To: MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

On: Discussion Document – Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships

3 August 2018

INTRODUCTION

1 The Ministry of Business, Innovation and Employment (*MBIE*) has sought written submissions on the Discussion Document "Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships" (the *Discussion Document*).

This submission is from Chapman Tripp.

2 We have no objection to our submission being published.

3 We would be happy to discuss with MBIE any of the comments we have made.

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ABOUT CHAPMAN TRIPP

4 Chapman Tripp is a leading law firm with a strong practice in commercial and corporate law and with offices in Auckland, Wellington and Christchurch.

5 The matters covered by the Discussion Document are of direct interest to us as legal practitioners and to our clients.

OUR RESPONSE

6 We set out below our answers to the specific questions asked in the Discussion Document.

7 The numbering used in the balance of this submission reflects the numbering used in the Discussion Document.

Responses to MBIE questions

1 **Do you agree with the nature of the problem? Do you have any views on the size of the problem? Do you have any evidence to support these views?**

Summary – beneficial ownership register is disproportionate response to any potential issue

We consider that a beneficial ownership register is a disproportionate response in the New Zealand context which will impose unnecessary costs on law abiding businesses. It is the classic sledgehammer to crack a nut.

It will put an additional burden on persons wanting to establish a company or limited partnership in New Zealand, the vast majority of whom will have legitimate intentions.

It is important to ensure that New Zealand registration procedures are not misused. But it is also important to protect New Zealand's ranking by the World Bank as first of 189 countries for ease of doing business and for starting a new business.

In this regard, we would urge that listed issuers, and their shareholders, be exempted from any new requirements as they are already subject to the extensive disclosure obligations in the Financial Markets Conduct Act 2013.

There are many legitimate reasons for using beneficial ownership structures, including privacy and commercial sensitivity, and it is not appropriate that these uses should be tested by public scrutiny.

A public register will:

- remove the ability for people to use legal and considered corporate structuring to keep their affairs out of the public domain, and
- dramatically alter the confidential nature of limited partnerships for investors.

These costs will be incurred for little benefit in our view, for two reasons.

One, we do not believe that there is a pervasive misuse of companies and limited partnerships for criminal activity in New Zealand.

We note that the Discussion Document can offer no information on how much of the estimated $1.35 billion generated from fraud and illegal drugs for laundering in New Zealand each year is laundered through corporate structures.

We suspect the proportion is very small and that the headline cases of SP Trading Limited (*SP Trading*) and Tormex Limited (*Tormex*) are by their nature extreme examples.

Two, partly as a result of SP Trading and Tomex, a number of policy changes have already been implemented which will deter misconduct.

Chief among these is the Anti Money Laundering and Countering the Financing of Terrorism (*AML/CFT*) regime, which has now been extended to lawyers and accountants.

Other initiatives include:

- the introduction of resident director and general partner requirements, and
- a focus by the Companies Office on verifying information in relation to limited partnerships with overseas limited partners, including identity verification.

Together these reforms have added rigour to the incorporation and registration process which has likely introduced a layer of deterrence to criminals without deterring legitimate use of New Zealand companies and limited partnerships.

If there is to be any further intervention, it should be limited in scope, modelled on the AML/CFT regime with the information not being made public, and targeted to risk. Risk factors identified by MBIE are: no IRD number or New Zealand bank account, no New Zealand presence, and engagement by offshore parties/businesses.

2 **What do you think are the benefits from increased transparency of beneficial ownership information?**

We acknowledge that greater transparency of beneficial ownership information may support New Zealand's AML/CFT enforcement and help New Zealand better meet developing international standards.

However, these potential benefits are subject to two assumptions, both of which are arguable. They are that:

- the information supplied will be true and accurate in all cases, and
- the changes are proportionate to the level of risk posed by the current regime.

We do not think, even in the face of a public beneficial ownership register, that persons intending to use companies and limited partnerships for nefarious purposes would supply true information.

And we do not think, for reasons discussed above, that the changes are proportionate to the risks.

3 **Do you have any information on your organisation's current compliance costs to supply or collect beneficial ownership information?**

Do you think your compliance costs would increase, decrease or stay the same under the different options? Would the change be significant?

The costs of implementing a regime of this kind should not be underestimated. Chapman Tripp has incurred significant cost in the infrastructure changes needed to support our response to the AML/CFT law change and reporting obligations. Necessarily, some of these costs will need to be passed on to clients not realistically at risk of AML/CFT misconduct.

The same outcome would occur with implementation of a beneficial ownership register – the costs of requiring all corporate entities to obtain the necessary information and maintain its accuracy will be significant for the relatively few occasions where that information might serve a useful purpose.

