

Lifting the lid on beneficial owners of Australian companies

Written by Elizabeth Moran

24.02.2017

Key Points

- The Australian Government recently announced that it would explore options for a beneficial ownership register for companies.
- In February 2017 the Government released its consultation paper on this issue, “Increasing Transparency of the Beneficial Ownership of Companies”, which seeks views on how to increase transparency of the beneficial ownership of Australian companies to relevant authorities.
- This could lead to changes in what information Australian companies are required to disclose to relevant authorities such as ASIC.

Introduction

As part of its international obligations, and as a founding member of the Financial Action Task Force (**FATF**) Australia has committed to “...fully and effectively implementing two recommendations on transparency of the beneficial ownership of legal persons (companies) and legal arrangements (trusts)”.¹ However, a fundamental consideration is determining the test for guiding companies in identifying the beneficial owners who have the power to exert influence and control over the decisions of Australian companies, and who benefit from their financial activities.

In May 2016, the Government announced that it would explore through public consultation options for identification of beneficial ownership. Its consultation paper “Increasing Transparency of the Beneficial Ownership of Companies” (**Consultation Paper**) was released in February 2017. One of its key considerations is the creation of a beneficial ownership registry. Such a register could make it far easier for appropriate Australian authorities to identify beneficial owners of companies who may currently be involved in illicit activities such as tax evasion or money laundering. These proposed changes will also invariably lead to further compliance and disclosure requirements for Australian companies.

Why is the current definition of beneficial ownership under Australian law?

¹ Australian Government, “Increasing Transparency of the Beneficial Ownership of Companies” Consultation Paper, February 2017, p 7.

Corporations Law

The definition of “beneficial ownership” varies, and is not consistently applied in Australian law. It differs depending on the context in which it is used; for example, under the *Corporations Act 2001* (Cth) (**Corporations Act**) beneficial ownership is not defined, however this information is often surmised under the concept of “relevant interest”.² Shares held by Australian companies are either held beneficially (i.e. the legal owner of the shares derives the benefits of ownership directly) or non-beneficially. The Corporations Act requires companies to establish and maintain a register of members, which must record the members’ details³; however, while proprietary companies must record if the shares are beneficially held, the identity of the beneficial owner is not required to be recorded. Different disclosure requirements apply to beneficial owners of shares in listed companies.⁴

Anti-Money laundering regime

In a money laundering context, beneficial ownership is defined as a natural person who ultimately owns or controls a customer and/or the natural person whose behalf a transaction is being conducted. The beneficial owner of a customer is an individual who ultimately owns or controls (directly or indirectly) the customer. Ownership is made out where more than 25% of that customer is owned by the individual (unless the ML/TF risk is high).⁵ Certain reporting entities are required to take measures to verify beneficial ownership information as part of their customer due diligence requirements.

What is the Consultation Paper asking?

The Consultation Paper seeks input on the ways to increase the transparency of beneficial ownership of Australian companies. The Paper therefore asks for the public’s views on three fundamental questions:

1. What companies should be in scope?

Companies listed on the Australian Securities Exchange (**ASX**) are already subject to disclosure requirements relating to those individuals who have a significant level of control or ownership. In the UK, comparable companies are exempt from obligations to report on its beneficial owners. The Consultation Paper questions whether the existing legislative framework is sufficient to identify the beneficial owners of listed companies, and seeks views on ways in which this framework may be improved.⁶

2. What beneficial ownership information should be captured?

First, the information captured must identify the natural persons who have a controlling ownership interest in a company. This could be identified as either:

- Natural persons who control the company through ownership interests;
- Natural persons who control the company through other means (i.e. personal connections, financing of the enterprise, etc.)

² *Corporations Act 2001* (Cth) s 608, 609.

³ *Corporations Act 2001* (Cth) s 169.

⁴ *Corporations Act 2001* (Cth) ch 6C.

⁵ *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (No. 1) part 1.1.1 definition of beneficial owner.

⁶ Australian Government, “Increasing Transparency of the Beneficial Ownership of Companies” Consultation Paper, February 2017, p 11.

- Natural persons who exercise control of the company through positions held within the company.⁷

Second, once the beneficial owners are identified, the Government needs to consider what information needs to be collected. ASIC currently requires information such as the name and address of company members. Company directors require additional information such as former given and family names and the date and place of birth, as well as other directorships held in Australia.⁸

3. How and where should beneficial information be recorded?

Authorities could rely on the registers maintained by the company, which is likely to impose lower compliance costs. Alternatively, a central registry could be created which stores this information, which may enhance the veracity of the information.⁹

What's next?

The Government is currently still seeking views on how to increase the transparency of beneficial owners. The submissions it receives will respond to the key questions posed by the Consultation Paper and will no doubt frame the direction which the policy will take.

The position by the Government to require the disclosure of this information is certainly on trend with other jurisdictions across the Pacific including Vanuatu, which has [recently enacted laws requiring for the disclosure of beneficial owners of international companies](#).

We will continue to provide updates as they arise.

Contact

For more information please contact:

Elizabeth Moran
Solicitor
T +61 422 452 023
E e.moran@pln.com.au



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⁷ Australian Government, "Increasing Transparency of the Beneficial Ownership of Companies" Consultation Paper, February 2017, p 11-12.

⁸ Australian Government, "Increasing Transparency of the Beneficial Ownership of Companies" Consultation Paper, February 2017, p 13.

⁹ Australian Government, "Increasing Transparency of the Beneficial Ownership of Companies" Consultation Paper, February 2017, p 14.