19 December 2022

Director
Beneficial Ownership and Transparency Unit
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

By email to: BenificialOwnership@treasury.gov.au

Dear Sir/Madam,

Multinational tax integrity: Public Beneficial Ownership Register

On behalf of the Institute of Public Accountants I submit our comments on the design features for the first phase of a publicly available beneficial ownership register that the Government committed to introducing as part of its multinational tax integrity package.

I have provided our views on the 'proposed design of a first phase of the reform, in which specified unlisted entities regulated under the *Corporations Act 2001* (Corporations Act) would be required to maintain accurate, up-to-date and publicly accessible beneficial ownership registers. The relevant entities include proprietary companies, unlisted public companies, unlisted registered managed investment schemes, and unlisted corporate collective investment vehicles.'

I have also provided our view on 'proposed amendments to the substantial holding notice and tracing notice regimes in the Corporations Act, which concern beneficial ownership disclosures with respect to listed entities.'

We therefore welcome the opportunity to provide feedback and make the following comments for consideration.

We are supportive of initiatives that:

(a) encourage stronger regulatory and law enforcement responses to tax and financial crime;

(b) assist foreign investment applications;

(c) facilitate the enforcement of sanctions;

(d) broadly align Australia with international approaches to transparency of beneficial ownership information;

(e) address the tax avoidance practices of multinational enterprises; and

(f) build on existing disclosure provisions for listed entities and establish a standardised, coherent framework for the collection, verification, and disclosure of beneficial ownership information.

Nevertheless, we encourage Treasury to consider the extent to which the proposed changes strike a balance between the general public interest in disclosing the data to prevent money laundering and terrorist financing, and the beneficial owners' fundamental rights (such as personal data protection concerns and relevant legal requirements). The changes would require disclosure of the holdings of the legitimate interests of private citizens who reasonably want to maintain confidentiality about their interests. This is likely to make the entities subject to this regulation, and Australia more generally, unattractive to investors who simply do not wish to have their business interests made public. We are particularly concerned with proprietary companies (and trusts, as contemplated in the second phase of proposed changes) being required to maintain registers of beneficial ownership and for that information to be publicly available.

We strongly recommend that Treasury reconsider the burden the proposed changes would place on such companies and the impact it would have on the ability of people to not have their financial affairs open to public scrutiny. While it might be recognised that information about a person's interests in listed companies, and even in certain circumstances unlisted company and investment schemes, may be made public in certain circumstances, there is a reasonable expectation that such information will not be made publicly available in proprietary companies.

Further, whilst the proposed changes are intended to reduce tax evasion and minimise the risk of terrorism financing and money laundering, there is a risk that the introduction of public registers could increase instances of other crimes, such as identity theft, cybercrime and extortion. The regulated entities and their service providers who would be required to maintain the public registers would be subject to another data capture and disclosure requirement which would, inevitably, increase the risk of cybercrime.

Finally, we have concerns about the extent to which the proposed changes will increase the regulatory burden in the 'retail' investment market, particularly the application of the changes to proprietary companies, for whom the proposed changes would be a new and significant compliance burden, and unlisted registered managed investment schemes, which are already subject to significant regulatory obligations that could affect the long-term viability of that portion of the market.

Specifically, in relation to the questions set out in the proposals paper:

1. Definition of beneficial ownership

The concept of 'the right to exercise….significant influence or control' over an entity is contentious, and likely to lead to confusion when applied to regulated entities who are not currently subject to analogous concepts under the takeovers provision of the Corporations Act (such as unlisted registered MISs, unlisted Corporate collective investment vehicles (CCIVs) and proprietary companies). This will create a significant new compliance obligation for entities that are, presumably, unlikely to be preferred targets for sophisticated criminal syndicates.

2. Entities subject to beneficial ownership disclosure requirements

The proposals indicate that 'the Government proposes to introduce obligations on Ultimate beneficial owners to identify themselves as beneficial owners and provide relevant beneficial ownership information to regulated entities (similar to the requirements currently under the substantial holding notices regime)'. We question the extent to which entities that wish to avoid public scrutiny (whether for nefarious reasons or not) will comply with this regime, leading to widespread non-compliance. We note that the proposals have indicated that a 'reasonable steps' defence will be available to regulated entities, but the requirement for unlisted entities to trace the chain of ownership to identity the ultimate beneficial owners, particularly where they are located offshore, will nevertheless be onerous in order to satisfy any likely reasonable steps defence. Further, the possibility that entities that wish to conceal their ownership will not comply with any obligation to self-disclose has the capacity for the regime to be ineffective in achieving its purpose.

