13 December 2024

Beneficial Ownership and Transparency Unit
Market Conduct and Digital Division
Treasury
Langton Cres
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By email: beneficialownership@treasury.gov.au

Dear Beneficial Ownership Team

Enhanced beneficial ownership disclosure for listed entities

The Australian Financial Markets Association (AFMA) welcomes the opportunity to respond to the Enhanced beneficial ownership disclosure for listed entities consultation on draft legislation.

AFMA represents the interests of over 125 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, and traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses, institutional investors, and superannuation funds.

General Comment

The changes that are proposed are complex in their implications and considered to be most significant. Expanding the meaning of a 'relevant interest' in securities to cover interests arising under equity derivatives irrespective of how the derivative is to be settled and whether the counterparty to the derivative has a relevant interest in any of the underlying securities is highly problematic. Not only is this expanding the interests in ways which do not seem relevant to identifying beneficial ownership and potentially misleading investors but also intruding into the regulation of takeovers.

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Giving such significant changes curtailed exposure in draft legislation for only a month is unacceptable and perplexing. There is widespread concern and desire to address the problems with the legislation before it is introduced by our members who are the people who must deal with the regime in practice. Our members have not yet had time to develop well-articulated cases around the problem areas and how these should be addressed in keeping with the overall objective of

Our clear message is that the legislation is not ready for introduction to Parliament and there needs to be stakeholder engagement in 2025 to get it in a fit state in order to do this.

Accordingly, this comment letter is preliminary in nature setting out in key point form areas we see as problematic. We will follow these comments up with expanded analysis of the keys points in January when members have had chance to provide us with fully formed views to explain the problems.

Problem Area Key Points

1. ***Extension of the relevant interest definition***

   The deemed inclusion of a cash-settled equity derivative interest in the definition of relevant interest for Chapter 6, 6C and other purposes fallaciously imputes there is a functional equivalence between cash-settled equity derivatives and shares.

2. ***Reform of the takeovers provisions***

   Some elements of the proposal, particularly those relating to the substantive changes to the takeovers provisions, are not consistent with the stated policy objective in the Explanatory Memorandum of increased transparency to *"discourage the use of complex structures to obscure tax liabilities and facilitate financial crimes"*.

3. ***ASIC discretion to determine number or calculation method for relevant interest***

   ASIC's power to determine the degree of relevant interest, either as a numerical output or through a prescribed calculation method, would create a significant amount of uncertainty and potential divergence from the economic reality of a derivative arrangement.

4. ***Beneficial tracing notices***

   The application of beneficial tracing notices should not be extended to equity derivatives and certainly not where the interest is below 5% as this in many cases does not have a control purpose.

5. ***Access to tracing notices***

   The extension of free-access to journalists and academics is an additional cost being imposed on industry.

6. ***Freezing orders***

   The freezing order proposal results in the writer of an equity derivative being subject to a freezing order due solely to the actions of the taker (i.e. no fault of writer). This increased risk for practitioners could result in an attempt to shift the risk and burden back to counterparties, which creates economic

inefficiency and may even meaningfully limit the amount of equity derivatives activity in the Australian market.

7. Substantial holding disclosure

Takeovers Panel GN20 on Equity Derivatives is well understood, and widely supported, by the market. We believe it is operating effectively to ensure there is adequate disclosure of equity derivative interests where there is a long position of 5% or more. There are certain aspects of the proposal which would add significant compliance burden to market participants with marginal market benefit.

8. Increased regulatory and cost burden

Overall, this is a further set of measures which will increase the regulatory and cost burden on industry. For example, the regime would be particularly challenging and complex for entities, which need to aggregate other entities' position (may be internal or external) with their own holdings by virtue of holding 20% interest in such other entities.

As noted at the start the is a preliminary list of key points of issues we wish to raise with you on which we will go into detail in a follow up letter in January.

Any questions on this letter should be directed to myself, David Love, at dlove@afma.com.au or on 0415 903 412.

Yours sincerely

David Love
General Counsel