4	**What impact do you think the options would have on businesses deciding whether to register as a company or limited partnership?**	*Option 3* A public beneficial ownership register (Option 3) will significantly reduce the ease of doing business in New Zealand and undermine the use of long-established corporate entity structures to legitimately protect confidentiality and privacy and to provide the commercial sensitivity attached to some transactions. Option 3 would erode a key tenet of the limited partnership regime, such that limited partnerships would no longer be fit for the purpose for which they were introduced. It would also impose additional compliance costs on listed issuers, which are already subject to the extensive disclosure obligations in the Financial Markets Conduct Act 2013. Protection of confidentiality under the Limited Partnerships Act 2008 was deliberate, to provide an internationally recognised business structure similar to limited partnerships in use in overseas jurisdictions. The Commerce Committee was attentive to this point, stating that: > *"We understand that the policy intent of the bill is to encourage investment in the New Zealand capital venture market. We are concerned that potential investors might be discouraged from investing in a limited partnership if their personal details were to be made public. Our recommended amendment to clause 99 [now section 115 of the Limited Partnerships Act 2008] would be* consistent *with comparable regimes in some overseas jurisdictions, where this information is kept confidential".* *Less impact caused by Options 1 and 2* Because under Options 1 and 2, the beneficial ownership information would not be made public, the disincentive on genuine businesses to incorporate or register a limited partnership in New Zealand would be less severe. But Option 2 would impose a significant compliance burden on the Registrar to establish and maintain a record of beneficial ownership. Legislative change would also be required to ensure the information was not capable of release under Official Information Act requests.
5	**Do you have any comments on our preliminary assessment of the options?**	We broadly agree with MBIE's preliminary assessment of each of the options with the exception that we are strongly of the view that Option 1 should be assessed for compliance with *current* international standards (in effect, against the status quo), rather than against some possible and as yet unknown future standard.
6	**What is your preferred option?**	We are strongly of the view that the existing regime is sufficient. The investigative powers of the Registrar, the Police and the Serious Fraud Office, coupled with the AML regulatory framework, which now includes lawyers and accountants, provide frontline protection against the misuse of companies and limited partnerships. The comments below need to be read in that context.

Where a change is required, then we suggest that, initially, further investigation into Option 1 be considered.

This option is preferred over Option 2 because it is less intrusive and it complements the Registrar's power to identity the ultimate controllers of a company or limited partnership without dramatically disrupting incorporation processes or the nature of limited partnerships.

Option 3, requiring public access to beneficial ownership information, goes beyond what is required to bring New Zealand into line with international standards. FATF recommendation 24, for example, recommends only that the information be accessed in a "timely fashion by competent authorities".

If Option 2 is to be pursued, an optimal result would:

- maintain the confidentiality of beneficial ownership information and exclude it from the application of the Official Information Act, and
- specify that the obligation to update beneficial information will arise when the Company or Limited Partnership becomes aware of a change and, if a proactive updating process is required, at the time of each Annual Return.

7 **What are your views on who should be captured as a beneficial owner of a corporate entity?**

While we strongly disagree with all three options, where any of the proposed options are to be implemented, the scope of investigation should be limited to those with *beneficial ownership interests* (including those people acting on behalf of or controlling those beneficial owners) and the threshold for triggering beneficial ownership should be consistent with the AML/CFT legislation (more than 25% ownership).

Directors and senior managers should be excluded from the regime on the basis that those persons are, in the case of directors, already recorded or otherwise are contactable via the corporate entity itself.

Ensuring consistency between the systems will limit the risk of misinterpretation and avoid duplication of administrative effort.

Where there are no persons who meet the prescribed threshold for beneficial ownership, we agree that the entity be required to make a declaration to that effect.

8 **What information do you think should be collected about beneficial owners?**

While we strongly disagree with all three options, where change is implemented we agree with the list set out in the Discussion Document as it is broadly consistent with the sort of information that would be collected when a corporate entity is conducting AML/CFT due diligence.

9	**What information about beneficial owners do you think should not be publicly available, and in what circumstances?**	Information about beneficial owners should not be required to be collected or be made publicly available. Where beneficial ownership collection is required, any publication of that information should be limited to the full legal name and address for service of the beneficial owner. This is consistent with the approach being proposed in relation to directors (and shareholders) regarding residential addresses on the Companies Register. Keeping the remaining information off a public register does not detract from the desired transparency objectives. Instead, it provides an ongoing level of privacy and confidentiality for those using beneficial ownership structures for legitimate purposes. As noted earlier in this submission, all information that is not published should not be capable of release under the Official Information Act.
10	**What are your thoughts on the obligations that should be placed on beneficial owners? Do you have any views on how these obligations should be enforced?**	While we strongly disagree with the changes proposed, where change is implemented we agree with the international trend that an obligation should be placed on beneficial owners to: • respond to requests for information about their beneficial owner status • proactively inform the corporate entity when becoming a beneficial owner or of any changes relevant to their status as a beneficial owner, including contact details. Beneficial ownership information and/or details as to nominee status could be provided (confidentially) as part of the director and shareholder consent process. We suggest that enforcement of these obligations via criminal sanctions or by restricting the rights associated with the beneficial owner's shares (similar to the approach taken in the United Kingdom) is out of all proportion to the risk the beneficial ownership register is intended to mitigate.
11	**When do you think corporate entities should update the beneficial ownership information that they hold?**	We strongly disagree with all three options. However, where Corporate entities are required to hold beneficial ownership information, they should have an obligation to update that information only: • when they become aware of a change, or • when compiling their Annual Returns. This ensures beneficial ownership is updated at least annually without imposing an excessive investigative burden or cost on corporate entities. Allowing a 20 working day timeframe for corporate entities to update beneficial ownership information once they become aware of a change would align with existing obligations (for example changes in directors).