It also appears that the new regime will 'piggyback' off existing disclosure requirements in the Chapter 6C of the Corporations Act, including by extending the information required to be provided by regulated entities in substantial holder or tracing notices. Again, we note that unlisted registered MISs, unlisted CCIVs and proprietary companies are not currently subject to such provisions, so this would be a significant additional burden for them. However, the greater concern is that the provisions in Chapter 6C are simply not designed or intended for the capture and disclosure of this information. It is likely that the relevant provisions would require significant modification in order to make them effective for the purposes of capturing the beneficial ownership information proposed under these regulatory reforms. The current substantial holder regime is designed for investors to inform themselves when others may be building a stake, or acting together in circumstances which may involve a change of control, in the regulated entity.

3. Recording requirements and 4. Content and availability of beneficial ownership register

Recent cybercrime activity has demonstrated the risk to organisations of collecting and storing information about customers, investors or third parties that can be used against them by threat actors. It is inevitable that any obligation that requires regulated entities to maintain a register which records information about beneficial owners will only increase that risk. We are concerned that the very process of compiling the information, by requesting information from investors about beneficial ownership through the chain of ownership is going to expose a significant numbers of persons, as well as the regulated entities themselves, to the increased threat of having their sensitive and confidential information compromised. However, the risks of providing public access to the beneficial ownership registers could far outweigh the purported benefits of doing so, particularly in circumstances where, if used for its intended purpose, the information is likely to be actioned by regulators (ASIC and the ATO) in any event.

5. Accuracy and currency of beneficial ownership registers

It is acknowledged that many of the proposed regulated entities would currently have processes in place as a result of their compliance with anti-money laundering legislation that could be utilised as a base to develop and maintain a public register. However, those systems have been developed for a different regulatory purpose, and it is not clear how the timing and method of beneficial ownership verification requirements under the proposed regime would overlap with the existing collection and verification of customer information, particularly if the new regime adopts the existing scaffolding in Chapter 6 of the Corporations Act as its regulatory framework.

6. Enforcement and penalties

The introduction of 'restriction notices' as proposed where investors fail, whether inadvertently or otherwise, to respond to requests for information, will add an additional layer of complexity and cost to a regulatory system that is already significant burdened with both. We expect the legal mechanics that would support a system that prevents entities from dealing in their holdings would require close consideration, and imposes on the regulated entity the obligation of first issuing warning and restriction notices, and then engaging with holders that have not complied or wish to contest the notice.

Further, we reiterate the concerns raised earlier about the appropriateness of Chapter 6, and the use of substantial holding and tracing notices, as the means by which information is gathered.

We are concerned that the proposed penalties impose substantial burdens on regulated entities, and confer significant powers on ASIC, that are not commensurate with the mischief the regime is seeking to address, particularly when regulators such as the ATO have broad existing powers to obtain the information through other means.

7. Regulatory costs and benefits

The Government recognises many of the three million regulated entities would incur regulatory and compliance costs under the proposals in this paper, including to:

- undertake an initial collection of beneficial ownership information (to the extent regulated entities do not have this information already) and provide it to regulators (if necessary)
- verify and maintain currency of information on the register
- identify and add to the register details of new beneficial owners.

The regulatory burden for Australian entities, particularly financial services entities that operate in 'retail' markets, is already high by comparison to other jurisdictions around the world. We are concerned that the cost of complying with these proposed changes will be passed on to investors, or will cause the offering of existing products and services to become uneconomical.

We recommend Treasury undertake more detailed analysis of the likely cost to the regulated entities, particularly proprietary companies and the unlisted investment vehicles, and weigh it against the likelihood of a disclosure regime which is based on self-reporting by beneficial owners being effective in achieving its intended purpose.

If you would like to discuss our comments, please do not hesitate to contact me.

Yours sincerely

Tony Greco

General Manager, Technical Policy

Institute of Public Accountants