

Erosion of Secrecy - The (International) Impact of Vanuatu's International Companies Amendment

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Key Points

- The *International Companies (Amendment) Act 2016* commenced in July 2016.
- It gives foreign governments' access to Vanuatu company documents where relevant in court proceedings.
- It also requires international companies to disclose details of its beneficial owners to the Vanuatu Financial Services Commission.
- Existing international companies are required to disclose to the Commission details of beneficial owners of the company within 3 months of the commencement of the Act, and are required to disclose details of any change in ownership within 3 months of the change.
- Officeholders of international companies incorporated in Vanuatu need to be aware of these changes, and how it may impact their reporting and recordkeeping obligations.

Introduction

On 7 July 2016 the *International Companies (Amendment) Act 2016* (Vanuatu) ("**Act**") commenced, changing the information international companies must provide the Vanuatu Financial Services Commission ("**Commission**"). Under the new laws, international companies must disclose details of their beneficial owners. Not all international companies incorporated in Vanuatu will be receptive to this change. The Amendment also gives foreign governments access to Vanuatu company documents where relevant in court proceedings, expanding the way organisations such as the Australian Taxation Office ("**ATO**") will be able to access information from Australian companies about their holding companies and subsidiaries.

What are the changes?

International companies must now disclose details of their beneficial owners with the Commission and must register a change of ownership within three (3) months of a change occurring.¹ The Act defines a 'beneficial owner' as a natural person who ultimately owns a share or debenture in an international company and who exercises ultimate effective control over the share or debenture even though it may be registered in the name of another entity.

¹ *International Companies (Amendment) Act 2016* (Vanuatu) ss 125(1), (5).

Because the register will hold sensitive data, the Act enshrines the confidential nature of company documents, imposing harsh penalties (including jail time) for contravention of the non-disclosure requirements.²

Company records that will be kept confidential include the shareholding in, or beneficial ownership of any shares in the company, management personnel, and assets or liabilities of the company.³

Despite the non-disclosure requirements, a court or the Commission in Vanuatu may disclose confidential information to a court of a competent jurisdiction where there is a *prima facie* case and the information would assist a conviction.⁴ The other obvious effect of all this is that all of the relevant information will be captured in one location, making it susceptible to cyber -crime and the like.

Will the Vanuatu enactment affect Australian holding companies and subsidiaries?

Traditionally, government instrumentalities have had difficulties in researching, finding, and compiling information about Australian companies and their related organisations. Instrumentalities, such as, the ATO, have needed to rely on their statutory powers within their home jurisdictions in order to have Australian companies furnish information regarding their holding companies and subsidiaries.⁵

In *ANZ Banking Group v Konza* (2012) 294 ALR 445, for example, the ATO could only request for documents that originated in a foreign jurisdiction in reliance of statutory powers granted by the *Income Tax Assessment Act 1936* (Australia) and on the fact that foreign documents of customers of the Vanuatu subsidiary were within the control (in a tax sense) of ANZ Banking Group in Australia. In that case the Australian Court ignored any obligations of confidentiality imposed on the information ANZ Banking Group "held" concerning customers of its Vanuatu subsidiary, reinforcing the primacy of Australian law in Australian courts.⁶ However, the ATO and the Australian courts could not access information solely held by the Vanuatu subsidiary.

The Act changes this completely so far as it relates to information regarding the foreign subsidiary itself. Australian courts can now lodge applications with the Vanuatu Commission holding information about Vanuatu subsidiaries of Australian companies so long as there is a *prima facie* case and if the information would assist a conviction in criminal or civil proceedings.⁷ This means that not only would the Australian government and its instrumentalities be able to compel the Vanuatu government (via the Vanuatu Commission) to release information regarding the beneficial owners of companies incorporated in Vanuatu, it would be able to access all information in one place regardless of whether the information was directly held in Australia by a holding company or subsidiary.

This latest move is one of a number of moves over a long period where secrecy and confidentiality in offshore financial centres has been eroded. It arguably started with the imposition of a requirement on 'shell banks' for a physical presence in the jurisdiction of incorporation, and the journey towards the breakdown of any form of secrecy in relation to any type of offshore entity is now almost complete. The Pacific Legal Network and PLN Advisory has extensive experience with these types of issues

² *International Companies (Amendment) Act 2016* (Vanuatu) ss 125A(3)-(5).

³ *International Companies (Amendment) Act 2016* (Vanuatu) s 125A.

⁴ *International Companies (Amendment) Act 2016* (Vanuatu) ss 125A(6)(a), (8).

⁵ *ANZ Banking Group v Konza* (2012) 294 ALR 445.

⁶ *ANZ Banking Group v Konza* (2012) 294 ALR 445 at 461 per Kenny, Edmonds and Robertson JJ.

⁷ *International Companies (Amendment) Act 2016* (Vanuatu) ss 125A(8).

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across the Pacific. Whilst we take the view that there often remains a legitimate reason for the use of an international company in any number of commercial transactions (whether it be as a look-through intermediate holding company, or as a receptacle for intellectual property), the challenge will be for the Pacific offshore finance centres to continue to adjust to the latest movements imposed on them and to justify their continued existence, in any form.

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