Submission on Increasing Transparency of the Beneficial Ownership of Companies

ActionAid Australia | March 2017

1. Introduction

ActionAid Australia welcomes the opportunity to give feedback on the *Increasing Transparency of the Beneficial Ownership of Companies* consultation paper.

ActionAid Australia is part of a global federation that works in more than 45 countries around the world to advance social justice, gender equality and poverty eradication. ActionAid supports women living in poverty to claim their human rights by collectively confronting the injustices they face. This work is supported by the Australian Department of Foreign Affairs and Trade through funding to advance women's empowerment and rights in more than 10 countries under the Australian Aid Program.

ActionAid is an active member of the global movement for tax justice and gender-responsive public services both in Australia and internationally. Our organisation believes that increasing transparency of beneficial ownership is essential to combat tax evasion and other activities that reduce public revenue, and that this will allow lower-income countries to finance essential public services such as education and health care. Access to these services is critical in advancing women's empowerment and gender equality.

2. Beneficial ownership transparency and lower-income countries

There is significant evidence that anonymous ownership leads to unrealised public revenue in lower-income countries due to tax evasion and illegal activities such as fraud and corruption. A 2014 report by global advocacy organisation ONE found that lower-income countries lose US $1 trillion annually due to illegal deals and activities, many of which are facilitated by anonymous company ownership.[1]

The impact on lower-income country revenue is significant. For example, in Nigeria in 2011 anonymous company ownership enabled a US $1.1 billion oil rights payment from Shell and Eni to be channeled to the former oil minister, rather than the Nigerian Government.[2] This amount represented 80% of the nation's proposed 2015 health budget.[3] Similarly, a 2013 report by the Africa Progress Panel found that the Democratic Republic of Congo lost US $1.36 billion due to anonymous company ownership structures used in five mining deals between 2010 and 2012 – the equivalent of the entire public revenue from extractive industries during this time.[4] This represents a significant loss of revenue for a country that is struggling to recover from decades of war, including providing access to justice to survivors or sexual and gender based violence.

This unrealised public revenue has a direct economic impact on public expenditure, often resulting in inadequate public services, which is felt most by vulnerable groups. In lower-income countries, it also results in governments and communities not fully benefiting from foreign ownership and control of their resources or privatised assets, and fuels poverty and inequality.

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[1] One, "Trillion Dollar Scandal: The biggest heist you've never heard of," 2014.
[2] Global Witness, "Shell and Eni's Misadventures in Nigeria," 2015.
[3] Global Witness, "Shell and Eni's Misadventures in Nigeria," 2015.
[4] Extractive Industries Transparency Initiative, https://eiti.org/beneficial-ownership

Government budget cuts and lower spending on public services have a disproportionate impact on women. This is most profound for women living in poverty who are less able to replace inadequate public services by paying for better services provided privately, for example in the case of water or basic medical services. This not only increases women's vulnerability to violence and exploitation (e.g. having to walk long distances for water or firewood), but also increases their unpaid burden of care due to gender roles that posit care for children, the sick and elderly in their hands. This in turn impacts on women's ability to participate in paid work and public life, and the contribution that women make to the formal economy.

In DFAT's Gender Equality and Women's Empowerment Strategy, the Australian Government has committed to advancing equality and economic empowerment for women across all aspects of Australia's foreign policy, trade, and aid programs. It is important that Australia's laws on beneficial ownership transparency are aligned with this strategy to ensure that governments can raise the public revenue needed to support women's empowerment in lower-income countries.

3. Recommendations on implementation of beneficial ownership transparency in Australia

As discussed above, transparency of beneficial ownership has significant benefits not just for Australia, but also for lower-income countries where increased public revenue will allow governments to better meet their development objectives. However these benefits will only be realised if Australia ensures beneficial ownership information is centrally maintained and publicly accessible, automatically exchanged between authorities, and collected from trusts as well as companies.

Public accessibility of registers is essential to ensure that civil society, citizens, and journalists are able to keep not just companies but also public officials accountable. As the Nigerian case above demonstrates, lost public revenue often occurs due to corruption of government officials. It is therefore critical that this information is not kept hidden within law enforcement agencies, but is instead accessible to scrutiny by non-government stakeholders.

Adequate accessibility by non-government stakeholders requires that information is easily available to the public and access to this information is not prohibitively expensive. ActionAid therefore recommends that a central register is maintained by the government, and information held on the register can be accessed free of charge.

Recommendation 1: The Australian Government should maintain a central register of beneficial ownership, and information held in the register should be publicly accessible free of charge.

It is important that beneficial ownership information is automatically exchanged with relevant authorities internationally. Recognising the significant disparities in country capacity to collect and maintain beneficial ownership information, sharing of information should not be based on reciprocal obligations. Instead, it should be based on the prioritisation of support to lower-income countries to improve their tax administration and ability to combat tax evasion and other illegal activities within their own jurisdictions. This would also be in line with the Australian Government's strategy on effective governance as one of the central pillars of its aid program.

Recommendation 2: Information collected as part of a register of beneficial ownership should be automatically exchanged with other jurisdictions, without requiring reciprocity agreements.

Recommendation 3: In addition to automatic exchange of information, Australian Government should provide bilateral support to lower-income countries to assist them to improve their tax administration.

Finally, it is essential that beneficial ownership transparency laws include trusts as well as companies. As shown by Global Witness in February 2017, trusts are often used alongside anonymously-owned companies as the final layer of secrecy to conceal corruption, fraud, tax evasion and other illegal activities.[5] Document leaks including the Panama Papers have revealed examples of trusts being used for these purposes. For example, trusts allowed Prince Jefri Bolkiah of Brunei to hide US $14.8 billion that he siphoned from the Brunei sovereign wealth fund to his personal bank accounts.[6]

ActionAid therefore strongly urges the Australian Government to include trusts as part of laws to increase transparency of beneficial ownership. Without this inclusion, the capacity of transparency laws to combat tax avoidance and illegal activities that impact on lower-income countries will be severely limited.

Recommendation 4: The central register of beneficial ownership should include information on trusts as well as companies.

4. Global precedents and obligations on beneficial ownership transparency

As noted in the consultation paper, Australia has been a global leader on greater transparency of beneficial ownership. The adoption of the G20 High-Level Principles on Beneficial Ownership Transparency was a key achievement of Australia's 2014 presidency of the G20. It is encouraging to see that the Government is now looking at options for applying these commitments domestically. It is also an opportunity to continue to show leadership by taking strong steps in line with global precedents and obligations under Australia's international commitments. This requires introducing a register that is maintained centrally, covers all companies including corporations and trusts, and is accessible by the public free of charge. It also requires the Australian Government to ensure lower-income countries are part of decision-making in defining global taxation rules, that these rules benefit women and those living in poverty and exclusion, and that there is consistency between tax policy and foreign policy commitments.

As noted in the consultation paper, the UK has recently introduced a register of Persons with Significant Control. This register is centrally maintained, covers both trusts and corporations, and the public is able to access the register free of charge. Similarly, in February 2017 the EU Anti-Money Laundering Directive was amended by the European Parliament to include trusts and make registers publicly available.

In addition, Australia has obligations to establish a public register of beneficial ownership as part of its commitment to implement the EITI. The EITI is clear in its recommendation that registers are made public, and 45 EITI countries have now published roadmaps to introducing public registers of beneficial ownership.[7] ActionAid Australia supports the timely implementation of the EITI in Australia, including the establishment of a public register of beneficial ownership.

[5] Global Witness, "Don't Take it on Trust," 2017.
[6] Global Witness, "Don't Take it on Trust," 2017.
[7] Extractive Industries Transparency Initiative, https://eiti.org/beneficial-ownership

5. Summary of recommendations

1. The Australian Government should maintain a central register of beneficial ownership, and information held in the register should be publicly accessible free of charge.
2. Information collected as part of a register of beneficial ownership should be automatically exchanged with other jurisdictions, without requiring reciprocity agreements.
3. In addition to automatic exchange of information, Australian Government should provide bilateral support to lower-income countries to assist them to improve their tax administration.
4. The central register of beneficial ownership should include information on trusts as well as companies.

Submitted by:
Lucy Manne
Head of Campaigns
ActionAid Australia
lucy.manne@actionaid.org
(02) 9565 9111

AIRA Submission

Response to Treasury Consultation Paper on increasing transparency of the beneficial ownership of Companies

AUSTRALASIAN INVESTOR RELATIONS ASSOCIATION
ABN 66095554153
GPO Box 1365, Sydney NSW 2001
T: +61 2 9872 9100 | F +61 2 9872 920 | www.aira.org.au

1 Introduction

The Australian Investor Relations Association (AIRA), as the peak body representing Investor Relations practitioners in Australia and New Zealand, welcomes the opportunity to respond to the consultation paper issued by Treasury in February 2017 (the **Consultation Paper**).

AIRA supports the Government's commitment to improving transparency around those who control and benefit from companies as a means of combatting illicit activities.

In response to the Consultation Paper, AIRA's main focus is to likely impact on those entities listed on the Australian Securities Exchange (**Listed Entities**), as well as other public entities.

In particular, AIRA agrees that the existing framework in place with respect to Listed Companies should operate to the exclusion of any new requirements to report on beneficial ownership.

In addition, however, the impact on non-listed companies is significant.

However, there are elements of the existing framework that could be improved as has been identified by the Consultation Paper.

AIRA has not endeavoured to answer each of the questions posed by Treasury, but rather this submission is structured based on the key themes reflecting the knowledge and experience of AIRA and the concerns of AIRA's members.

AUSTRALASIAN INVESTOR RELATIONS ASSOCIATION
ABN 66095554153
GPO Box 1365, Sydney NSW 2001
T: +61 2 9872 9100 | F +61 2 9872 920 | www.aira.org.au

2. Areas of primary concern

AIRA supports the notion that Listed Companies should be exempt from any new requirements to report on beneficial ownership (Q1)

Summary

There is an existing framework applicable to Listed Companies with the aim of providing transparency of ownership and control of those companies.

Imposing additional requirements on Listed Companies would unnecessarily increase the cost of compliance for those companies without providing any increase to the quality of information gathered regarding ownership and control.

Recommendation

The current framework imposed on Listed Companies in Australia is sufficient to address the primary concerns raised in the Consultation Paper with respect to transparency over those persons with ownership or controlling interests in Listed Companies.

AIRA believes some elements of this framework could be improved, for example:

Improving the definition of "relevant interest in securities" for the purposes of Chapter 6C of the Corporations Act to ensure that substance takes precedence over form; and

Addressing a number of deficiencies in the current provisions requiring compliance with tracing notices under Chapter 6C of the Corporations Act.

Discussion

As described in the Consultation Paper, Chapter 6C of the Corporations Act includes a number of mechanisms by which information regarding ownership and controlling interests in a Listed Company are collected and disclosed. These mechanisms are accurately described in the Consultation Paper and therefore we will not go into details in this Submission.

In AIRA's experience, there are some deficiencies in the operation of these Corporations Act provisions, which are discussed in the following section.

Due to the nature and scale of the ownership interests in Listed Companies, imposing additional obligations on the Listed Company to identify and report on beneficial ownership will result in significant additional compliance costs for the company without any benefit in increased transparency. This is because under both existing and the proposed changes, Listed Entities would be

entirely reliant upon the veracity and quality of information provided to them by the underlying beneficial owners in the company. In our members' experience, it is only if the underlying beneficial holders have a willingness to self-identify and report that the company will ever be in a position to have confidence with regard to their underlying beneficial ownership.

A useful comparison in this regard is the current provisions dealing with substantial holder notices. Inherent in those provisions is a recognition of the fact that the most appropriate person to identify and report on a substantial holding is the substantial holder themselves (and their associates).

Deficiencies in existing framework applicable to Listed Companies (Q2, Q35, Q36, Q37, Q38, Q39)

Summary

The definitions in the Corporations Act of "relevant interest in securities" and "associate" (for the purpose of grouping relevant interests) contain highly technical elements. This opens opportunities for ultimate beneficial holders to rely on technicalities and legal ambiguity to claim they have no disclosable relevant interest in securities.

The ability for a Listed Company to trace beneficial holders is hindered in a number of situations; ultimate beneficial owners may choose to delay and obfuscate responses to tracing notices, ignore notices, or interpret their replies in a manner which reflects their own policies or preferences rather than law.

Recommendation

It is important that those required to comply with obligations must adopt a "substance over form" approach. Otherwise, technical arguments will always be used as a means of delaying or preventing disclosure.

AIRA strongly agrees with points made in the Consultation Paper about introducing sanctions affecting relevant shares owned by beneficial owners who fail to self-identify or self-report (e.g. restrictions on voting and dividend rights). This should be extended to those beneficial owners who do not appropriately comply with tracing notices under the Corporations Act.

Discussion

Definition of "relevant interest in securities"

While the definition of "relevant interest in securities" is intended to be broad in s 608 of the Corporations Act, underlying holders of shares are in practice able to rely on technical elements of the definition to develop a legal argument

that they have no relevant interest. This often taints the accuracy and reliability of both substantial holder notices and tracing notices, and yet the company is not really in a position to take any effective action because the cost and timeliness of existing enforcement mechanisms and in a minority of circumstances of the legal ambiguity and the lack of equal knowledge about the underlying circumstances.

The effectiveness of these provisions in practice would be greatly enhanced if the framework forced the underlying shareholder to adopt a "substance over form" approach in identifying their relevant interest, at risk of ASIC being empowered to impose sanctions where it considers that such an approach has not been adopted. That is, where in the circumstances it is clear that an underlying owner has a level of control not reflected in the relevant disclosure, ASIC and the company should be ready and willing to impose temporary sanctions on relevant securities until the underlying owner provides satisfactory evidence (either reflecting the relevant interest or evidence to the contrary).

AIRA is also concerned that the current regime, which relies on the concept of "relevant interest in securities" does not inherently capture alternative forms of ownership interests, which in practice can be equally important (for example, derivatives, convertible debt securities and equity swaps). Again, this leads to less accurate and reliable information regarding the ownership and controlling interests in Listed Companies, including shares held via an offshore listing or shares held via CDI's.

Deficiencies of tracing notices

The Consultation Paper already identifies a key deficiency of the existing tracing notice provisions; that ultimate beneficial owners can delay disclosure of relevant interests by means of the structure of their holding in that company.

The key example discussed in the Consultation Paper is where direct shareholders are able to delay the identification of ultimate beneficial owners by reporting only information that is known to them (as opposed to making additional reasonable enquiries).

AIRA shares the concerns expressed in the Consultation Paper, but for the reasons highlighted above, these deficiencies need to be addressed by empowering but not imposing obligations on the Listed Company.

As indicated in other sections of the Consultation Paper (and above), this could be enforced via the imposition of certain sanctions). Should there be any deficiency in the response to a tracing notice (either by the registered member, or by another party with a relevant interest in the 'chain' of ownership), either the company or the regulator should be able to impose these sanctions on the relevant shares (we also note that the regulator should also act on request by the company in circumstances where the issuer of securities may not be in a position to impose the sanctions, either because it is not certain that the

underlying beneficial holder is in breach of the provisions or for fear of recourse from that holder when casting votes at future general meetings).

Further, a registered holder of the shares and underlying beneficial holders claiming to rely on the laws or regulations of their home jurisdiction, internal policies, self-constructed practicalities, or instructions of the beneficial holder to withhold disclosing their relevant interests to the company or the regulator in response to a tracing notice should be seen as a 'deficient' response by the recipient of the tracing notice and be exposed to the imposition of sanctions.

Where the Listed Company acts in light of a clear failure by an underlying beneficial owner to comply (for example, a tracing notice is not responded to within the permitted timeframe) it should be made clear in the legislation that the company's imposition of sanctions (such as disenfranchisement or withholding of dividends) will not expose the company to any civil liability or claim from either the registered holder or any beneficial owner.

3. Other concerns

Use of a central register (Q16, Q18)

AIRA recognises that a robust framework for the identification of ownership and controlling interests in non-Listed Companies provides for reliable and accurate of information reported on regarding Listed Companies.

In AIRA's opinion, a robust framework for other entities can simply and easily be achieved by extending the powers of s.672 to those entities.

The key deficiencies of the use of a central register are:

- Cost on companies, their shareholders and government
- Red tape
- Discourages investment and therefore wealth creation
- No increase in transparency vs 672
- Distraction of board and management away from wealth creation
- Introduces new forms of transparency avoidance
- Likelihood of significant additional adverse unintended consequences

For example – there is no evidence the UK central register model has improved transparency or confidence in markets. However it absolutely has resulted in all above deficiencies and cost.