12	**What are your views on the enforcement mechanisms that should be available to the Registrar?**	The current suite of enforcement powers identified in the Discussion Document is sufficient. Additional enforcement mechanisms are not required.

13	**Do you think there are any types of corporate entities that should be excluded from the options?**	In our view, the existing regime is sufficient and no changes of the type referred to in any of options 1, 2 or 3 are necessary. however, where changes are made:
		• publicly listed companies should be excluded from these obligations for the reasons discussed above
		• corporate entities which are:
		  • covered by the reporting requirements of AML/CFT
		  • have a New Zealand bank account or IRD number, and/or
		  • have been incorporated with the assistance of a law firm or accounting firm
		should also be excluded.
		Finally, for the reasons set out earlier in this submission Limited Partnerships should be excluded from any public beneficial ownership register.

14	**What are your thoughts on how frequently, and in what circumstances, the registers should be updated?**	Where a register is required, as discussed in response to question 11, we consider that the register should be updated within 20 working days of corporate entities becoming aware of a change in their beneficial information or a new beneficial owner being identified. This would maintain consistency with current procedures. Updates with Annual Return filings could also be adopted.
15	**What are your views on what verification should be undertaken?**	Where changes are required, we agree that the Companies Office should undertake targeted, risk based verification of information provided to it. The Companies Office has a Registries Integrity Team which conducts targeted due diligence on behalf of the Registrar into persons wishing to incorporate a company or register a limited partnership. A similar level of verification could be performed in relation to beneficial ownership. Depending on the responses given, further and more detailed scrutiny may need to be conducted.
16	**What are your views on having a unique identification number for beneficial owners?**	Where changes are required, we can see value in this. It will ensure consistency with the proposed Director Identification Number, while also allowing a level of confidentiality and protection for those using beneficial ownership structures legitimately.

17	**Do you have any views on whether any changes are needed to the requirements for company share registers?**	We strongly disagree with all three options. However, where corporate entities are required to hold beneficial ownership information, the only changes to the requirement for company share registers would be to identify whether: • the shareholder was holding the shares legally or beneficially (or both), or • a director is a nominee.
18	**Are there any other factors that MBIE should consider?**	Where any of the options are adopted (and in our view, the status quo should be maintained), a significant transition time should be allowed for existing companies and limited partnerships to come into line with the new regime. We suggest at least 12 to 24 months, coinciding with the first annual return after that period.
19	**Do you have any thoughts on any additional measures that could be taken to combat the misuse of corporate entities?**	We are not convinced that the changes that have already been made to the law will not provide an effective solution, meaning that no further change is necessary. The only rationale advanced in the Discussion Document for the regulators and other agencies who already have the power to require beneficial ownership information has been that they do not wish to show their hand in making such request. However, such agencies do have (in the case of the Serious Fraud Office) the power to impose secrecy and confidentiality obligations. Correspondingly, the expanded reach of the AML/CFT regime to a significant number of additional professional advisers and other reporting entities has only just, or is about to, commence. That regime would seem to be a more direct way to monitor the situation the proposals seek to address.
20	**Are there legitimate purposes for using a nominee director? What would the implications be if nominee directors were expressly prohibited?**	Yes, frequently in our experience. For example directors might want to appoint an alternate to attend meetings where they are not practically able to. Nominee directors might be employed to enable legitimate commercial activity for example, allowing large businesses to acquire sites for expansion without leaving themselves exposed to commercial prejudice or unrealistic price expectations from vendors.
21	**Do you have any information about problems with companies or limited partnerships on the overseas registers?**	Not in our experience.
22	**Do you think there should be obligations on companies and limited partnerships on the overseas registers to provide information about their beneficial owners?**	We consider that these obligations should follow the AML/CFT procedures and calibrate the level of information required to the presence of risk factors.

23	**Do you have any information about problems related to TCSPs?**	This is not a core part of our practice so any information we have is anecdotal and our understanding is that such providers are already subject to AML/CFT obligations and oversight by relevant regulators.
24	**Are there any other areas of concern?**	Yes. Beneficial ownership structures are not, in and of themselves, proof of nefarious intent. We have serious concerns that a public beneficial ownership register will undermine the many legitimate purposes for using nominee directors (as discussed in response to question 20), nominee shareholders and limited partnership structures. Legitimate reasons for nominee shareholding structures or limited partnerships include: • the desire for investors to avoid the glare of publicity, which can arise from being identifiable as wealthy, or the owner of a particular asset, and • the need to avoid commercial prejudice or unrealistic price expectations from vendors. We are also concerned that the proposed changes may give rise to a real risk of non-compliance. Where this is the case, we question the policy rationale for a legislative amendment with which large numbers are not going to comply.

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