the specified percentage. ASIC already operates a publicly available and centrally located register of company information. Governance Institute recommends that beneficial ownership details be maintained on the existing ASIC register. We consider that it is more cost effective for government to adapt the existing ASIC register and to incrementally build on that capability rather than create a new central register separate to the existing ASIC system.

In the event that obligations are imposed on unlisted companies to collect information from their shareholders concerning beneficial ownership Governance Institute recommends that:

- The obligation to make the disclosure is imposed on the party which has the interest
- That party is required to notify the company of their interest when they reach the specified percentage
- That the obligation to disclose should be limited to beneficial shareholders who are natural persons (as is the case with the UK concept of People with Significant Control)
- There is no requirement for the company to verify the information provided
- The company must then record this information on its own register and notify the information to ASIC
- This information will appear on the ASIC register
- The company's obligation to notify ASIC of beneficial ownership information arises upon registration and within 28 days of being notified of a change by a beneficial owner relating to the specified percentage.

Governance Institute would welcome further contact during the consultation process and the opportunity to be involved in further deliberations.

Yours sincerely



Steven Burrell
Chief Executive