AUSTRALIAN BANKERS' ASSOCIATION INC.
Strong banks – strong Australia

Level 3, 56 Pitt Street
Sydney NSW 2000
Australia
+61 2 8298 0417
@austbankers
bankers.asn.au

20 March 2017

Ms Jodi Keall
Senior Adviser, Financial System Division
The Treasury
100 Market Street
SYDNEY NSW 2000

By email beneficialownership@treasury.gov.au

Dear Ms Keall

Consultation Paper: Increasing Transparency of the Beneficial Ownership of Companies

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide The Treasury with comments on the Consultation Paper *Increasing Transparency of the Beneficial Ownership of Companies* (**Consultation Paper**).

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The ABA strongly supports the government's objective of improving transparency around who owns, controls and benefits from companies, which will assist with preventing the misuse of companies for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing.

While the Consultation Paper is in respect to the beneficial ownership of companies, the ABA notes that Australia has committed to fully and effectively implementing two of the Financial Action Task Force's (**FATF**) recommendations on transparency of the beneficial ownership of legal persons (companies) and legal arrangements, e.g. (**trusts**). The FATF recommends that countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries that can be obtained or accessed in a timely fashion by competent authorities. The ABA is supportive of the adoption of the entire FATF framework and the Organisation for Economic Co-operation and Development's (**OECD**) transparency initiatives[1] with regard to beneficial ownership as this will greatly assist in deterring and disrupting financial crime, greatly reduce the regulatory burden and result in significant cost savings not only for the Government and its agencies, but particularly for reporting entities in Australia.

This significant reduction on regulatory costs and ongoing savings will only be fully realised when the FATF recommendation on the beneficial ownership of trusts is fully implemented in Australia, alongside some bold but necessary reforms to the 'reliance' provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (**AML/CTF Act**). The ABA notes that the Attorney-General's Department is looking at reforming the reliance provisions in their *Phase 1 amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006: Industry Consultation Paper*.

[1] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, http://www.oecd.org/tax/transparency/

The urgent need for reliable access to accurate and up-to-date beneficial ownership information arises from significant domestic and international obligations, including the AML/CTF Act, the Common Reporting Standard (**CRS**) and the *Foreign Account Tax Compliance Act* (**FATCA**). The use of shell companies, complex trust structures and nominee agents to hide the true identity of the owners of assets, shielding them from tax authorities and other investigators of financial crimes, undermines tax systems, facilitates financial crime and erodes trust in governments.

The ABA believes that for the Australian regime to be successful it should, like the United Kingdom (**UK**), have a single centrally managed and maintained beneficial owner register. The ABA also strongly recommends that, in Australia, the central beneficial owner register be made available beyond 'Competent Authorities' envisaged by the G20 Principles. Making the register available to those entities with obligations under the AML/CTF Act, CRS and FATCA, will result in significant benefits, costs savings and a large and measurable reduction in red tape burden in Australia.

The ABA further recommends that reporting entities under the AML/CTF Act should be entitled to rely on the registered beneficial owner information reflected in the central beneficial owner register to meet the 'verify' requirement of their know your customer and customer due diligence (**CDD**) obligations for the non-individual customer subjected to customer identification procedures. The ABA acknowledges that there may be separate verification requirements that may still apply to meet verification of the actual beneficial owner.

The proposed register of beneficial owners of companies would, if available to reporting entities, assist in increasing transparency and reducing the complexity and costs associated with identifying and verifying the beneficial owners of corporations. The identification of the beneficial owners of other entity types is equally, if not more complex. Accordingly, the ABA strongly recommends that the register of beneficial owners be extended to include other entity types such as trusts, associations, registered co-operatives and partnerships. For these entity types, in many instances, there are only limited sources of independent and reliable information to verify the beneficial owner of the organisation.

The ABA sees no benefit to including publicly listed companies trading on comparable 'regulated markets' as an existing listing, and disclosure obligations require full transparency of significant beneficial ownership information above 5%.

There are also a number of other types of entities where the beneficial owner need not be disclosed. The ABA makes this recommendation on the grounds that for these entity types there is already sufficient information known to relevant authorities (including through the application of fit and proper requirements) about the beneficial owners of these organisations.

Therefore, the ABA recommends that where an entity (entity A) holds an interest in another entity (entity B) and where entity B is required to provide beneficial owner information to the register, entity B should not have an obligation to provide beneficial owner information in relation to entity A where entity A is:

- An Australian listed public company
- A majority owned subsidiary of an Australian listed public company
- A foreign listed public company or a majority owned subsidiary of a foreign listed public company where the listing rules of the exchange are broadly equivalent to those in Australia
- A company licensed and subject to the regulatory oversight of a Commonwealth, state or territory statutory regulator in relation to its activities as a company, e.g. an Australian financial services licence holder or Australian credit licence holder; a company authorised by APRA as a financial institution; a company authorised by a state licensing authority, e.g. casinos
- A managed investment scheme registered by ASIC

- A managed investment scheme that is not registered by ASIC and that only has wholesale clients and does not make small scale offerings to which section 1012E of the *Corporations Act 2001* (Cth) (**Corps Act**) applies
- A trust registered and subject to the regulatory oversight of a Commonwealth statutory regulator in relation to its activities as a trust, e.g. a superannuation fund
- A government superannuation fund established by legislation
- A Commonwealth, state or territory government body
- A foreign government body of a FATF member country.

The ABA also believes that adopting the UK approach in Australia will have significant benefits for all Australians. For example, currently there are differences in the information each bank requires to identify a customer, so changing banks can be a time consuming activity. A central register should assist in reducing the information required, making it quicker and easier for customers to change banks or access a product/service at an institution they have not banked with previously, thereby enhancing competition for Australians.

The ABA is of the view that the effectiveness of a central beneficial owner register will be severely limited if the beneficial ownership information in respect of non-regulated trusts, for example typical family trusts, is excluded. The Australian Taxation Office (**ATO**) currently collects beneficial ownership information in respect of beneficiaries to whom distributions have been made during the Australian tax-year as part of the annual tax return process. This information, together with beneficial ownership information is currently maintained by the Australian Securities and Investments Commission (**ASIC**) in respect of companies. The ABA recommends that all this beneficial ownership information should be combined into a single beneficial ownership register, irrespective of the agency that is ultimately tasked to maintain that central register.

In addition, to supplement beneficial ownership information collected in respect of beneficiaries, the Government should also consider the inclusion of additional data fields in the ATO's annual trust tax return to collect additional beneficial ownership information in respect of settlors and those individuals that exercise actual, as opposed to, or in addition to, legal control over the trust. Leveraging and supplementing the existing ATO annual tax return process, for inclusion into a central register will sustainably improve data quality and consistency and be more cost effective and quick to implement.

In addition to our key concerns outlined above, the ABA has provided a response to the questions posed in the Consultation Paper.

Increasing the transparency of beneficial ownership of Australian companies

Which companies are in scope?

Questions

1) *Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exemption apply to companies listed on all exchanges or only to specific exchanges?*

The ABA believes that there are already sufficient and robust reporting requirements for listed companies, therefore further obligations are not necessary. The exemption should apply to companies listed on exchanges in comparable regulated markets.

Shareholders in listed companies with 'substantial shareholdings' (more than 5%), are required to report changes in their holdings. In this regard, the ABA draws your attention to paragraph 5.2 in ASIC's regulatory guidance *RG 5 Relevant interests and substantial holding* notices.[2]

Requirements apply when the votes attached to securities, in which a person and any of their associates have a relevant interest (as a proportion of all voting shares or interests), increase above one of the following two thresholds:

(a) The 5% substantial holding threshold - after which a person must provide substantial holding notices relating to movements above or below the threshold, and any change of 1% or more (Pt 6C.1); and

(b) the 20% takeover threshold - after which acquisitions and offers to acquire relevant interests in voting shares or interests are only permitted through certain transactions or in certain circumstances (Ch 6).

To have additional reporting obligations over and above this is an unnecessary duplication for listed companies. An exemption for listed companies on exchanges comparable to the Australian Stock Exchange (**ASX**) and other regulated markets also provides a means of overcoming some of the difficulties with nominee registers and superannuation funds, as discussed later in this letter.

Should trusts become subject to the proposed regime, it is suggested that any trust that is listed should be similarly exempted. Additionally, trusts that are registered with ASIC as managed investment schemes under the Corps Act are required to maintain unit registers under s168 of the Act and as such separate reporting is again unnecessary.

It should also be noted that for CRS and FATCA it is not necessary to look through listed vehicles. Hence an exclusion for listed vehicles would establish a consistency of practice.

2) Does the existing ownership information collected for listed companies allow for timely access to adequate and accurate information by relevant authorities?

Yes, in general listed companies keep centralised computerised share registers. Often these registers are maintained by an external entity offering registry management services, and timely access to accurate and current information.

What beneficial ownership information should be captured?

Identifying the natural persons who have a controlling ownership interest in a company

Questions

3) How should a beneficial owner who has a controlling ownership interest in a company be defined?

Given the different definitions in the various regulatory regimes, it is suggested that the highest standard is adopted for the definition of 'beneficial owner' to ensure that the requirements of all regimes are satisfied. In this respect, the starting point should be the OECD CRS definition of "controlling person"[3]. The CRS definition of controlling person is also aligned with the FATF definition of beneficial owner.[4]

2 ASIC Regulatory Guide 5: Relevant interests and substantial holding notices (Nov 2013), p 4, http://download.asic.gov.au/media/1236706/rg5-published-20-december-2013.pdf

3 OECD Common Reporting Standard, p 57, Section D: Reportable Account, Paragraph 6 , http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm

4 OECD Common Reporting Standard – pp 198-99, Controlling Persons, Paragraphs 132 – 137. http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm

In line with both the FATF and OECD CRS definitions, the Australian regime must align and facilitate the confirmation and reporting of the individual/natural person with 'ultimate beneficial ownership', in that an intermediary corporate or trust beneficial owner is not considered an 'ultimate beneficial owner' under the FATF and OECD CRS definitions.

4) *In light of these examples given by the FATF, the tests adopted by the UK (see Part 3.2 above) and the tests applied under the AML/CTF framework and the Corporations Act, what tests or threshold do you think Australia should adopt to determine which beneficial owners have controlling ownership interest in a company such that information needs to be collected to meet the Government's objective?*

   a. *Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?*

   b. *Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exerted via means other than owning or having interests in shares, or by a position held in the company? If so, how would those types of control be defined?*

Given that the UK regime is a comparable jurisdiction on which to base the Australian regime, it is suggested that the UK rules (as set out at Section 3.2 People with Significant Control (**PSCs**)[5]) be adopted, including the 25% ownership test (a level of 25 per cent or more is consistent with the current AML requirements).

5) *How would the natural persons exercising indirect control or ownership (that is, not through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?*

The UK regime imposes requirements on both the companies and the "significant controllers", with penalties for non-compliance. This is similar to the CRS where penalties apply to both the financial institutions[6] and to those providing self-certifications.[7] Again, the ABA recommends that the Australian approach be modelled on the UK regime.

6) *Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the ultimate beneficial owner?*

The ABA recommends that the processes outlined in the UK's *Register of People with Significant Control: Guidance for Companies, Societates Europaeae and Limited Liability Partnerships*[8], Chapter 2: Identifying PSCs and Chapter 7: Understanding conditions (i) to (v) in detail, be used as the basis for the Australian approach.

7) *Do there need to be special provisions regarding instances where the relevant information on a beneficial owner is held by an individual who is overseas or in the records of an overseas company and cannot be identified or obtained?*

Yes, the ABA recommends that the approach outlined in paragraph 7.4.9[9] of the UK guidance be followed.

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5 UK Department for Business Innovation and Skills, Register of People with Significant Control Guidance for Companies, Societates Europaeae and Limited Liability Partnerships. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies__LLPs_and_SEsv4.pdf

6 *Taxation Administration Act, (1953),* Common Reporting Standard, s 288-85

7 Ibid

8 *Register of People with Significant Control Guidance for Companies, Societates Europaeae and Limited Liability Partnerships*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies__LLPs_and_SEsv4.pdf

9 Ibid, p. 34

8) Should there be exemptions from beneficial ownership requirements in some circumstances? What should those circumstances be and why?

The ABA believes there should be exemptions from beneficial ownership requirements in some circumstances. The UK guidance contained in Annex 1: Regime for suppressing PSC information in exceptional circumstances[10] would also be a suitable approach for Australia.

Details of beneficial owners to be collected

9) What details should be collected and reported for each natural person identified as a beneficial owner who has a controlling ownership interest in a company?

The ABA would recommend replicating the UK model where (in the case of the UK regime a PSC has been identified) a prescribed amount of information must be entered on the company's PSC register. The ABA would also recommend that all of this information be included in the centrally managed beneficial owner register, and strongly recommends that the central register contain the information required for AUSTRAC reporting entities to satisfy the collection requirements for regulatory purposes, e.g. AML/CTF, CRS, FATCA, including:

AML fields

- Full legal name
- Date of birth
- Residential address
- Percentage ownership

FATCA/CRS

- Place of birth
- Country of birth
- Country of tax residence
- Tax file number (to the extent permitted by law)

Beyond the collection of data, an opportunity presents itself for the verification of beneficial owners to be performed centrally by the administrator of the beneficial ownership register. The AML/CTF Act and rules could then be amended to provide the ability for reporting entities to rely on the fact that these parties have been identified and verified to a satisfactory level as agreed between agencies, such as AUSTRAC and the administrator of the beneficial ownership register. The reduction in regulatory red tape and the cost savings to industry would be significant.

The principle benefit of a centralised-verification model would be to perform the identification and verification once, rather than spread the impost of that activity across all reporting entities that deal with each company customer. Furthermore, reporting entities face their customers, beneficial owners are therefore generally at least one degree of separation away from the reporting entity.

When each reporting entity has to verify beneficial owners the customer is also impacted. If information is sought by a reporting entity pertaining to beneficial owners, the customer ends up needing to source the detail, e.g. verification documents pertaining to beneficial owners i.e. copies of passports, drivers licences etc. A central register which ensures the veracity of the identities of the beneficial owners upon which both government and reporting entities could rely, would significantly ease the regulatory burden on reporting entities as well as having clear benefits for the customers themselves.

[10] *Register of People with Significant Control Guidance for Companies, Societates Europaeae and Limited Liability Partnerships*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies__LLPs_and_SEsv4.pdf

10) *What details should be collected and reported for each other legal persons identified as such beneficial owners?*

Where shares are not held beneficially the information on the ultimate beneficial owner is as per our response to question 9 above. Furthermore, for each interposed beneficial owner, each reporting entity between the ultimate beneficial owner and the customer, should also be required to provide:

Companies

- Legal name
- Registration number
- Name of company register
  - Registered address
  - Primary business address
- Date and country of incorporation

Trustees

- Requirements for individual or company as appropriate

Trust details

- Full trust name
  - Type of trust
- Registration number (if any)
- Date and country of establishment
  - Full names of settlors/grantors and trustees
  - Full names and/or description of beneficiaries

11) *In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?*

As above, the ABA recommends a regime where reporting entities can rely on the register to satisfy identification and verification obligations.

How and where to record beneficial ownership information?

How should this information be collected and stored?

12) *What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?*

A company's obligations should include the identification, collection and verification of beneficial owner information in line with the existing obligations under the AML/CTF Act.

To ensure information is accurate and up-to-date, it would be appropriate for companies to have an ongoing obligation to take reasonable steps to ensure the beneficial ownership information that they maintain correctly reflects the beneficial ownership of the company.

In terms of the beneficial owners, there should be an obligation to supply the required information promptly to the company.

The UK regulations[11] on the *Register of People with Significant Control* has provisions to achieve the above. The implementation of an associated penalty regime in Australia needs to be robust and sufficient to enforce compliance and to strongly discourage late and false reporting.

The ABA recommends that the final regime allows an individual to remove themselves from the central beneficial owners register if they are able to produce evidence that they are not, or are no longer the beneficial owner.

13) Should each company maintain their own register?

