

14 August 2018

Business Law
Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington

Email: corporate.law@mbie.govt.nz

Increasing the transparency of the beneficial ownership of New Zealand companies and limited partnerships

The Institute of Directors (IoD) appreciates the opportunity to comment on the Ministry of Business, Innovation & Employment's (MBIE) [discussion document](#) *Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships*. The document mainly focuses on measures to improve the transparency of beneficial ownership of companies and limited partnerships in New Zealand. This includes exploring the establishment of a public register of beneficial ownership information. Other measures to combat misuse of companies and limited partnerships are also considered.

Summary of submission

The IoD is supportive of measures in New Zealand to combat the misuse of corporate entities by criminals, and recognises the importance of law enforcement agencies being able to access beneficial ownership information of corporate entities. However, we consider a public beneficial ownership register is not a proportionate and appropriate response to MBIE's concerns, including for the following reasons:

- New Zealand has already implemented a number of changes aimed at addressing the misuse of entities and these should be given time to embed
- the extent to which corporate entities related to New Zealand are misused by criminals is unclear
- we are concerned that compliant citizens will bear the burden of a public register
- a beneficial ownership register for companies and limited partnerships will be ineffective without the inclusion of trusts and may ultimately lead to less transparency
- commercial confidentiality and privacy of individuals will be impacted and this could also affect New Zealand's ability to attract foreign investment.

In the event that MBIE does proceed with beneficial ownership measures, we consider an option of allowing corporate entities to hold beneficial ownership information and disclose it to the Registrar of Companies on request would be preferable. Requirements could be tailored to certain entities based on risk (eg listed companies could be excluded because they already have high levels of disclosure).

We have commented on the use of 'nominee directors' and also the issue of overseas banned directors acting as directors in New Zealand.

Notwithstanding our comments here, the IoD may make further and broader comment as the review progresses.

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of over 8,700 members drawn from listed issuers,

large private organisations, small and medium enterprises, state sector organisations, not-for-profits and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Background

Criminals can misuse corporate entities, especially through complex ownership structures, to hide their assets and activities. In some circumstances, law enforcement agencies can find it difficult to identify people behind a corporate entity and hold them to account. It is important that agencies have access to appropriate information to detect and deter crime.

The misuse of corporate entities is an international problem and requires collective action. In 2012, the Financial Action Task Force (FATF), an inter-governmental body of which New Zealand is a member, developed recommendations for countries to combat money laundering and terrorist financing. A key recommendation was that countries should ensure adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.

A 'beneficial owner' essentially means a natural person who ultimately owns or exercises effective control over a corporate entity (as distinct from the legal owner of the entity which may be another entity for example).

In 2016 at the London Anti-Corruption Summit, New Zealand said it would explore the establishment of a public central register of company beneficial ownership information. MBIE's consultation considers this and other matters relating to the misuse of companies and limited partnerships. Many other countries are also looking at ways to improve the transparency of the beneficial ownership of their corporate entities to help combat misuse.

New Zealand has already taken action to combat the misuse of entities including by:

- extending the anti-money laundering and countering the financing of terrorism regime to cover more businesses (who need to be able to identify the beneficial owner of a customer to make reliable estimates about the level of money laundering and terrorist financing risk associated with that customer)
- introducing a residency requirement for New Zealand company directors and the general partners of New Zealand limited partnerships
- extending the investigation powers of the Registrar of Companies.

The discussion paper relates to companies and limited partnerships only, and not trusts.

Options for increasing the transparency of beneficial ownership

MBIE has set out the following options to address the transparency of beneficial ownership, with a preference for option three:

1. **Corporate entities to hold information:** Corporate entities would be required to hold up-to-date information about their beneficial owners and only have to provide this information to the Registrar when requested.
2. **Register with restricted access:** Corporate entities would be required to provide information about their beneficial owners and this information would be included on a register that is not publicly available (the Registrar would have access and would be able to share information with law enforcement agencies).
3. **Public register:** Corporate entities would be required to provide information about their beneficial owners and this information would be publicly available on a register.

