

3 January 2023

Beneficial Ownership and Transparency Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

From: Roger Wallis

[REDACTED]

Email: roger.wallis@chapmantripp.com

Ref: 100222216/9657017.1

by email beneficialownership@treasury.gov.au

BENEFICIAL OWNERSHIP CONSULTATION: NZ COMPANY LISTED ON ASX LACUNA

- 1 The Australian Treasury's Consultation Paper: *Multinational tax integrity: Public Beneficial Ownership Register* dated November 2022 (*Consultation Paper*) has recently been drawn to my attention.
- 2 The purpose of this letter is to highlight a lacuna in the current application of the Corporations Act 2001 (*Act*) to identification of beneficial ownership in certain entities listed by ASX Limited (and other prescribed financial market operators in Australia), and to suggest a reform to close that lacuna.

The Lacuna

- 3 Pages 5 to 7 of the Consultation Paper seek to describe current requirements of the Act for the disclosure of beneficial ownership through the substantial holding notice and tracing regimes in Part 6C the Act.
- 4 However the description on page 5 of the Consultation Paper (also reflected in the following Box 1.1) incorrectly states that "Australian corporations law currently requires *entities* listed on a prescribed Australian financial market to collect and disclose beneficial ownership information." (emphasis added).
- 5 In fact the substantial holding notice and tracing regimes in Part 6C of the Act generally only apply to positions in a "listed company" or a "listed registered managed investment scheme".
- 6 The definition of "company" in section 9 of the Act is limited to a company registered under the Act. Likewise, the definition of a "registered managed investment scheme" is limited to a scheme registered under s 601EB of the Act.
- 7 While section 671A of the Act extends Part 6C to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia, importantly it does not extend to bodies listed on a prescribed financial market operated in Australia that are incorporated or formed outside Australia.

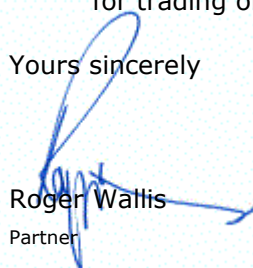


- 8 There are currently 65 companies incorporated in New Zealand that are listed by ASX Limited¹. 21 of those entities have their primary listing only on ASX. Because Part 6CA is limited to companies incorporated or formed in Australia, none of these New Zealand companies are subject to Part 6C.
- 9 Around 44 of the New Zealand entities currently also have a primary listed on the NZX Main Board in New Zealand. As such, persons with a substantial holding in those entities are required to comply with subpart 5 of Part 5 of the New Zealand Financial Markets Conduct Act 2013 (*FMCA*), which is broadly similar to Part 6C. In other words, the around 44 companies that have a primary listing on the NZX Main Board (that are also listed by ASX Limited) need to comply with similar New Zealand law disclosure obligations even though no Australian law obligation applies.
- 10 Importantly, the FMCA does not limit its application to entities incorporated or formed in New Zealand. Rather regulation 144 of the Financial Markets Conduct Regulations 2014 exempts persons from having to comply with New Zealand substantial holding disclosure regulations for listed entities not incorporated or established under New Zealand law only if they have a secondary listing by a market operator licensed in New Zealand and the person is subject to “overseas substantial holding disclosure requirements” An “overseas substantial holding disclosure requirements” is defined, in relation to a financial product market in an overseas jurisdiction, as requirements (whether under the market’s rules or under the law of the overseas jurisdiction) for persons who have significant holdings of financial products approved for trading on the market to disclose those holdings to the market.”
- 11 While we are not familiar with the detail of the laws in their place of establishment for the 120 other entities listed by ASX incorporated outside Australia, we expect a large number of them are not subject to any similar regime to Part 6C of the Act (and, for the same reasons noted above, Part 6C of the Act does not apply to them).

Suggested reform

- 12 It is respectfully suggested that, when finalising policy outcomes from the Consultation Paper, the Australian Treasury recommend closing the lacuna discussed in this note by extending that application of Part 6C of the Act to entities incorporated or formed outside Australia and listed on a prescribed financial market operated in Australia, except where the Australian listing is only a secondary listing and the entity has its primary listing in an overseas jurisdiction that has equivalent requirements (whether under the market’s rules or under the law of the overseas jurisdiction) for persons who have significant holdings of financial products approved for trading on the market to disclose those holdings to the market.

Yours sincerely



Roger Wallis
Partner

¹ See <https://www2.asx.com.au/listings/why-list-on-asx/international-companies>. In addition as at 9 November 2022 according to ASX, ASX listed 51 companies formed in the USA, 19 formed in Israel, 19 formed in Singapore, 16 formed in Canada, 13 formed in the UK, and 2 formed in Ireland.