The ABA strongly favours the concept of a single central register rather than individual company registers. However, there is benefit in companies maintaining their own registers, in that they can update beneficial owner information without the potential delay associated with notifying a central registry. There are a number of practical reasons, including costs that led the ABA to recommend a central registry. These include:

- The objective of the reforms is to improve transparency around who owns, controls and benefits from companies and will assist with preventing the misuse of companies for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing. A central register, operated and maintained by a government entity with strong enforcement powers is the most transparent mechanism for the Australian Government to remain a leader in anti-corruption efforts and cooperation regarding tax evasion and tax transparency.
- The unnecessary regulatory costs associated with each individual company having to deal with multiple requests for access to beneficial owners information where this is not publically available through existing arrangements i.e. ASIC and ATO.
- For those entities seeking to comply with their obligations under the AML/CTF Act and the *Income Tax Assessment Act 1997* (Cth) and associated regulations, the cost of obtaining this information from individual companies (rather than a central register) would be an unreasonable and unnecessary additional cost for industry and government agencies.
- There is a question as to consistent reliability of information as there is the real potential for the quality of information to vary between internal procedures in individual companies, particularly when there is no visible enforcement or regulation.

14) How could individual registers being maintained by each company provide relevant authorities with timely access to adequate and accurate information? What would be an appropriate time period in which companies would have to comply with a request from a relevant authority to provide information?

Similar to the UK approach, the ABA recommends that a central register should be created.

However, if individual registers are also to be maintained by each company, it should be mandated that any internal beneficial owners register should be combined with the internal register that contains all the other existing company information, some of which is already reported to ASIC. A single register will ensure efficiencies in maintenance and access and government guidance would ensure consistency in approach.

The ABA also recommends that any beneficial ownership changes should be communicated to ASIC via their online “changes to company” details process. The reporting period to communicate the change should be aligned with the existing obligation of 28 days of the change occurring.

[11] UK Statutory Instruments 2016 No. 339 Companies – the *Register of People with Significant Control Regulations 2016* http://www.legislation.gov.uk/uksi/2016/339/pdfs/uksi_20160339_en.pdf

15) Should a central register of beneficial ownership information also be established?

Yes, a central register should be created and would be the preferred solution over just individual company registers. Beneficial ownership information should be combined onto a single register, alongside the existing company information that is required to be provided to ASIC. This would provide those entities accessing the single register with all the information required to comply with their obligations, without the need to access multiple sources. The ongoing cost savings to industry would be substantial and the reduction in red tape significant.

16) What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?

As outlined in our response to question 13.

17) In particular, what do you see as the relative compliance impact costs of the two options?

There will always be regulatory costs associated with establishing, maintaining and accessing and disclosing beneficial owner information. However, Australia must maintain a strong reputation for high levels of transparency and accountability in business practice and continue to be a leader in anti-corruption efforts and cooperation regarding tax evasion and tax transparency. Improving transparency around who owns, controls and benefits from companies will assist with preventing the misuse of companies for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing. Therefore the ABA would argue the ongoing benefits to Australia will far outweigh the costs.

Operation of a central register

Questions

18) Who would be best placed to operate and maintain a central register of beneficial ownership? Why?

ASIC is the most logical choice to operate and maintain the central beneficial ownership registry as they already manage the company incorporation and registration process which requires the maintenance of certain information relating to company ownership. In Ireland, the central register and the corresponding requirement for companies to maintain a register of beneficial owners came into effect on 15 November 2016 and is maintained by ASIC's Irish equivalent, the Companies Registration Office. The Irish Government is currently silent on whether or not this will be a public register but at a minimum, the ABA recommends that the information should be available to:

a) Financial intelligence units

b) Financial institutions that are required to carry out CDD on their clients; and

c) Those who can demonstrate they have a legitimate and bona fide interest in the information.

Irrespective of which entity is ultimately chosen to operate this register, it is the ABA's view that it must:

a) Be a Commonwealth Government authority;

b) Have the requisite authority to obtain and verify the information; and

c) Ensure the information is secure and robust and only available to parties with a legitimate interest in obtaining the information (similar to the Irish model).

19) *What should the scope of the register operator's role be (collect, verify, ensure information is up to date)?*

The central register will only achieve its goal, and the benefits realised if the information contained within it is accurate and available to all that have a legitimate and bona fide interest in the information. It must be the responsibility of the company to promptly notify the central registry if there is a change to beneficial ownership information. It is also in the interest of shareholders to have this information up to date to ensure they receive the benefit of shareholder protections under the Corps Act[12].

Under the EU/Irish legislation[13], it is an offence for an entity to fail to keep and maintain beneficial ownership information. The introduction of similar obligations in Australia should be considered to ensure companies are incentivised to update their beneficial ownership registers.

20) *Who should have an obligation to report information to the central register? Should it be the company only or also the persons who meet the test of being a relevant 'beneficial owner'?*

The obligation should be on the individual company to report to the central registry the details of their beneficial owners. Ideally, the obligation should be on a responsible officer of the company, such as the Company Secretary, to notify the central register. In order to ensure compliance with this obligation, the legislation should make it clear that the responsible officer has a clear duty to report changes to a company's beneficial ownership.

As noted in our response to question 12, the obligation on beneficial owners should be limited to them supplying the correct information to the company within a specified time, but there should be a clear obligation and strong incentives for beneficial owners to meet their obligations.

The UK regulations[14] on the Register of PSC has provisions which can be adopted to achieve the above.

21) *Should new companies provide this information to a central registry operator as part of their application to register their company?*

Yes, companies who incorporate or register their company with ASIC after the regime is in place, should provide the central register with beneficial owners information to ensure the integrity of the information is maintained. If ASIC were the operator of the central register, this would streamline the process and have a minimal additional regulatory cost, substantially less than the significant benefit of the availability of such beneficial ownership data.

22) *Through what mechanism should existing companies, and/or relevant beneficial owners, report?*

Reporting should be done to ASIC via their online "changes to company details" process. Expanding ASIC's online arrangements already used by companies will limit the costs associated with establishing new processes and allow companies to electronically report changes to beneficial ownership using a reporting system they are already familiar with.

Ensuring information is accurate and current

23) *Within what time period (how many days) should any changes to previously submitted beneficial ownership information have to be reported to a company (where registers are maintained by each company) or the registry operator (where there is a central register)?*

In the case of individual company registers: For an individual company where they maintain an internal register, any changes to previously submitted beneficial ownership information must be reported to that company by the beneficial owner within 14 days.

12 http://asic.gov.au/about-asic/contact-us/how-to-complain/disputes-about-your-rights-as-a-proprietary-company-shareholder/
13 The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016
14 UK Statutory Instruments 2016 No. 339 Companies – *the Register of People with Significant Control Regulations* 2016 http://www.legislation.gov.uk/uksi/2016/339/pdfs/uksi_20160339_en.pdf

In the case of a central register: With ASIC being the most logical choice of operator of the register, a company should be required to submit a "changes to company details' within 28 days of the change occurring. Otherwise both late fees and penalties should apply, given the importance of this data.

24) If reporting to a central register is required, should this information be included in the annual statement which ASIC sends to companies for confirmation with an obligation to review and update it annually?

Yes, this would be good practice and gives effect to Australia's commitment to implement the OECD global transparent mechanism.[15] This proposal would only result in a minimal additional regulatory cost, however, the benefits of accurate beneficial ownership data is enormous.

25) What steps should be undertaken to verify the information provided to a central register by companies or their relevant beneficial owners? Who should have responsibility for undertaking such steps?

An obligation should be on the individual company to report to the central registry the correct details of their beneficial owners. Ideally, the obligation should be on a responsible officer of the company, such as the Company Secretary, to notify the central register.

The obligation on beneficial owners should be limited to them supplying the correct information to the company in a timely fashion, so that it can then be reported to the central register. ASIC should be allowed to apply penalties where it has been shown that the beneficial owners failed to provide complete and accurate information to the company in the required timeframe.

The regulations[16] applying to the UK regime is a good example of how the above relationship and obligations could be regulated.

As is the case now, ASIC should be allowed to apply penalties where it has been shown that the company failed to provide any available information in the required timeframe. The implementation of an associated punitive penalty regime needs to be sufficient to enforce compliance and discourage late and false reporting, given the importance of this data.

Exchange of information between authorities

Questions

26) Should beneficial ownership information be provided to one relevant domestic authority and then shared with any other relevant domestic authorities? Please explain why you agree or disagree.

The ABA agrees that beneficial ownership information should be provided to one single authority and can be accessed, as required, by other relevant domestic authorities and other entities particularly reporting entities under the AML/CTF Act.

Currently, different government agencies collect different information in respect of aspects of beneficial ownership under different regulations. For example, the ATO collects information in relation to trusts beneficiaries through the tax return process and the Foreign Investment Review Board collects information through their application process[17]. ASIC also collects some information when shares are held beneficially.

In order to ensure the information collected is easily available, there is a need for a single point for the collection and maintenance of beneficial ownership information. As different agencies have different collection requirements under the relevant regulatory provisions, such agencies can access the single register as required and retrieve information as required.

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15 OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, http://www.oecd.org/tax/transparency/

16 UK Statutory Instruments 2016 No. 339 Companies – the Register of People with Significant Control Regulations 2016 http://www.legislation.gov.uk/uksi/2016/339/pdfs/uksi_20160339_en.pdf

17 *The Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) contains tracing provisions which have the effect that the 'foreign person' characterisation of an entity is determined by the status of the ultimate legal and beneficial interest holders of the entity

In the interests of having a system that is transparent, beneficial ownership information should be made available (with appropriate privacy safeguards) and searchable online. In line with the current approach for information held by Australian regulators, there could be a two-tier approach to searching for beneficial ownership information with government agencies being able to search the register without charge, and all other parties to pay a small fee for access to the information required to meet their legislative obligations.

27) *Should beneficial ownership information be automatically exchanged with relevant authorities in other jurisdictions? Please explain why you agree or disagree.*

Yes, in order to effectively combat tax and other financial crimes, beneficial ownership information should be subject to automatic exchange of information between the competent authorities of participating countries, subject to data and confidentiality protections.

The ABA notes that the OECD via BEPS Action 12 - Mandatory Disclosure Rules[18] is proposing a three-pronged approach in respect of tax transparency and Beneficial Ownership. The OECD proposes to:

- Analyse where there are gaps between tax compliance needs for beneficial ownership and the relevant FATF standards for AML, and where gaps are identified, suggest possible solutions taking cost/benefit considerations into account.
- Create the common transmission system for automatic exchange of financial account information, which could consider an approach to collecting and storing beneficial ownership information, for possible use by other repositories of ownership information such as registries, and designated non-financial businesses and professions; and
- Consider the legal ability of countries and jurisdictions to share and access beneficial ownership information, ensuring that the right legal and procedural framework is in place for this information to be shared domestically between government agencies, as well as internationally.

The ABA also notes the December 2016 statement[19] by a number of countries for the *Initiative for Automatic Exchange of Beneficial Ownership Information*. The 33 countries agreed to automatically exchange beneficial ownership information in a similar manner as under CRS. Under CRS, certain information relating to beneficial owners in certain passive entities that are tax residents of other relevant participating jurisdictions is subject to automatic exchange. The automatic exchange of beneficial ownership information will enable relevant tax administration and law enforcement authorities to track complex offshore arrangements that are used for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing.

Other implementation and administration issues

Sanctions

28) *What sanctions should apply to companies or beneficial owners which fail to comply with any new requirements to disclose and keep up to date beneficial ownership information.*

The ABA strongly agrees with the view that improving transparency around who owns, controls and benefits from companies will assist with preventing the misuse of companies for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing.

[18] OECD/G20 Base Erosion and Profit Shifting Project, Mandatory Disclosure Rules, Action 12 - 2015 Final Report, http://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm

[19] Statement on the initiative for the systematic sharing of beneficial ownership Information, 14 December 2016 , https://www.gov.uk/government/publications/beneficial-ownership-countries-that-have-pledged-to-exchange-information/countries-committed-to-sharing-beneficial-ownership-information

It is critical that beneficial ownership information is accurate and timely. Regulators and reporting entities with obligations to prevent and combat illicit activities (tax evasion, fraud, money laundering) are reliant on accurate beneficial ownership information. If the information is not accurate, it will ultimately lead to a requirement for additional work to be undertaken by each entity to verify information drawn from the register. Such an outcome would add an additional regulatory burden for regulated entities and negate any cost savings and efficiencies which would be derived from this heightened level of transparency.

The UK guidance on its Register of PSC is a thoughtful approach[20] [21]. The UK applies sanctions with regard to what companies and beneficial owners can and cannot control. It also provides guidance to companies on potentially freezing shareholder rights if a shareholder fails to provide information after the issue of various notices. The discussion around freezing rights usefully employs an appropriate regulatory leverage in an attempt to resolve failures before more serious sanctions have to be applied. However, ultimately, breaches of the requirements are considered to be criminal offences punishable by fines and/or imprisonment.

The ABA would be supportive of adopting an approach similar to the UK model, including the guidance around freezing of shareholder rights as one tool to encourage compliance. The use of criminal and civil sanctions for both companies and beneficial owners appropriately reflects the importance the global community is now placing on transparency of ownership and the combatting of money laundering and terrorism financing.

The current level of fines and imprisonment applied to a failure to notify ASIC of changes to a company's details would be a good starting point for both company and individual sanctions. However, an ongoing review is likely needed to ensure the severity of the sanction is in fact acting as a deterrent given the seriousness of the criminal activity we are seeking to deter and disrupt.

Finally, an important consideration will be the speed of regulatory enforcement. On the assumption that appropriate sanctions can be agreed, it is important that enforcement action is appropriate, swift and decisive. A failure to quickly address breaches of the requirements goes to the very heart of keeping the register up-to-date. The use of strict liability for obligations on companies and individuals should be considered.

Transitional arrangements

29) How long should existing companies have from when the legislation commences to report on their beneficial owners? What would be an appropriate transition period?

Time is of the essence, with FATCA and the commencement of the CRS from 1 July 2017, reliance on AML/CTF processes to identify and verify the actual controlling person and beneficial owner has become even more critical for banks and other reporting entities to detect and deter illicit activities, including tax evasion, money laundering, bribery, corruption and terrorism financing.

Under the UK model, reporting entities were required to set up and maintain their own PSC registers reasonably quickly as companies were able to compile the data from existing information with some additional investigations. The obligation to pass this information through to the central registry operated by the UK Companies House was linked to the UK equivalent of the ASIC Annual Return, like Australia, which is not one uniform date, rather the date of incorporation of that entity.

[20] Statutory Instruments 2016 No. 339 Companies – the Register of People with Significant Control Regulations 2016 http://www.legislation.gov.uk/uksi/2016/339/pdfs/uksi_20160339_en.pdf

[21] Department for Business Innovation & Skills, Guidance for Companies, Societates Europaeae and Limited Liability Partnerships https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies__LLPs_and_SEsv4.pdf

The ABA would be supportive of a similar approach being adopted here in Australia. In terms of establishing a company's own register of beneficial owner information, a period of three months after royal assent seems reasonable considering the company is likely to already be in possession of a substantial amount of the necessary information. In terms of the obligation on the company to pass beneficial owner information on to a central registry, linking this obligation to an established annual process such as the ASIC requirement to file an annual return will minimise the regulatory burden of the company during the initial one-year transition phase. Post the transition phase, changes to beneficial ownership data should be reported to ASIC within 28 days of the change.

Despite the fact it may take a full twelve months to ensure all beneficial owners information is properly reflected in the central register, those dealing with a company during this transitional period should be allowed to access the required information by requesting a certified copy or certified extract of the company's own register of beneficial owner information. It will also be important that regulators are explicit in placing the same level of trust in beneficial owners information sourced from an individual company as that sourced from the central registry during any transition period.

Paragraph 15 of the UK PSC Register summary guidance[22], notes that companies will need to make their own PSC register available for inspection on request at the company's registered office or provide copies. When making the PSC register available for inspection or providing copies the PSC's usual residential address must not be included.

Impact on affected companies and stakeholders

Questions

30) Do you foresee any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?

No, this information should already be available and the legislative regime should contain obligations for the company and individual to record and report the information.

31) What types of compliance costs would your business incur in meeting any new requirements for record-keeping and reporting of beneficial ownership information?

In terms of establishing a company's own register of beneficial ownership information, each company is likely to be in possession of a substantial amount of the necessary information and already have a system of records for other pertinent company information which can be easily extended to include beneficial ownership information. The obligation on the company to pass beneficial owners information on to a central registry beyond the transition period, linking this obligation to an established process such as the ASIC "changes to company details" process and the ASIC annual return, will minimise the regulatory burden.