General comments

The IoD is supportive of measures in New Zealand to combat the misuse of companies and other entities by criminals, and recognises the importance of law enforcement agencies being able to access beneficial ownership information of corporate entities.

New Zealand is currently ranked first in the World Bank's *Doing Business* rankings (in the categories of *ease of doing business* and *starting a business*). It is essential that we protect this and our ability to attract foreign capital. New Zealand is also ranked first in the world for low levels of corruption in Transparency International's 2017 Corruption Perceptions Index and we should strive to maintain our position.

We believe MBIE's preferred option of creating a public beneficial ownership register would be a significant change for New Zealand and we have highlighted some concerns including:

- the extent to which corporate entities related to New Zealand are misused by criminals is unclear from the discussion document
- New Zealand has implemented a number of changes aimed at addressing the misuse of entities, including recently extending the anti-money laundering and countering of financial terrorism regime. Some of these changes will be effective in their intent and should be given time to embed
- there will be compliance costs for organisations and private individuals, and administrative costs for government (which MBIE says may be passed on to entities through the annual return or registration fees). We are concerned that compliant citizens will bear the burden of a public register
- a beneficial ownership register for companies and limited partnerships will be ineffective without the inclusion of trusts given the extent of their use in New Zealand and may ultimately lead to less transparency
- commercial confidentiality and privacy of individuals will be impacted and this could also affect New Zealand's ability to attract foreign capital (especially foreign private equity and venture capital)
- the suggested changes would appear to undermine the limited partnerships regime, a key purpose of which is confidentiality of limited partners.

IoD position

On balance, we consider a public beneficial ownership register is not a proportionate and appropriate response. In the event that MBIE does proceed with beneficial ownership measures, we consider an option of allowing corporate entities to hold beneficial ownership information and disclose it to the Registrar of Companies on request would be preferable. Requirements could be tailored to certain entities based on risk (eg listed companies could be excluded because they already have high levels of disclosure). We encourage MBIE to carefully evaluate the likely impact of any new measures (including costs and benefits) and whether changes will actually help bring an end to most of the criminal behaviour in misusing corporate entities in New Zealand.

Nominee directors

MBIE has asked if there are legitimate purposes for using a 'nominee director' and what the implications would be if they were prohibited. MBIE states that they understand a nominee director "to mean someone who has been appointed as a director of a company but who acts on behalf of another person or organisation". The use of nominees can be a way for criminals to distance themselves from the entities they control as a way of hiding their assets and activities.

There are many directors who are 'nominated' for their role by another party and from then on act entirely properly. However, there are other directors who are appointed in name only, for example a person appointed solely to meet the resident director requirement under the Companies Act 1993

(sometimes referred to as 'dummy' or 'front' directors). We can understand why MBIE is concerned with these directors who do not exercise governance responsibilities and the IoD is committed to raising standards for directors.

We note that the term 'nominee director' is not recognised under the Companies Act 1993. All registered directors are the same for the purposes of the Companies Act 1993 in New Zealand, irrespective of the title, and are subject to director duties. We anticipate that addressing issues with dummy or front directors may not be straightforward and urge careful consideration around potential reforms in this area.

Overseas banned directors

Although not mentioned in the discussion document, we understand that MBIE is considering the position of foreign directors who have been banned from acting as directors overseas and whether they should also be prohibited from being a director of a New Zealand company.

As a general principle, we believe it is *inappropriate* for a director who has been banned overseas and who would have been banned from being a director under New Zealand law to still be entitled to be a director here. Some remedies already exist under the Companies Act 1993 and associated regulations, for example banned Australian directors are disqualified from being directors in New Zealand. We note that an automatic disqualification may not be appropriate in all cases, given the differences that exist between regimes.

The IoD is committed to raising the standards of governance in New Zealand and we would appreciate the opportunity to engage with MBIE on issues affecting directors, including in relation to nominee directors and overseas banned directors.

Thank you for the opportunity to comment on behalf of our members.

Yours sincerely

29(1)(a)

Felicity Caird
General Manager, Governance Leadership Centre
Institute of Directors