32) If you are already required to comply with AML/CTF obligations, how do you see any new requirements to collect beneficial ownership interacting with those existing obligations?

The proposed reforms will have a substantial and positive impact for Australia. The adoption of the entire FATF framework and OECD transparency initiatives with regard to beneficial ownership will greatly assist in deterring and disrupting financial crime, greatly reduce the regulatory burden on reporting entities and result in significant cost savings not only for the government and its agencies, but particularly for the reporting entity population as a whole.

The OECD has legislated that countries that have an AML/CTF standard approved by FATF, i.e. has fully implemented recommendation 10, can rely on their AML program for the purposes of complying with CRS.

[22] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555657/PSC_register_summary_guidance.pdf

The FATF's *Mutual Evaluation Report Australia*[23]*,* points out that most designated non-financial business and professional sectors are not subject to AML/CTF requirements'. The FATF recommended actions for Australia are to "ensure that lawyers, accountants, real estate agents, precious stones dealers, and trust and company service providers understand their ML/TF risks and are required to effectively implement AML/CTF obligations and risk mitigating measures in line with the FATF standards, the project plan should reflect, in detail, the steps of this important reform …". The ABA has recommended progressing these reforms as a priority. If the second phase of AML/CTF reforms was already in force, then it would then be mandatory upon those setting up the company structures to collect and report beneficial ownership information to a central register.

33) *If companies had access to the additional beneficial ownership information collected, could this reduce companies' compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?*

Yes, if this information was already available in a public register it would help meet the enhanced CDD requirements under AML/CTF, and would also greatly assist in entities meeting their CRS and FATCA obligations.

34) *Could any changes be made to streamline or merge existing reporting requirements in order to reduce the compliance costs for businesses?*

Yes, as discussed earlier, ASIC and the ATO have a number of online reporting mechanisms that can be easily expanded to allow companies to report beneficial ownership information.

Other beneficial ownership transparency issues

Identifying those who can control listed companies

35) *Are the current substantial holding disclosure provisions sufficient to identify associates which may have the ability to influence or control the affairs of a company? What changes could be made to improve their operation?*

Whilst it may be possible to create a central share register that discloses actual beneficial ownership, it is very challenging to identify shadow directors. In the listed company space, the substantial holding provisions are adequate due to the need for public confidence in the ASX. In the private company space the situation is more challenging, hiding control or ownership is an art form.

36) *Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies?*

In the past, individuals have exploited the tracing rules by imposing very large numbers of intervening entities in order to slow down information gathering by a reporting entity or government agency. The logic being that if each entity takes the maximum time to respond to a tracing request then completion of the exercise will take a long time and the quest may be abandoned or become commercially redundant. Therefore, the ABA recommends that where multiple holding company structures are encountered it is recommended that expedited times to respond to a tracing notice should apply. The use of overseas jurisdictions for some holdings inevitably delays the inquiry process. Whilst the goal of achieving timely access is admirable, those truly determined will inevitably be able to slow the process down.

37) *In your experience, are there issues or obstacles (specific to obtaining ownership information) which currently arise when using tracing notices? If so, what are those issues or obstacles?*

See our answer to question 36.

[23] FATF and APG (2015), Anti-money laundering and counter-terrorist financing measures - Australia, Fourth Round Mutual Evaluation Report, FATF, Paris and APG, Sydney

38) In order to improve and incentivise compliance with the tracing notice regime should ASIC have the ability to make an order imposing restrictions on shares the subject of a notice until the notice has been complied with?

Yes, the existing restriction in the listed environment for entities that are not complying with a tracing notice should be replicated into this regime. Such powers should rest with ASIC.

39) What other changes could be made to improve the operation of these provisions?

The usefulness of the regime will be negated if the fees charged for using the system to trace ownership are exorbitant. High charges will frustrate the government's objective of improving transparency around who owns, controls and benefits from companies. High fees will also reduce the benefits and regulatory costs savings for reporting entities. The ABA recommends that any access fees should be limited to cost recovery only.

Other aspects of implementing recommendation 24: nominee shareholders and bearer share warrants

40) Who uses nominee shareholding arrangements, and for what purpose?

Nominee shareholding is often used by institutional investors and foreign investors.

Institutional investors, public offer superannuation funds, managed investment trusts (**MITs**) and wrap/Investor Directed Portfolio Services (**IDPS**) operators often make use of nominees (or custodians) in order to satisfy requirements to separate legal ownership as a governance requirement. By using nominee/custodian holding arrangements, such entities can also more efficiently manage their investment offerings. For example, if underlying owners of a MIT or IDPS redeem, rather than sell shares, the operator can simply reallocate them to new investors. This is administratively efficient and eliminates the need for brokerage with every underlying investor change.

Non-resident investors, particularly institutional, often make investments into Australian shares through an Australian nominee/custodian. This is because that nominee will be familiar with the obligations under domestic securities and taxation laws etc.

41) How often are nominee shareholding arrangements used?

Nominee/custodial arrangements are the most common way that institutional investment is made, hence for listed companies nominee shareholding arrangements are used frequently.

Managed investment scheme trusts will always use a custodian to hold the legal title in assets held. Hence for equities held by MITs, the title will always be held by a nominee/custodian.

42) What do you see as the benefits of nominee shareholding arrangements? Are there any negative aspects of their use?

The beneficial aspects are outlined in our response to question 40. One downside is that there is a financial cost for using a custodian.

43) Should further obligations be introduced in order to increase the transparency of the beneficial owners of shares held by nominee shareholders?

Not for listed companies nor managed investment schemes.

44) Are you aware of practical obstacles which would make increased reporting in respect of shares held by nominee shareholders problematic?

The ownership of listed company shares changes on a daily basis as does the ownership of units in managed investment schemes. Accordingly, listed shares and managed investment schemes held by nominees should be excluded from this regime.

45) Who uses bearers share warrants, and for what purpose?

The ABA is not aware of any current use of bearer share warrants and understands that proprietary companies would be the main issuer (user of bearer share warrants).

A *share-warrant to bearer* is a document issued by a company certifying that the bearer is entitled to a certain amount of fully paid stock shares.

Upon issuing the share warrants, the company must strike out the shareholder's name from its register of members and must state the date of issue of the warrant and the number of shares issued.

Generally, share warrants are easily transferable without any need for a transfer document. Accordingly, mere delivery of the warrant operates as a transfer of the shares of stock. If the share-warrant to bearer is purchased in good faith and without notice that it has been stolen, the purchaser obtains complete title to it, even though the warrant has been stolen by the person that stole it. This is an instrument with a primary purpose to hide (or provide privacy) to shareholders.

46) How often are bearer share warrants used?

The ABA believes bearer share warrants are used very rarely. However, as bearer share warrants are issued by companies and are not products listed on an exchange, there is no way of knowing how often they are issued (and hence, used).

47) What do you see as the benefits of bearer share warrants? Are there any negative aspects of their use?

Benefits can include:

- For shareholders:
  - This is an instrument that's primary purpose is to hide (or provide privacy) to shareholders. The transfer of the warrant (and hence the transfer of the underlying shares) will also be non-transparent.
  - Can derive an income stream from the purchase of a warrant dependent on its conditions.
  - As above share warrants are easily transferable without any need for a transfer document. Easy administration to transfer ownership of the underlying bearer shares.
- For companies: It is an avenue to allow for the purchases of their shares by potential shareholders (hence increase liquidity)

Negative aspects could include:

- Bearer shares are unregistered shares that are owned by whoever physically holds the share warrant. As no one is entered in the company's register of members as the owner of such shares, it allows them to be held anonymously and be easily transferable, thereby facilitating the concealment of, for example, a person/entity exercising significant control.
- The underlying value of the shares will be able to be transferred from one party to another very easily with no transparency of change of beneficial ownership. This will make it a potential tool for tax evasion or money laundering.
- As the transfer of a bearer share warrant can be facilitated by handing over the document to another person, the sale of the warrant will not be recorded, or be transparent, hence the source of funds will be undetectable.
- The warrant could be traded for other assets or products, and not necessarily cash (which in itself has issues). With these warrants not being on a regulated market, how they are traded and for what value etc. is not monitored or supervised.

- As above, the primary purpose is to hide (or to provide privacy) to shareholders. The transfer of the warrant (and hence the transfer of the underlying shares) will also be non-transparent. This means that for CDD purposes the shareholders/beneficial owners will not be recorded on registers.

48) Should a ban be introduced on bearer share warrants?

Bearer shares have become extinct in the UK as the UK Government suspected that, in some cases, they were being misused to facilitate illegal activity. As a result, since 26 May 2015, companies were no longer permitted to issue share-warrants to bearer. At the same time, all existing bearer shares were transitioned out of existence by 26 May 2016. Therefore the Australian Government should consider following suit and also ban companies from issuing bearer share warrants based on the above integrity issues.

If you wish to discuss any part of this submission please contact me on the number below.

Yours sincerely

Signed by A O'Shaughnessy

Aidan O'Shaughnessy
Policy Director - Industry Policy
02 8298 0408
aidan.oshaughnessy@bankers.asn.au

13 March 2017

Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market Street
SYDNEY NSW 2000

By email: beneficialownership@treasury.gov.au

Dear Ms Keall

Increasing Transparency of Beneficial Ownership of Companies

The Australian Financial Markets Association (AFMA) welcomes the opportunity to make this submission commenting on the Increasing Transparency of Beneficial Ownership of Companies consultation paper.

AFMA supports the objective of increasing transparency in relation to beneficial ownership.

As a general principle, AFMA recommends that the concept of 'beneficial ownership' should be aligned as closely as possible to existing regulatory frameworks, including those for Anti-Money Laundering/Counter-Terrorism Financing (AML/CTF) and the 'relevant interest' provisions of the *Corporations Act*. This should help ease the reporting and compliance burden associated with changes to the law to increase transparency.

The collection and dissemination of beneficial ownership information should also be integrated where practical with that for company information more generally. This should occasion a Government review of the accessibility regime for existing registers of company information to ensure that the economic value of this information is maximised and to bring this regime into conformity with Government policy commitments on public data principles and standards.

AFMA notes that the current consultation only deals with FATF Recommendation 24 on companies and not trusts, but trusts should be brought within the scope of the register.

There is scope to combine the information the ATO currently collects in respect of the beneficiaries of trusts, while also seeking additional beneficial ownership information through annual trust tax returns. This information should be combined with the beneficial ownership information on companies into a single register.

Q1: Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exemption apply to companies listed on all exchanges or only to specific exchanges?

AFMA supports an exemption for listed companies given the substantial disclosure and reporting obligations already imposed on these entities. The exemption should be limited to those domestic financial markets that have been licensed to operate in Australia by the Minister in accordance with Chapter 7 of the *Corporations Act*. Existing computerised share registries provide timely and efficient access to this information.

Q15. Should a central register of beneficial ownership information also be established?

A central register could be expected to facilitate more accurate, timely and efficient access to information compared to individual company registers. Given that ASIC already maintains a register of company information, it would make sense for ASIC to also maintain a register of beneficial ownership. This approach should not be seen as precluding future changes in the ownership or operation of the register, including by the private sector.

Beneficial ownership information, including verification, could be sought at the time of incorporation. Reporting obligations and the penalty regime in relation to the beneficial ownership register could then be aligned to those that apply to company information more generally. Beneficial ownership information could be included in the annual statement ASIC sends to companies for review and confirmation.

An important issue that arises in this context is the accessibility of the information contained in the beneficial ownership register. With the exception of question 33, the consultation paper contemplates the register being made available mainly to government users. However, there is a strong case for this information to be made more widely available to maximise its value to the community that will bear the cost of complying with beneficial ownership reporting requirements. AFMA note that the UK Register of People with Significant Control (PSC) is searchable by the public free of charge, excluding a PSC's residential address and date of birth for privacy reasons.

A more limited accessibility regime, canvassed in Question 33, would see the information made available to private sector entities with Know Your Customer (KYC) obligations and would assist in lowering the compliance burden of these obligations.

The question of accessibility to the beneficial ownership register also raises the issue of the charging framework to be applied to private sector use of the information. In the context of the Government's examination of the possibility of selling ASIC's register of company information, many observers noted that ASIC's charges for accessing this

information are among the highest in the world. If a central register of beneficial ownership is to be created and made searchable by non-government entities, consideration needs to be given to whether a user-charging framework is applied.

The Australian Government Public Data Policy Statement commits Australian government entities to make non-sensitive data open by default. The current charging framework in relation to ASIC's company register would seem incompatible with the Policy Statement.

The recent Productivity Commission inquiry into Data Availability and Use noted that ASIC's company register might constitute a National Interest Dataset in terms of the inquiry's proposed *Data Sharing and Release Act*. A central register of beneficial ownership could be viewed similarly.

A central register of beneficial ownership, along with publicly-held company information more generally, should be brought into conformity with the Government's Public Data Policy Statement. This suggests the need for a wider review of the accessibility arrangements and the charging framework applying to such data to ensure consistency of approach. In particular, the arrangements governing any beneficial ownership register should reflect the Government's forthcoming response to the Productivity Commission's report on Data Availability and Use.

Making existing company information and the beneficial ownership register freely available would be a cost to Government revenue, but would have wider economic benefits and facilitate good corporate governance by enhancing the private sector's ability to scrutinise corporate affairs, in addition to scrutiny by tax authorities and regulators. AFMA's submission to the Productivity Commission's inquiry into Data Availability and Use canvasses these benefits and related issues.[1]

27. Should beneficial ownership information be automatically exchanged with relevant authorities in other jurisdictions? Please explain why you agree or disagree.

If a register of beneficial ownership were made publicly accessible, the issue of exchange of information with other jurisdictions does not arise, except in relation to information that might be suppressed from public access for privacy reasons, such as residential address and date of birth. Any automatic exchange of information with authorities in other jurisdictions containing sensitive private information should be subject to a Memorandum of Understanding between the jurisdictions in relation to the use of such data to ensure that private information is adequately safeguarded.

33. If companies had access to the additional beneficial ownership information collected, could this reduce companies' compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?

[1] Submission to Productivity Commission Inquiry into Data Availability and Use, Australian Financial Markets Association, 29 July 2016.
http://www.pc.gov.au/__data/assets/pdf_file/0010/203230/sub057-data-access.pdf

An important potential benefit of a central register of beneficial ownership information is to alleviate existing AML/CTF reporting obligations on companies. This benefit could arise either through regulators directly accessing the information in lieu of current reporting obligations or companies accessing the register in the course of meeting these obligations. Ideally, the central register would also perform the identification and verification function so that this burden is not multiplied across all reporting entities dealing with each company customer. Reporting entities could then rely on the register to meet the verify requirement of KYC and ongoing customer due diligence obligations.

However, as noted previously in this submission, this argues for making the information generally available to maximise its economic value, subject to privacy protections. The Government would also need to give consideration to an access pricing regime if the information is not to be made freely available. As previously noted, any access pricing regime should conform to the Government's policy commitments in relation to publicly-held data and access to other business information.

Yours sincerely

Dr Stephen Kirchner
Economist

AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

Level 30
20 Bond Street
Sydney NSW 2000
www.companydirectors.com.au
ABN 11 008 484 197

T: +61 2 8248 6602
F: +61 2 8248 6633
E: ceo@aicd.com.au

17 March 2017

Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market Street
Sydney NSW 2000

via email: beneficialownership@treasury.gov.au

Dear Ms Keall

Increasing Transparency of the Beneficial Ownership of Companies

The Australian Institute of Company Directors (**AICD**) is pleased to provide a submission in response to the Australian Government's consultation paper titled *Increasing Transparency of the Beneficial Ownership of Companies* (**Consultation Paper**).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 39,500 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD acknowledges the important role that transparency of the beneficial ownership of companies can play in assisting authorities to combat and prevent illicit activities such as tax evasion, money laundering, bribery, corruption and terrorism financing. The Australian Government's commitment to the integrity of the domestic and global financial systems through exploring enhancements to the rules governing disclosure of the beneficial ownership of companies is laudable.

The AICD is supportive of measures to improve beneficial ownership transparency that are effective, efficient and consistent with existing relevant regulation.

Approach to transparency measures

Australia's more than 2.4 million companies already grapple with a complex array of compliance costs associated with doing business in Australia. Many of these are small or family companies. Accordingly, while the government's desire to introduce some form of beneficial ownership register is commendable, it has the potential to impose additional administrative requirements and costs on every company in Australia, the vast majority of which are law-abiding corporate citizens. We urge the government to carefully assess the practical impact of any new measures on business and the economy, before they are adopted.

We also strongly recommend that the government undertake the following steps in deciding whether to introduce new disclosure requirements and, if so, their form:

- The government should undertake a cost-benefit analysis of any proposed reform to measure its effectiveness and efficiency, and disclose this analysis to the public;
- To ensure consistency across the various Australian laws and regulations impacting on companies, and to minimise the disruption caused to business by regulatory changes, the government should utilise (insofar as is possible) legal concepts and processes already existing under the *Corporations Act 2001* (Cth) (**Corporations Act**). The UK approach to beneficial ownership should not be seen as the only viable model for Australia;
- To the extent possible, the government should integrate new data with existing government databases (eg the ASIC Register), and consider the impact of any planned upgrades to those registers. We note, for instance, that the ASX is currently undertaking a significant redevelopment of the CHESS system, which might impact on reforms relating to listed companies;
- Should the government ultimately decide to implement a new stand-alone central register, technology should be utilised to ensure that the register is effective and efficient; and
- As this scheme is one which the government has committed to, any notices required to be filed with an authority should be free of charge. No Australian company should be charged or "taxed" for providing information to the government for the purposes of policing illicit activity.

Summary

Having regard to the principles of effectiveness, efficiency and consistency, the AICD has considered a number of the questions posed in the Consultation Paper. Our detailed comments on those questions are set out below. In summary though, the ACID is supportive of:

- An exemption for listed entities from any new beneficial ownership disclosure requirements, as those companies are already subject to a transparency regime that appears to satisfy the G20 High-Level Principles on Beneficial Ownership Transparency developed during the Australian Presidency of the G20;
- A definition of "beneficial ownership" that draws on concepts already well established in the Corporations Act, such as "related interests";
- The onus of providing "beneficial ownership" information being placed on the natural persons holding a relevant interest in a company's shares, rather than the company being obliged to ascertain or verify this information; and
- Amendments to the tracing regime for listed companies being explored to improve their efficacy.

Question 1

Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exception apply to companies listed on all exchanges or only to specific exchanges?

The AICD strongly endorses a listed company exemption from any new beneficial ownership reporting requirements. More specifically, the AICD supports an exemption for companies included in the official list of a "prescribed market" (as defined in section 9 of the Corporations

Act) operated in Australia. An exemption is warranted because these companies are already subject to an ownership transparency regime which, as the Consultation Paper acknowledges, results in the disclosure of "persons who have a significant level of control or ownership of the companies". The regime, which is imposed by the Corporations Act, includes the following elements:

- Substantial holdings notices – A person who, together with any "associates", has "relevant interests" in the shares of a "listed" company such that they hold, or cease to hold, 5 per cent or more of the voting power must provide the company and relevant market operator(s) with a "substantial holdings" notice (section 671B of the Corporations Act). The notice must include the name, address and "relevant interests" details of that person and any associates. Notices must also be provided for movements of at least 1 per cent in these holdings; and
- Tracing notices register – Listed companies must keep a register recording the "relevant interests" information received in response to tracing notices issued under Part 6C.2 of Corporations Act (section 672DA of the Corporations Act). Given the existence of the substantial holdings notice regime, tracing notice information typically pertains to relevant interests in securities of less than 5 per cent.

Question 2

Does the existing ownership information collected for listed companies allow for timely access to adequate and accurate information by relevant authorities?

The substantial holdings notices regime allows for timely access to share ownership information by relevant authorities. In the AICD's view, the information captured by this system is adequate because it reveals the holders of legal and beneficial interests of 5 per cent or more of the voting power of listed company shares. Importantly, relevant authorities (and members of the public) can access substantial holding information without charge.

Additionally, the legal ownership data on a listed company's share register and the beneficial ownership information on a tracing notice register can be accessed and, for a fee, a copy obtained (although some authorities may be entitled to the information at no charge).

Regulators, such as ASIC, have significant powers, including the power to compel the production of books or the examination of witnesses, which may assist in their collection of corporate ownership information.

Question 3

How should a beneficial owner who has a controlling ownership interest in a company be defined?

To ensure any new regime is easy to use and roll-out, we recommend (insofar as is possible) adopting a definition of "beneficial ownership" which draws on existing legal concepts and definitions in the Corporations Act. This approach would avoid the need for new legal concepts to be introduced, and then interpreted or judicially considered.

For instance, drafters of any legislation could draw on the concept of "relevant interests" found in the Corporations Act. The concept of "relevant interests" is extremely broad, and would in our view more than satisfy the Financial Action Task Force's transparency and beneficial ownership recommendations.

In addition, a sensible source to draw upon to frame "beneficial ownership" (as that term is used in the Consultation Paper) would be Australia's takeover rules. Under these rules, a person cannot acquire a "relevant interest" in voting securities of an entity that is subject to the takeover rules if it would result in any person's "voting power" exceeding 20 per cent. The AICD considers that any definition of "beneficial ownership" for unlisted companies should be set at no less than 20 per cent voting power or shareholding of a company. There may be sound policy and compliance arguments for the threshold to be higher.

Question 12

What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?

The below suggestions relate to unlisted companies and are made on the basis that listed companies would be exempt from any new disclosure regime.

The AICD supports a disclosure model where a natural person (**RI Holder**) who holds relevant interests in a company (where those interests are above a certain prescribed threshold of say 20 per cent), bears the onus of reporting their relevant interests (**RI Information**) to the company. The RI Holder should also be required to update the company of any changes to their RI Information. Further, the legal holders of shares who do not hold the corresponding beneficial interests to those shares, should also be obliged to take reasonable steps to ascertain and provide to the company RI Information.

This approach would place the administrative and legal burden on the persons who are, practically speaking, best placed to know or ascertain RI Information. It would also minimise the cost and time implications of the new regime for companies.

A company should only be responsible for:

- Requesting RI Information by sending a notice (**RI Notice**) to legal shareholders who do not hold a corresponding beneficial interest, upon their entry onto the register of members and periodically (say annually) thereafter;
- Maintaining and updating a register (which could form part of the register of members) with the RI Information received (**RI Register**); and
- Reporting the RI Information received to ASIC in the same manner as the company reports other changes to the company's details.

We also recommend the government take the following comments into account when designing any new disclosure requirements:

- Companies should not be expected to verify the accuracy of RI Information received or "chase-up" shareholders who fail to respond to a RI Notice;
- Any obligation imposed on companies to send RI Notices should be time-specific, so that companies will not have to send more than one notice to shareholders within a given period (say, a 12 month period);
- Companies should have a period of 28 days within which to notify ASIC of new RI Information received by the Company. This period would align with the existing timeframe within which companies must notify ASIC of changes to their details;
- Any late fees charged by ASIC for failure to report RI Information should be no greater than the current fees charged for late changes to company details; and

- Companies should not be liable for unresponsive shareholders or inaccurate RI Information provided in response to an RI Notice.

Should the government expect companies to collect RI Information, appropriate sanctions should be put in place to secure compliance with the regime.

Question 13

Should each company maintain their own register?

While the AICD has concerns in relation to the administrative costs imposed on companies if they are obliged to maintain a register, it is difficult to imagine a system which does not involve, at least, the company holding this information and acting as a conduit to ASIC.

Question 15

Should a central register of beneficial ownership information also be established?

AICD does not believe a central register is necessary for the following reasons:

- The existing ASIC register could be leveraged to provide the equivalent functionality of a central register, particular if the government chooses to adopt the *de minimis* model suggested by the AICD in our response to question 12;
- In the context of listed companies, the substantial holding notification regime already provides publicly accessible beneficial ownership information; and
- There is a risk that the costs associated with the establishment and operation of a central register would be borne by companies and their shareholders under the "user pays" system currently being rolled-out by ASIC.

Question 28

What sanctions should apply to companies or beneficial owners which fail to comply with any new requirements to disclose and keep up to date beneficial ownership information?

The AICD recommends adopting sanctions which are consistent with those imposed by the Corporations Act with respect to similar matters, such as the failure to report a change of company details, or a failure to update a member register.

To the extent that such sanctions apply to directors or officers, the AICD strongly recommends the government ensure that such laws operate consistently with (at the very least) the Council of Australian Governments (COAG) principles on personal liability for corporate fault, agreed on 7 December 2010. The principles establish that where a corporation contravenes a statutory requirement, the corporation should be liable in the first instance and directors should not be liable for corporate fault as a matter of course.

Question 30

Do you see any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?

Any "beneficial ownership" register ultimately requires the co-operation of the persons holding the controlling or beneficial interests. In the absence of sanctions similar to those adopted by the UK to compel compliance, it is unlikely that companies would be able to secure co-operation from shareholders. The UK model triggers liability when a shareholder fails to

respond to a notice. A similar model should be considered in Australia in order to ensure shareholder compliance with any new regime.

In addition, and contrary to some perceptions in the community, many unlisted companies already provide their shareholders with a large quantity of paperwork, including annual reports, voting papers and notices of meetings. As a consequence, there is a real danger that any proposed mechanism would simply add to the existing "swirl" of paperwork, resulting in a large swathe of incomplete or inaccurate information being held by companies. Consideration should therefore be given to a scheme which minimises the paperwork required, and is flexible enough to be suitable for all kinds of companies.

Question 36

Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies??

Question 37

In your experience, are there issues or obstacles (specific to obtaining ownership information) which currently arise when using tracing notices? If so, what are those issues or obstacles??

While the AICD supports an exemption for listed companies as outlined above and a *de minimis* approach to any reform relating to this issue, we do recognise that there are some limitations to existing tracing laws. This is partly because the tracing laws contain provisions which essentially provide relief or shelter from the disclosure obligations. These provisions include:

- The requirement for the information to "only be disclosed to the extent to which it is known to the person"; and
- The relief from providing the information if the person proves the giving of the notice, requiring the information, to be "vexatious".

In addition, there are a number of hurdles and barriers which undermine the efficiency and effectiveness of the tracing laws. Some of these include:

- Legal structures which, although not specifically designed to facilitate such a purpose, segregate beneficial from legal ownership, with the legal registered owner not having direct access to information concerning the true beneficial owner;
- Financially engineered instruments (e.g. derivatives) where the entitlement to the underlying rights attaching to shares are "dismembered" or "partitioned and segregated" either on an ongoing basis or for a short temporal period (e.g. share lending for voting or short selling facilitations);
- Legal structures specifically designed to mask or shield the identity of the beneficial owner (e.g. corporations or trusts (including discretionary and "blind" trusts)); and
- Successively linked legal structures, perhaps even "shadowing" through global jurisdictions whose laws favour identify protection (including commonly known tax havens).

One consequence of these limitations is that, in some circumstances, ASIC or the company do not have timely access to current information in relation to beneficial ownership information where those "relevant interests" are less than 5 per cent of the voting power.

Accordingly, to improve the existing regime, the AICD recommends that the government consider whether the provisions referred to above could be modified to reduce the time and costs involved in issuing tracing notices. For example, the government could explore the possibility of amending section 672B(1A) of the Corporations Act so that a person who is given a direction must take "reasonable steps" or make "reasonable inquiries" to ascertain the full details of the information required to be provided under section 672B(1). Such a change may enhance the effectiveness of the tracing notice regime.

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Matt McGirr, Policy Adviser, on (02) 8248 2705 or at mmcgirr@aicd.com.au.

Yours sincerely

LOUISE PETSCHLER
General Manager, Advocacy

Australian Shareholders' Association Limited
Suite 1A Level 2
20 Loftus Street Sydney NSW 2000
GPO Box 359 Sydney NSW 2001
t 02 9252 4244
f 02 9252 4966
e share@asa.asn.au
ABN 40 000 625 669

20 March 2017

Ms Jodi Keall
Senior Adviser
Financial System Division
The Treasury
100 Market Street
Sydney NSW 2000

By email to beneficialownership@treasury.gov.au

ASA SUBMISSION – IMPROVING TRANSPARENCY OF THE BENEFICIAL OWNERSHIP OF COMPANIES

Dear Ms Keall

The Australian Shareholders' Association (ASA) represents its members to promote and safeguard their interests in the Australian equity capital markets. The ASA is an independent not-for-profit organisation funded by and operating in the interests of its members, primarily individual and retail investors, self-managed superannuation fund (SMSF) trustees and investors generally seeking ASA's representation and support. ASA also represents those investors and shareholders who are not members, but follow the ASA through various means, as our relevance extends to the broader investor community.

We refer to Treasury's consultation paper entitled "Increasing Transparency of the Beneficial Ownership of Companies" (the **Consultation Paper**) dated February 2017.

We are supportive of the move to increase transparency of the beneficial ownership of companies and establish a beneficial ownership register. We note that the impetus behind the introduction of a register of beneficial owners is, at a minimum, to make the information available to financial institutions in conducting their customer due diligence procedures for anti-money laundering purposes, to certain authorities such as police forces and to other persons or organisations who can demonstrate a legitimate interest in the information. This can include regulators such as the Australian Taxation Office (ATO) seeking to ascertain if tax evasion is being undertaken. Registers of beneficial ownership in multiple jurisdictions will help create a global financial system that is transparent and accountable, and that is ultimately also in the interests of shareholders.

Beneficial owners are essentially individuals with significant control (whether direct or indirect) over the company, which is a matter of interest to ASA. Notwithstanding that ownership interests in listed companies appear to be excluded from these requirements, we strongly believe that Treasury should take this opportunity to review the existing disclosure requirements in respect of beneficial

ownership of listed entities. We are also of the view that the Government should ensure that ASIC has sufficient funding and resources to carry out any additional responsibilities without detriment to its other responsibilities.

We acknowledge the Government's objective of providing information to relevant authorities to enable them to counter illicit activities, including tax evasion and money laundering. However, it is important that any information available on a central register is also made available to the general public.

Our comments on the proposals are set out below. Any new legislation should adopt a principles-based approach that is not overly prescriptive, which is then supplemented by relevant guidance provided by ASIC in the form of a Regulatory Guide.

We note the Consultation Paper refers generally to 'Australian companies' and 'share ownership'. It is unclear to us whether the proposed reforms are intended to cover other entities such as managed investment schemes where beneficial ownership information will also be useful to securityholders. ASA recommends that the Government provide clarity as to whether managed investment schemes will be covered.

Collection of beneficial ownership information

We are broadly supportive of adopting a beneficial ownership reporting system similar to that in the United Kingdom, including the definitions and thresholds used. Our view is that any information collected should be about beneficial ownership only, rather than information related to control exerted via means other than owning or having interests in shares or a position held in the company.

We agree with listed companies being exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies. This exemption should apply to all listed entities which are subject to Chapter 6C of the Corporations Act 2001 (Cwlth) (**Corporations Act**), including listed managed investment schemes and irrespective of the exchange they are listed on, provided the information already reported is publicly available.

Companies should be required to maintain their own register. We also support the establishment and maintenance of a central register of beneficial ownership information which can be readily searched by the public. ASIC would be best placed to operate this register, although we note that given the limited funding and resources currently available to ASIC, a sufficient level of Government funding must be provided to ASIC for it to properly administer the central register to achieve the desired outcomes. While we note that the industry-funding model proposed by the Government could be utilised to address any deficiencies in the regulator's funding, ASA encourages the Government to clarify that the funding of a central register by ASIC has been considered as part of the proposal to introduce a register of beneficial ownership.

We strongly recommend that the register held by ASIC should be free to search, that is, no fees should attach to any searches conducted on the information held on the register.

Those required to report beneficial holding information should be required to report this information to the relevant company as well as directly to ASIC. This ensures that up-to-date information is available to the company, ASIC and the general public. We would expect companies to regularly take steps to ensure the accuracy of information on the central register, including to verify the information on the central register at least on an annual basis. However, we would like a greater emphasis on requiring beneficial owners to report information rather than companies to regularly verify information, as the latter may be difficult given the compliance burden and the practicalities of when a company is able to know if reported information is incorrect.

Disclosure of substantial shareholders and tracing beneficial owners

We have a number of concerns about the current regime of disclosure and reporting of substantial holding information under Chapter 6C of the Corporations Act. Listed companies are required to maintain a register of substantial shareholders. ASA strongly supports this register, which goes to the heart of understanding control of a company. However, even with this register being mandated, it can be difficult for companies to identify shareholders on the register. Tracing through layers of nominees and custodians is challenging to identify the beneficial owner. Companies are required to disclose a list of top 20 shareholders in their Annual Report, however at least in the case of the larger entities, this list does not reveal any meaningful information as many of the top shareholders are nominees or custodians. It would be helpful to be able to rely on that list as a statement of beneficial ownership.

There are tracing provisions in the Corporations Act, but the process itself is time-consuming and expensive — we note that it is shareholder funds that are expended on this process. Many companies commission specialist analyst advisers to trace shareholders on the register. Even with specialist assistance, the information can be out-of-date by the time the company receives it, given that the composition of the register is constantly changing. Moreover, the costs of the specialist analyst advisers can be beyond the resources of smaller listed companies, although many smaller companies have detailed knowledge of their major shareholders, due to the smaller size of the register.

For the investor, we note that the current ASX announcements platform, which contains the substantial holding information for listed entities, is not readily searchable. It is troublesome for an ordinary person to find useful information about substantial shareholders of listed entities without using a paid resource. Furthermore, the information disclosed on substantial holding notices is difficult to understand as it includes information which is repetitive and often undecipherable to the ordinary person.

The current substantial shareholder regime also relies on the accuracy of information provided by those required to report information. At present, there appear to be inadequate sanctions for failing to provide accurate information in a timely manner. As a result, there are circumstances such as in the recent Bellamy's case where even the company did not know the ultimate beneficial owners of the parties who had requisitioned an extraordinary general meeting. That information was only determined following a tracing notice that was issued by Bellamy's under the Corporations Act.

For all the reasons set out above, we question the effectiveness of the current regime of disclosing substantial shareholders and the use of tracing notices. Furthermore, whilst we believe there is reasonable scope in these provisions to find out more information, the use of tracing notices is dependent on the relevant authorities and companies regularly monitoring public disclosures, shareholding patterns and the media in order to determine whether the provision of a tracing notice is warranted.

Our view is that this is an opportune time to reconsider the disclosure of substantial holders for listed entities and merge information disclosed under Chapter 6C of the Corporations Act into a central register that is simple, user-friendly and accessible to the public. ASA strongly recommends that the introduction of a beneficial ownership register be accompanied by reform of the disclosure of substantial shareholders for listed entities.

ASIC funding and operation of other registers

Parts of the ASIC registry's existing technology systems are over 25 years old. This limits service levels, search functionality, and the capacity to access and use the data. Some registrations remain paper-based, and particular data cannot be linked across the 31 registers that form the registry business. Without doubt, without an influx of funds to upgrade and provide ongoing improvement to the IT systems, the ASIC registry will struggle to meet the needs of an advanced economy, so simply adding one more register to this challenged system is unlikely to achieve the desired public policy outcome of the proposed reform in relation to a beneficial ownership register.

As noted above, we believe that if ASIC is to maintain the central register and be able to fully utilise its powers under the relevant legislation to investigate missing information, it is important that ASIC is adequately funded and resourced, and that resources are not redistributed away from ASIC's other activities to fund this new role. We strongly recommend that dedicated funding be provided to ASIC (whether under the industry-funding model or otherwise) to reconsider the operation of the various public registers and whether any information in those registers should be merged into a single register that can be easily accessed.

If you have any questions about this submission, please do not hesitate to contact me on (02) 9252 4244.

Yours sincerely

Judith Fox
Chief Executive Officer
Australian Shareholders' Association

Australian Government, Increasing Transparency of the Beneficial Ownership of Companies, Consultation Paper, February 2017

Submission by Dr David Chaikin

Barrister, Chair of the Discipline of Business Law and Associate Professor
The University of Sydney Business School
Codrington Street, Darlington, Sydney NSW 2006
Email: david.chaikin@sydney.edu.au
13 March 2017

Thank you for the opportunity of providing comment on the above mentioned consultation paper.

Background

There are significant obstacles in identifying the beneficial owners of companies largely due to the system of nominee shareholdings. Although the original rationale of nominees was to facilitate the administration of assets, the nominee shareholding system has evolved so that it is now an "essential part of the infrastructure of the world's capital and financial markets": see David Chaikin, 'Nominee shareholders: Legal, commercial and risks aspects', (2005) 18 *Australian Journal of Corporate Law 288* (**Attachment A**). Since there is no prospect of abolition of nominee shareholdings – which would plainly be a foolish endeavour – identifying beneficial ownership will be problematical whatever proposals are enacted by the Australian government.

There are numerous studies documenting the abuse of corporate structures in relation to corruption, tax evasion, money laundering, fraud and phoenix trading. It is widely accepted that beneficial ownership information is critical to law enforcement and the tax authorities, but this begs the question whether a new regulatory regime which requires "adequate, accurate and timely information on the beneficial ownership and control" of companies and legal arrangements, such as trusts (FATF Recommendations 24 and 25), would secure this objective. A related question is how will an increase in transparency of beneficial ownership deter criminals or tax evaders from using companies?

A new requirement of disclosure of beneficial ownership, will make it more 'difficult' for criminals to use corporations, but this is unlikely to offset the significant advantages of using a corporation, coupled with the ease of incorporation and relative low costs of establishment and maintenance. In these circumstances, any new regulation to improve the transparency of beneficial ownership of companies is likely to have only a modest effect on criminal misuse of corporations; assuming criminals are rational actors, they will take steps to evade or avoid any beneficial ownership transparency requirement. A counterfactual case is that of the Panama Papers where the intermediaries of suspected criminals and tax evaders disclosed to a Panamanian law firm/corporate services provider the beneficial ownership of thousands of offshore corporations.

As far as government policy is concerned, the major justification for enacting enhanced transparency of beneficial ownership of a proprietary/private company should be the Australian Government's commitment to the G20 and the Financial Action Task Force (FATF). If this is the case, then the regulatory policy that is adopted by Australia should comply with the minimum requirements of the global standards. Whether Australia should 'gold plate' those standards, as the United Kingdom government has done in relation to its creation of a central corporate registry of persons of 'significant control', is perhaps the major policy question that will need to be addressed in this consultation.

In relation to the issues raised in the consultation paper, I make the following observations.

Scope of companies subject to a new transparency ownership requirement

Listed companies should be excluded from any new requirement to obtain beneficial ownership information and/or establish a new beneficial ownership register since this would be an unnecessary duplication of the existing obligations on listed companies. This is consistent with the FATF's global standards on anti-money laundering (AML) and counter-terrorist financing (CTF) and the UK legislation on transparency of beneficial ownership of private companies (see *Small Business*, *Enterprise & Employment Act 2015* amending the *Companies Act 2006* by inserting a new Part 24). Any attempt to amend the existing requirements on listed companies, for example by imposing a new obligation on listed companies to obtain beneficial ownership information (rather than imposing the obligation on the beneficial owner of a listed company as is the current law in Australia, UK and elsewhere) would make Australian corporate securities law unduly burdensome and uncompetitive.

Tests for beneficial ownership

If the government seeks to obtain a high level of compliance with any new legislation it should ensure that the tests for beneficial ownership disclosure are easily understood by the directors and owners of companies in Australia that would be subject to the new obligation.

The UK tests for disclosure of beneficial ownership of companies are somewhat complicated in that it is necessary to examine the legislation, regulations, statutory guidance and non-statutory guidance. The reason for such complexity is that legitimate businesses in the UK wished to have greater certainty in respect of their new obligations, given that a breach of their obligations would amount to a criminal offence.

It is highly likely that the vast number of criminals who misuse criminal structures will not be combing through a regulatory maze of tests to avoid compliance with any new beneficial ownership requirement; they will just evade their obligations. If this is the case, and given that there are relatively simple mechanisms to avoid complying with any new regulatory scheme, then the effect

of a complex test of beneficial ownership may be to impose additional regulatory costs without commensurate benefits.

Collection of beneficial ownership information

The UK legislation imposes an obligation on private companies to collect information on persons with significant influence (PSC), and a default obligation on PSCs to notify the company of their interests. This may be contrasted with the UK law (and the Australian law) in respect of listed companies, where the obligations are imposed only on beneficial owners. No explanation has been given as to why the obligations on private companies in the United Kingdom should be greater than listed companies in collecting beneficial ownership information. One possible explanation is that the UK adopted a more onerous regime because this was the only realistic method of quickly creating a central corporate registry of beneficial ownership.

Tracing Notices/Directions

Tracing notices/directions under the *Corporations Act 2001 (Cth)* have facilitated the statutory objective of a fully informed, efficient competitive market in the shares of listed companies. The reason for this success is that a secret beneficial owner will not be able to take control of a company through a takeover, unless it complies with a tracing notice.

On the other hand, the use of tracing notices to obtain beneficial ownership information has been of limited utility in unmasking secret beneficial owners of listed companies who hide behind foreign nominees: see *Australian Securities Commission v Bank Leumi Le Israel (Switzerland)* [1996] FCA 825; 69 FCR 531; 139 ALR 527; 14 ACLC 1576; 21 ACSR 474. The case law suggests that tracing notices will not be effective in identifying a secret beneficial owner who wishes to maintain anonymity even if this means the sale of its shares: see David Chaikin, 'Penetrating Foreign Nominees: A failure of strategic regulation', (2006) 19 *Australian Journal of Corporate Law* 141, and cases cited at pp 153-157 (**Attachment B**).

Even if the Australian courts were prepared to impose punitive sanctions (such as confiscating shares) on unidentified beneficial owners who refuse to consent to their nominees disclosing their identity under a tracing notice, this would have little, if any, deterrent effect on 'shell companies', since by definition such companies have no valuable asset within the jurisdiction.

The above considerations do not mean that tracing powers have no policy importance. It would be useful to make the existing tracing powers under the *Corporations Act* 2001 (Cth), which can be utilised by the Australian Securities and Investment Commission and listed companies, available to proprietary companies. An extension of the law would allow the Australian Government to argue in international fora, such as in respect of the FATF, that it has increased its investigatory capacity to obtain beneficial ownership information.

Should there be a central registry of beneficial ownership?

Under the existing FATF global standards, there is no present requirement for countries to create a central registry of beneficial ownership. Whereas the UK has adopted a regime requiring a central register of beneficial ownership, under the proposed Singaporean legislation companies will be required to maintain a register of beneficial ownership but no central registry will be created at this stage.

One of the advantages of a central registry is that law enforcement will be able to apply 'Big Data' techniques to beneficial ownership and other corporate information. According to Anthony Wong: "Big data allow us to combine, interrogate, mine and analyse large structured or unstructured, multiple datasets with ease where the sum of these datasets is more valuable than its parts, allowing us to identify correlations that were not easily done previously": see Antony Wong, 'Big Data Fuels Digital Disruption and Innovation: But Who Owns the Data', chapter 2 in David Chaikin and Derwent Coshott (forthcoming) (eds), *Digital Disruption: Impact on Business Models, Regulation and Financial Crime*, Australian Scholarly Publishing, 2017, pp 19-20). This is illustrated by a recent study by Global Witness which examined the UK beneficial ownership data set in November 2016 and found numerous inconsistencies as well as interesting investigatory leads: see Robert Palmer and Sam Leon, *What Does the UK Beneficial Ownership Data Show Us*, Global Witness Blog, 22 November 2016.

Operation of a central registry

Any proposal to privatise a central registry of beneficial ownership (and any other register operated by ASIC) would result in increased costs to the general public in accessing information on the register. This would undermine the basic goal of transparency by making it more costly to access information that is being collected under statutory enactment.

Australia is notorious in its policy of imposing high charges and fees to access corporate information. For more than 20 years it has been far cheaper to investigate foreign incorporated companies (eg companies registered in the cantons of Switzerland) than Australian companies, since many foreign countries do not charge fees on electronically accessing information on their corporate registries.

If Australia continues to charge fees for accessing corporate information, the potential benefits of a central registry will be more limited than is the case, say in the United Kingdom, which permits the entire PSC data set to be downloaded by the public at no cost.

Verification of beneficial ownership information

One of the most difficult challenges in ensuring compliance with any new law is verifying beneficial ownership information which is supplied to the company. Under chapter 4 of the *Anti-Money Laundering and Counter-Terrorism Financial*

Rules Instrument 2007 (No.1) (Cth) reporting entities are obliged to take 'reasonable measures' to verify certain information concerning the beneficial owner. For larger reporting institutions, such as banks, there is an incentive to comply with a verification obligation because of the penalties that may be imposed under Australian law but also under foreign laws, such as under the United States AML/CTF laws and the Foreign Account Tax Compliance Act (FACTA). Larger reporting entities rely on economies of scale to obtain benefits from spending resources on verification, while smaller reporting entities do not have adequate resources to verify beneficial ownership information.

It has sometimes been asserted that the corporate registry should have an obligation to vet and verify information that is supplied to it, for example that ASIC should have an obligation to verify beneficial ownership information in relation to proprietary companies. This argument ignores the costs which would be incurred by ASIC if it had to vet the millions of documents that it receives each year from companies.

Given that more than 70% of new companies are registered through a corporate services provider (CSP), it would make sense if an obligation was imposed on CSPs to verify the accuracy of beneficial ownership information. This new obligation on CSPs should be part of a new regime whereby CSPs were made reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).*

A Modest alternative proposal(s)

If the Australian government decides that comprehensive legislative approach to beneficial ownership transparency is preferable, it could adopt the UK legislative framework with some slight modifications. A central corporate registry of beneficial ownership information would be an essential plank of the new system.

If the Australian government is concerned about the increased costs on small businesses which may result from a comprehensive legislative regime, it may consider a more modest proposal as follows:

> The transparency obligation should be imposed only on a limited class of persons, for example, new companies upon registration. A new company is in the best position to know the identity and details of its beneficial owners. Given that approximately 200,000 new companies are registered with ASIC each year, the burden of compliance would be much less than imposing the obligation on 2.4 million registered companies. The other advantage of targeting new companies is that such companies are more likely to be used in phoenix trading, which is a serious problem for businesses and the tax authorities.
>
> The transparency obligation should be also be imposed on the transferees of shares of existing companies. That is, where a member's shares are transferred to a third party, that party would not only have an obligation to disclose whether those shares are beneficially held or not (as is the

current law), but also identify who is its nominator (if applicable) and the identity of the ultimate beneficial owner (if known). This information would be of some value to law enforcement and tax authorities which could use their investigatory powers to make inquiries of the nominator and/or the UBO.

Companies should be given the power to trace beneficial shareholders if they desired to utilise such powers.

The above approach is admittedly gradualist, not comprehensive and in the modern parlance full of loopholes, in that criminals will be able to misuse existing companies. However, where criminals seek to use a new company to carry out a crime or launder monies, there will be obligations of disclosure.

In relation to the vast majority of companies which are law abiding, it might be useful to encourage such companies to voluntarily supply beneficial ownership information as part of their annual return. Many proprietary companies might decide that it is in their best interests to volunteer such information as part of their corporate social responsibilities.

END OF SUBMISSION

Nominee shareholders: Legal, commercial and risk aspects

*Dr David A Chaikin**

It has been settled law since the nineteenth century that the shares of a registered company may be held under a nominee arrangement. The original justification for nominee shareholding was that it provided an efficient mechanism for the administration of assets held on behalf of another person, and that it secured the financial privacy of persons who did not wish to appear on the company registry. The role of nominee arrangements has expanded beyond its original rationale to become an essential part of the infrastructure of the world's capital and financial markets. The demand for efficient systems for registering, holding, transferring and clearing securities transactions has resulted in the widespread use of nominee arrangements. The commercial use of nominee shareholdings is so important that any proposal to prohibit the use of nominees would be costly and unworkable. There is nothing illegal or unethical in using nominees as part of a private or commercial arrangement. In the case of a nominee, there is no common law principle or doctrine of equity requiring the identification of the ultimate beneficial owner of securities. The corporate law justification for requiring disclosure of substantial holdings of listed companies does not apply in the case of proprietary or private companies. Any proposal to extend the substantial shareholder disclosure regime to proprietary companies requires separate and substantial justification, which has not yet been forthcoming. There is an argument that the financial privacy justification for nominee shareholdings should be discarded because nominees may be used for illicit purposes, particularly money laundering. This argument ignores the legitimate demands for financial privacy. It is not supported by empirical evidence of significant misuse of nominees. It also fails to appreciate that nominee shareholdings are only one of many devices that are open to those who wish to conceal their interests in shares for illicit reasons.

1 Introduction

It has been settled law since the nineteenth century that the shares of a registered company may be held under a nominee arrangement. The original justification for nominee shareholding was that it provided an efficient mechanism for the administration of assets held on behalf of another person and that it secured the financial privacy of persons who did not wish to appear on the company registry. The demand for nominee shareholdings has increased as a consequence of the development and internationalisation of capital markets. Today nominee arrangements are an essential feature of the system for registering, holding, transferring and clearing securities transactions.

The main criticism of nominee shareholding is that it may facilitate hidden

* Ph D in Law (Cambridge), LLM (Yale), BCom/LLB (UNSW), Barrister (NSW).

changes in corporate control, especially in relation to takeovers.[1] The concern of company lawyers with the potential misuse of nominees has focused on the lack of transparency of significant shareholdings in listed companies. This has led to the enactment of laws requiring disclosure of persons who have a substantial interest in shares. These laws only apply to a limited class of companies, usually shares that are traded in the public securities markets.

The use of nominee shareholdings to conceal financial crimes such as corruption and money laundering has resulted in the questioning of the financial privacy rationale of nominee shareholdings.[2] Criticism of nominee shareholdings is often made without an understanding of the legitimate demands for financial privacy which may also be important for the efficiency of business enterprises. It also ignores the fact that nominee shareholding arrangements are only one of many devices that are open to those who wish to conceal their interests in shares for illicit reasons. The widespread use of nominee shareholdings means that any proposal to require increased disclosure should be carefully designed so as not to impose onerous burdens on business and markets.

2 Historical overview of nominee shareholders

Anglo-American jurisprudence has recognised for a long time that the shares of a company may be held under a nominee arrangement. In 1844 when registered companies were first introduced in England,[3] there was a requirement of a minimum number of members (or shareholders) whose identity was disclosed on the corporate registry. There was no requirement to disclose the beneficial ownership of shares. The concern of the English legislature at this time was with the legal liability of members for calls on partly paid shares issued in their names.[4] Since the registered shareholder was liable for the calls, it did not matter whether those shares were held under a nominee arrangement.

In 1897 in the important case of *Salomon v Salomon*[5] the House of Lords held that the minimum number of members of a company could be satisfied even if the interests of some shareholders were small, or indeed nominal. Lord Herschell observed[6] that although a 'one-man company' may not have been in contemplation by parliament when bestowing limited liability on registered companies,[7] there was nothing in the companies legislation requiring the seven registered shareholders to be beneficially entitled to their shares.

1 See Company Law Advisory Committee Report to the Standing Committee of Attorneys-General, *Substantial Shareholdings and Takeovers*, Chairman R M Eggleston, Commonwealth Government Printing Office, Canberra, December 1969.

2 'With respect to publicly traded shares, nominees . . . are commonly and legitimately used to facilitate the clearance and settlement of trades. The rationale for using nominees in other contexts, however, is less persuasive and may be subject to abuse.' : see OECD, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purpose*, OECD, Paris, 2001, p 31.

3 Joint Stock Companies Registration and Regulation Act 1844 (7 & 8 Victoria c 110).

4 See *Report of the Committee on Company Law Amendment*, Cmnd 6659, HMSO, London, 1945, par 77-9 (Cohen Committee).

5 *Salomon v Salomon & Co* [1897] AC 22.

6 Ibid, at 43–4.

7 The members of a registered company were liable for its debts until the Limited Liability Act 1855 (18 & 19 Vict c 133).

The idea that company law was not concerned with discovering the beneficial ownership of shares was reiterated by a number of principles. In countries which followed the British model of shareholder membership, such as Australia,[8] there was a statutory enactment which provided that no notice of any trust, whether express, implied or constructive, may be entered on the register of members.[9] The purpose of this requirement was to protect the company from legal action by persons who were not registered as shareholders, such as beneficiaries of a trust where shares were held in the name of a trustee. The company was not required to adjudicate on disputes that may arise between registered shareholders and third parties in relation to the shares of the company. The virtue of this requirement was that it facilitated a free market in shares. It also reinforced the foundation principle of the separate legal personality and identity of the company.

Under the British model of share ownership, there was a freedom to transfer shares without disclosing beneficial or equitable interests. A registered shareholder was free to transfer or assign any equitable interest in his or her shares without disclosing this to the company or to the public generally. This allowed a shareholder to deal with interests in shares through an equitable assignment.

Until the rapid development of public capital markets in the latter half of the twentieth century, company law in most countries was not concerned with the identity of the ultimate beneficial owner of shares.[10] It was the demands of the market for information about the persons who exercised control over publicly listed companies which led to the enactment of legislation requiring the disclosure of the beneficial ownership of shares.

3 Substantial shareholder disclosure law in Australia

The historical reasons for enacting a shareholding disclosure regime relate to matters of concern to company lawyers, and have little, if anything, to do with matters relating to financial crime. The classic justification for a law requiring public disclosure of substantial beneficial interests is that it facilitates the creation and maintenance of a fully informed, efficient and competitive market in shares.[11] An equally important justification for shareholder disclosure is the maintenance of public confidence in the securities market.[12] In most countries the disclosure obligation applies to a limited class of companies 'whose membership is likely to be a matter of interest to investors, potential investors

8 Most of the Australian colonies passed legislation based on the model of the English Companies Act 1862 (25 and 26 Victoria).

9 See Companies Act 1862 s 101, now Companies Act s 360 (England). For the current Australian provision limiting the placing of trusts on the corporate registry, see Corporations Act 2001 (Cth) s 1072E (10).

10 This article does not examine tax and the general fiscal law, which have developed far reaching provisions, in many instances allowing full penetration of nominee registration.

11 See *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 69 FCR 531 at 535 per Lehane J; 139 ALR 527. See also Corporations Act s 602(a).

12 Securities Commission of New Zealand, *Nominee Shareholdings in Public Companies: A Review of the Law and Practice, with a Proposal for Reform*, Government Printing Office, Wellington, 1981, pp 133, 146. See also D Chaikin, 'Cracking the Nominee in New Zealand' (1982) 8 *Commonwealth Law Bulletin* 814–20.

and the public at large'.[13] For example, in Australia the statutory regime for disclosure applies to 'substantial holdings' in the securities of listed companies and managed investment schemes.

The shareholder disclosure obligation was first enacted in Australia in 1972 and has been revised on a number of occasions to deal with unintended loopholes. As a consequence the shareholder disclosure law is detailed, complex and often difficult to interpret in the increasingly sophisticated and rapidly changing capital markets.[14] There are considerable compliance costs associated with a comprehensive substantial shareholder disclosure law. Under s 9 of the Corporations Act 2001 (Cth) the disclosure obligation arises when a person has a substantial holding, that is, when a person and their associates have a relevant interest in shares which carry 5% or more of votes.

Of critical importance is the definition of 'relevant interest' which is set out in ss 608 and 609 of the Act. The basic rule is that there are three circumstances where a person has a relevant interest in securities: '(a) [if they] are the holder of securities; (b) [if they] have the power to exercise, or control the exercise of, a right to vote attached to the securities; or (c) [if they] have the power to dispose of, or control the exercise of a power to dispose of, the securities.' The Corporations Act extends the basic rule to cover a range of situations in which control of securities may be exercised. For example, a person has a relevant interest in any securities held by a company where that person's voting power is above 20% in relation to that company.[15] A person also has a relevant interest in any securities of a company which that person controls.[16] A person is deemed to control a company if that person has the 'capacity to determine the outcome of decisions' of that company.[17] This means that a person who exercises control through a chain of companies will be subject to the disclosure obligation.

The definition of relevant interests focuses on a person's voting power which is measured by a formula set out in s 610. In calculating whether the 5% threshold has been reached, the relevant interests of the person and their 'associates' are added together. The courts and the Takeover Panel have adopted a liberal interpretation of the concept of associates, which is dealt with in ss 10 to 17 of the Act. As a practical matter, it may be difficult to determine whether a person who is resident overseas is an associate. The Act also lists situations in which a 'relevant interest' is to be disregarded. The justification for excluding certain relevant interest from the disclosure obligation is that these interests are generally not held for the purpose of exercising or obtaining control of the company. For example, one of these exceptions is a nominee that holds securities as a bare trustee.[18]

The law on substantial holding disclosure sets out the requirements as to the

13 *Report of the Company Law Committee*, Cmnd, 1749, HMSO, London, June 1962, para 143 (Jenkins Report).

14 For an outline of the history and context of the Australian law, see A G Hartnell, 'Relevant Interest — "Control" in the 1980s' (1988) *C&SLJ* 169.

15 Corporations Act s 608(3)(a).

16 Corporations Act s 608(3)(b).

17 Corporations Act s 608(4).

18 Corporations Act s 609(2).

information and documentation that must be disclosed.[19] Notification must be given of the details of the relevant interests of the person and their associates, any relevant agreement which has contributed to the situation giving rise to the relevant interest, and the documentation of the relevant agreement. ASIC considers that the substantial holder disclosure practices of many companies have not been satisfactory[20] and this has led ASIC to revise its policy on substantial shareholding disclosure.[21]

Disclosure of the substantial shareholding must be made to the company and the relevant exchange within two business days after the holder of a substantial interest becomes 'aware of the information'.[22] This requirement of actual knowledge is problematical in the case of companies because they are artificial entities and can only have knowledge through human agents. The issue of how a company has knowledge is dealt with by applying rules of attribution[23] but this is not always satisfactory where the identifiable agents of a company claim to be ignorant of who gave them instructions to purchase the shares.[24] A breach of the substantial holder law may give rise to a compensatory claim for loss and damages under s 671C. The court has wide ranging powers under s 1325 of the Act to deal with a contravention of the substantial holder law. The Takeover Panel has the power to make a declaration of unacceptable circumstances where there has been a contravention.

4 Beneficial shareholdings disclosure and proprietary companies

Unlisted companies, such as proprietary companies, are not required to comply with the substantial shareholder disclosure law. The 'investment protection' and 'market confidence' justifications for laws requiring substantial shareholder disclosure have no application in the case of proprietary companies. However, the justification for extending shareholder disclosure to proprietary companies may be based on notions of protecting parties which have existing or potential contractual relationships with the company, such as creditors or employees. There is also a public interest in increasing shareholder disclosure so as to detect and prevent the illicit use of nominee shareholdings or other corporate secrecy vehicles.[25]

Australian law provides for a limited degree of disclosure of share

19 Corporations Act ss 671B(3)–(5).

20 See, eg, *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263; 18 ACLC 742. See, generally, G Costa, 'ASIC enforces more decent disclosure', *Sydney Morning Herald*, 19 November 2004.

21 ASIC Policy Statement 159, *Takeovers, compulsory acquisitions and substantial holding notices*, paras 159.270–271, November 2004.

22 Corporations Act s 671B(6).

23 See, eg, *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; [1995] 3 NZLR 7 (Privy Council).

24 See, eg, *ASIC v Merkin Investments Pty Ltd* (2001) 38 ACSR 648; 19 ACLC 1481, where the court refused to attribute the knowledge of the unknown client to its principal in circumstances where there was no evidence as to 'the chain of command or the precise relationship involved'.

25 OECD, above n 2, p 14 ff.

ownership in the case of unlisted companies. Since 2003 a proprietary company has been required to indicate in its share register whether any shares held by a member are held beneficially.[26] In determining[27] whether a member holds shares beneficially or non-beneficially, the company is to have regard only to notices given to it by transferees,[28] disclosures of relevant interests under the tracing provisions,[29] or information supplied by ASIC.[30] A proprietary company is also required to notify ASIC of any change in its registry of members, including particulars required to be kept concerning a member's beneficial shareholding.[31] If a proprietary company has more than 20 members, the ASIC notification requirement only applies to changes in respect of the top 20 members, or persons who will become a top 20 member after the change.[32]

Registered shareholders are not affected by the notice requirements unless they become new members. The obligation to provide notice to the company of non-beneficial share ownership is imposed on a very limited class of persons, namely a transferee who holds non-beneficially particular shares. Upon registration of a transfer of shares,[33] a transferee must give notice to the company showing that the shares are held non-beneficially. The Corporations Act provides for relevant presumptions about beneficial ownership, for the purpose of complying with the share transfer requirements. For example, a person who 'holds shares as trustee for, as nominee for, or otherwise on behalf of or on account of, another person' is presumed to hold the shares non-beneficially.[34]

The longstanding rule that no notice of a trust may be entered on a register kept in Australia or be receivable by ASIC[35] has been modified by the new law requiring the disclosure of the existence of non-beneficial shareholding's interests. Furthermore, trustees, executors and administrators of an estate may be registered as owners of shares and their shares may be identified in the corporate register as being held in respect of a trust.[36] The risk that notice of a trust may affect the liability of a company is dealt with by the Act which provides that 'no liabilities are affected' by any such registration or notice and 'nothing so done (pursuant to the statutory provision) affects the body corporate concerned with notice of the trust'.[37]

The above mentioned statutory provisions have the advantage that they are not burdensome, are simple to understand and are relatively inexpensive. They have not resulted in the imposition of major compliance costs on proprietary companies or their registered shareholders. There is no retrospective operation of the provisions, so that registered shareholders are not required to make any

26 Corporations Act s 169(5A).
27 Corporations Act s 169(6).
28 Under s 1072H of the Corporations Act.
29 Under s 672B of the Corporations Act.
30 Under s 672C of the Corporations Act.
31 Corporations Act s 178A(1)(b)(viii). See Form 484.
32 Corporations Act ss 178A, 178B.
33 Corporations Act s 1072H.
34 Corporations Act s 1072H(8)(a).
35 Corporations Act s 1072E(10).
36 Corporations Act s 1072E.
37 Corporations Act s 1072E(10)(b) and (c).

additional disclosures. The notice obligation only arises when there is a transfer of shares. There is no requirement to disclose the identity of the underlying beneficial owners of proprietary companies

5 Legal concept of nominee shareholders

The legal duties of a nominee shareholder may be affected by the law of contract, the law of agency, the law of trust, and legislation. The classic nominee situation is when a nominee shareholder is the registered shareholder who holds the bare legal title to the share and deals with the share for the benefit of another person. In such a case the nominee shareholder is a bare trustee whose sole duty is to maintain the trust property and convey the legal estate (ie, the share) to the beneficiary, if so requested.[38] A leading Australian textbook on trusts states:

> A more precise use of the term 'bare trustee' is to identify a trustee who has no legal interest in the trust asset, other than that existing by reason of the office of the trustee and the holding of the legal title, and who never had any active duties to perform or who has ceased to have those duties with the result in either case the property awaits transfer to the beneficiaries or at their direction.[39]

A bare trustee has no interest in the shares of a registered company apart from holding those shares on behalf of the beneficiary. This is recognised by companies legislation in most countries, where a bare trustee is exempted from the obligation to disclose a substantial interest in the shares of a listed company. For example, s 609(2) of the Corporations Act in Australia provides that:

> A person who would otherwise have a relevant interest in securities as a bare trustee does not have a relevant interest in the securities if a beneficiary under the trust has a relevant interest in the securities because of a presently enforceable and unconditional right of the kind referred to in sub-section 608(8).

In *Corumo Holdings Pty Ltd v C Itoh Ltd*,[40] the NSW Court of Appeal considered the meaning of the 'bare trustee exception' under s 8(8)(a)(iii)(B) of the Companies (New South Wales) Code 1981. The question in this case was whether Mr Stapleton who held a share in a listed company as trustee was a bare trustee and thereby exempt from substantial holder disclosure. Under the trust deed, Mr Stapleton was required to vote in respect of the share and execute notices, transfers and other instruments as directed by Ito Ltd (the beneficial owner), and to pay all dividends and other benefits to Ito Ltd, or as directed by it. In finding that Stapleton was a bare trustee, Meagher JA, with whom Samuels JA agreed, stated:

> A 'bare trust' is one in which the trustee has no active duties to perform and is usually contrasted with a trust where there are such active duties. . . . As a matter of strict logic a person in [the trustee's] position would theoretically have been in a position where he had an active independent duty to perform in some circumstances,

38 *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 281 per Gummow J; *Christie v Ovington* (1875) 1 Ch D 279 at 281 (V-C Hall).

39 R P Meagher and W M Gummow, *Law of Trusts in Australia*, Butterworths, Sydney, 1997, para 319.

40 (1991) 24 NSWLR 370; 5 ACSR 720.

> for example if he found himself so situated that he had to vote at a formal meeting and [the beneficiary] had declined to instruct him how to exercise his vote. But, as a matter of strict logic, almost no situation can be postulated where a trustee cannot in some circumstances have active duties to perform. The applicants would have the phrase confined to situations where the trustee was immediately bound to transfer the share to his beneficiary. But this, in my view, is too narrow a construction, and would result in reading down the phrase so that it applied only to situations which almost never occur.[41]

The court in *Corumo*'s case considered that the purpose of the 'bare trustee exception' was to disregard persons who 'in a practical sense, have no say in the utilisation of the powers attached to those shares'. Where a trustee is a 'nominee or cypher in a common sense commercial view' then it is a bare trustee. Other courts have also described a bare trustee as a 'naked trustee',[42] or a 'dummy' for the true owner.[43] The critical question is whether a trustee has authority to exercise independent discretion in dealing in the interests in shares or in exercising rights attached to those interests. The rule is that a trustee of a bare trust must be obliged to and act strictly on the instructions of the beneficiary. However, where the beneficial owner has declined or failed to give instructions on a matter, a trustee may still be considered a bare trustee even though it is empowered to and does vote on an issue affecting the trust property.[44]

Although a bare trustee which holds shares in its name is sometimes called a nominee, it is not the case that all nominee shareholders are bare trustees. A nominee that is a bare trustee must be distinguished from an active trustee, which has significant powers and responsibilities in relation to the trust property. Equity has regard to substance over form. This means that where the registered shareholder holds the share as bare trustee for another person, who in turn holds the share as bare trustee for a third person, equity would 'disregard the interposed beneficiary whom it would see as having no interest in the property (ie the share) at all'.[45] A trust to be valid must be certain. This means that under trust law a bare trustee is required to know who the beneficiaries are, or at least must know whether a person is a beneficiary or not. A nominee shareholder that is a bare trustee is not required to know whether its client beneficiary is holding the share under a sub-trust for others. A nominee may thus be unaware that the share is held under a series of sub-trusts which conceal the 'real owner', sometimes called the ultimate beneficial owner (UBO).[46]

There is no common law principle or doctrine of equity requiring the

41 Ibid, at NSWLR 398–9.
42 *Morgan v Swansea Urban Sanitary Authority* (1878) 9 Ch D 582 at 585.
43 *Tomlinson v Glyns Executor and Trustee Co* [1970] Ch 112 at 126.
44 *In the Matter of Aulron Energy Ltd* [2003] ATP 31 (unreported, 22 September 2003, BC200307607) at [96] citing *Australian Securities Commission v Bank Leumi Le-Israel* (1995) 18 ACSR 639 at 684; 134 ALR 101.
45 *Corin v Patton* (1990) 169 CLR 540 at 579 per Deane J; 92 ALR 1.
46 For an example of the use of a chain of nominees to circumvent the Australian substantial shareholder disclosure requirement, see *Re North Broken Hill Holdings Ltd* (1986) 4 ACLC 131; 10 ACLR 270, and on appeal, see *Crosley Ltd v North Broken Hill Holdings Ltd* [1987] VR 119; (1986) 4 ACLC 432.

identification of the 'ultimate beneficial owner.' Michael Ashe QC makes the astute observation:

> In law, if there is no requirement that true ownership is disclosed there is nothing legally wrong in its concealment and although it is not wholly clear this will often be implicit in the relationship between a nominee and his beneficiary that the latter's identity will not be disclosed.[47]

6 Rationale of nominee shareholders

The practice of using nominees developed largely as an administrative convenience so as to separate the shareholdings of an individual from other activities. Nominee arrangements facilitated the administration of property such as shares, as well as dividends or distributions associated with those shares. Administration of a deceased estate or an inheritance, or property held on behalf of a child or a person with a mental disability will usually require the use of a nominee arrangement or trust. The Corporations Act recognises the important role of nominees in administering shares. For example, under s 1072E of the Act a trustee, executor or administrator of the estate of a dead person, who is the registered holder of shares, may apply to be placed on the share register. A similar situation applies to an administrator who is appointed to administer the estate of a person who is incapable of managing his or her affairs. The Official Trustee in Bankruptcy may also apply under s 1072E (6) and (7) of the Act to be registered as the holder of shares which have been vested in it as part of the estate of the bankrupt. In a wide range of circumstances, nominees provide a valuable legal tool for executing important and legitimate business services. Solicitors and accountants use nominee companies for carrying out important functions of their businesses.

Another key motivation for the use of nominee shareholdings is financial privacy. Businesses seek financial privacy because it may be fundamental to the carrying out of a business plan. For example, beneficial owners of a company may not wish to have their name on the public record where that company is purchasing real estate for the purpose of conducting a land assembly. Premature disclosure of the underlying beneficial owners of the company may result in an increased market price for the properties which are being acquired and undermine the viability of the proposed real estate investment project. Privacy in securities transactions is highly valued by investors who wish to conceal their identity for reasons of business efficacy. For example, where an institutional investor wishes to dispose of or purchase a large block of securities, it may use a number of nominee companies to sell or buy the shares at the best possible price. Corporate deal makers and corporate raiders rely on the privacy advantages of nominee companies to execute investment deals and takeovers. Investment plans would be frustrated and profits from arbitrage lost if third parties could prematurely discover the identity of underlying interests and then 'piggy back' on those plans.

Nominees are also used for the purposes of disassociating public officials from the temptation to take advantage of their position and/or to avoid

47 M Ashe, *Nominee Shareholding*, Report submitted to the Commonwealth Law Ministers Meeting Barbados, Commonwealth Secretariat, London, 1980, para 26.

imputations of tainted conduct. In a number of countries where business persons take up public office, they will either dispose of their investments or place their securities in the hands of a nominee with full discretionary management. Blind trusts are viewed as an effective way to manage potential conflicts of interest. Ministers of Government who put their investments in blind trusts when assuming public office will be protected from accusations of impropriety and will enjoy a measure of financial privacy.[48] It is not necessarily in a State's interest to require the disclosure of beneficial ownership. The exploitation of nominees by governments may be an important mechanism for pursuing national policy. For example, the People's Republic of China owns and directly controls a vast amount of property and interests in securities in nominee form in Hong Kong. It was because of the political sensitivity of the Chinese Government's shareholdings interests that prior to 1997 the Hong Kong Government did not enact adequate shareholder disclosure laws.[49]

7 Nominee shareholders and the capital markets

The utility of nominee shareholdings has expanded beyond considerations of administrative convenience and financial privacy. Nominee arrangements have been critical to the development of securities and capital markets. It is not just a coincidence that countries in the civil law tradition, which historically have not recognised the concept of nominees, have experienced problems in developing efficient clearing and settlement systems.[50] Given that settlement of securities transactions will usually involve several layers of intermediaries, it is more efficient and less costly to process securities transactions by using nominee arrangements. The absence of nominee holdings will inevitably result in increased settlement risks.[51] The demand for efficient systems for registering, holding, transferring and clearing securities transactions has resulted in securities not only being used in a nominee form but in securities becoming a species of international currency. Indeed, securities are referred to as such in the documentation governing the integration of the European capital markets. The need for a common form which nominee registration facilitates is illustrated by the documentation of the Eurobond market.[52] All these factors have contributed to nominee arrangements becoming an essential part of the infrastructure of the world's capital and financial markets.

There is a trend towards increased nominee registration in the complex and

48 B Pullen, 'Conflicts of Interest Avoidance: Is there a Role for Blind Trusts?', Economics, Commerce and Industrial Relations Group, *Current Issues Brief*, No 14, 1996–1997, available at <www.aph.gov.au> (accessed 8 February 2005).

49 B Rider, *Commercial and Organised Crime in Hong Kong — Proposals for combating the problem*, report prepared for HM Government, transmitted through the Attorney-General of Hong Kong, 1984.

50 See Euroclear, *Harmonisation Fundamentals: Euroclear Business Model Implementation*, 30 June 2004, para 8.3, available at <www.euroclear.com> (accessed 20 January 2005).

51 M Guadamillas and R Keppler, *Securities Clearance and Settlement Systems: A Guide to Best Practices*, April 2001, World Bank Policy Research Working Paper No 2581, p 9.

52 See R S Rendell (Ed), *International Financial Law: Lending, capital transfers and institutions*, Euromoney Publications, 1990, Ch 4.

sophisticated securities and capital markets. All professional intermediaries in the securities industry use nominees. Increased nominee participation in the securities industry is most evident where banks act as depositaries and agents for overseas principals. The commercial reasons for nominees are not usually concerned with matters of financial privacy or concealment, as is shown by the following examples.

(i) Private client investors

A private client investor who retains a traditional portfolio of investments may place shares in the name of a nominee company which provides administrative services, such as collecting dividends and preparing paperwork for tax purposes. Where a private client investor places a portfolio of shares under the control of a discretionary fund manager, the shares will inevitably be placed in the name of a nominee so as to facilitate the rapid transfer of shares.

(ii) Stockbrokers

Stockbrokers will typically have nominee companies for at least two purposes, for example, to hold shares purchased by brokers on their own account, and to hold shares as agents or custodians for others. Australian stockbrokers establish distinct nominee companies for each of these purposes. Regulatory requirements will often require the use of nominee companies to facilitate the segregation of clients' monies from monies of the stockbroker. The development of execution-only brokers and dealing of shares through internet share brokers has also encouraged the increased use of nominees.

(iii) Institutional investors

Institutional investors, such as mutual funds, pension funds and their managers, control a large volume of the world's investments. Institutional investors will usually employ professional managers of their own principal investment and those of their clients. Professional investment managers invariably use nominee companies to hold the shareholding interests. The advantage of nominee companies is that they reduce the administrative burden of handling company documentation, such as annual reports, and the distribution of entitlements connected to shareholdings, such as dividend issues and rights issues.

(iv) Custodians

Custodians play a significant role in the efficient management of the financial services industry. Many investment management firms will outsource some of their investment management administration to companies which provide specialist custodian functions. The Australian Custodial Services Association describes the practices of the industry as follows:

> Typically a custodian trustee is a nominee company which acts as the bare trustee holding an investment on behalf of the beneficial or equitable owner of the particular investment. These nominee companies are often special purpose subsidiaries of financial institutions. Investors that use the services of nominee companies are usually institutional investors such as investment trusts and superannuation and pension funds or fund managers acting on behalf of these types of institutions. The

institutions will often be non-residents. Also many foreign central banks employ the services of locally based nominee companies in Australia to facilitate investment in Australia.[53]

Under the custodial arrangements the custodian becomes the shareholder of record, while the investor's rights will be solely against the custodian and not against the issuer of the shares. The depositing of securities with a custodian is sometimes described as the immobilisation of securities in that it involves the breaking of a direct link between the investor and the issuer.[54] The holding of securities by a custodian in its own name for the benefit of its customers involves a fiduciary relationship. This should be distinguished from custodians who merely act as bailees, holding the securities for physical safekeeping for their customers, but without becoming the shareholder of record. The practice of using custodians to safeguard and administer assets, especially investments, is so widely accepted that the United Kingdom Treasury[55] has described the use of custodians as 'best practice' in the investment industry. In the United States, the Securities and Exchange Commission rules[56] require US mutual fund managers, whenever they make an investment decision, to take into consideration the local market depositories and the safety of underlying assets during the settlement process and in on-going safe custody.

(v) Cross border portfolio investment

The internationalisation of capital markets, as evidenced in the increase in ownership of shares by foreign non-residents, has also resulted in an increased demand for nominees. Investors holding overseas investments will use nominees, such as banks, broker-dealers and other financial intermediaries, to trade in shares and other securities. Administrative convenience and lower transaction costs ensure that nominees will continue to be popular among foreign investors.

(vi) American depository arrangements

The most widely used form through which non-US companies offer and trade their shares in the US equity markets are American Depository Receipts (ADRs).[57] First created by the investment bank J P Morgan in 1927 for the British retailer, Selfridges, ADRs are used by European, Asian and Australian companies. Over 74 major Australian companies, including NAB, Westpac,

53 Australian Custodial Services Association, *Securities Custody and Financial Institutions Duty*, September 1996, pp 1–2, available at <http://fsi.treasury.gov.au/content/downloads/PubSubs/000051.doc> (accessed 10 January 2005).

54 See R Goode, 'The Nature and Transfer of Rights in Dematerialised and Immobilised Securities' in F Oditah (Ed), *The Future for the Global Securities Market*, Clarendon Press, Oxford, 1996, pp 110–12.

55 Treasury, *Custody: A Consultation Document*, HMSO, June 1996. See also Law Commission, *The Employment of nominees and custodians — the practice and its advantages*, HMSO, London, 1997.

56 Securities and Exchange Commission Rule 17f-7, which came in effect on 12 June 2000.

57 The volume of trading in ADRs in 2003 amounted to $US660 billion with 22 billion shares traded. In 2000 volume was $US1100 billion with 35 billion shares traded. See <www.adr.com> (accessed 10 December 2004).

ANZ, Coles Myer, BHP-Billiton, CSR, Fosters, Lend Lease and Southcorp have shares that are issued and traded under an ADR arrangement. Two concepts, American Depository Shares (ADS) and American Depository Receipt (ADR) require explanation. An ADS has been described as:

> a US dollar denominated form of equity ownership in a non-US company. It represents the foreign shares of the company held on deposit by a custodian bank in the company's home country and carries the corporate and economic rights of the foreign shares, subject to the terms specified on the ADR certificate.[58]

The American Depository Receipt (ADR) is defined as:

> the physical certificate issued by the custodian bank as evidence of ownership in one or more ASRs. The ADR holder is either a directly registered holder of the certificate or the beneficial owner of the certificate where it is held through a nominee, such as a bank, custodian or broker. In either case the actual underlying shares of the issuer are registered in the name of the custodian bank.[59]

Under ADR arrangements, the actual underlying shares of the issuing company are registered in the name of a custodian, usually a bank, which issues a physical certificate to the shareholder as evidence of ownership.

(vii) Dematerialisation

Historically all securities were issued in a materialised form, that is, with a certificate or physical instrument evidencing ownership. In contrast, dematerialised securities have no physical document of title, for example, no share certificate in the case of shares issued by a corporation. Initially dematerialised securities were used only in cases of investment in securities issued by governments and other public institutions. They are now available for securities issued by corporations. The desire to eliminate the paper mountain associated with materialised securities and the demand to trade securities electronically has resulted in dematerialised securities becoming the norm in many countries. The process of dematerialisation of shares involves the confirmation to the investor that its shareholding has been registered as an electronic holding. Although it is not a requirement, in practice dematerialisation and other market influences drive active shareholders into nominee holdings because of cost and convenience.[60]

(viii) Financial products

Innovation in financial products is a major source of competitive advantage for financial institutions, especially investment banks. The supply of new financial products and financial instruments has spawned an increased use of nominee arrangements. Many financial products which are offered to the retail market can only be held under a nominee arrangement.[61] The feasibility and

58 J P Morgan Group, *ADR Reference Guide*, September 2004, p 45, available at <http://www.adr.com/pdf/ADR_Reference_Guide.pdf> (accessed 10 December 2005).

59 Ibid, p 46.

60 See G Oldham, *Nominee Service versus Certificate*, March 2003, available at <www.uksa.org.uk/Nominees_v_Certificates_2002.pdf> (accessed 15 December 2004).

61 An Australian example is the Commonwealth Bank long dated instalment warrant. English examples are PEPs and ISAs.

success of these financial products will depend on low administrative costs which are achieved through the use of nominee administration. It is expected that there will be an increase in financial products which are retailed in a nominee form.

7 Risks of nominee shareholders

The OECD claims in a report published in 2001[62] that nominee shareholders are one of the primary mechanisms to obscure beneficial ownership and control. There is no doubt that the use of nominees reduces the usefulness of shareholder registers in that the registered shareholder may not be the ultimate beneficial owner of the shares. Although acknowledging that nominees serve legitimate purposes, the OECD report argues that nominees are used to conceal illegal transactions. The accommodation of secrecy that nominee shareholding allows has being criticised mainly from the viewpoint of changes in corporate control, especially through takeover activity,[63] rather than in the context of criminal or seriously abusive conduct. Shareholders are concerned that nominees may facilitate secret changes in the control of their companies which can profoundly affect the value of their shares. There is also the likelihood that nominees may conceal securities-related offences, such as insider trading and market manipulation. These problems relate to the public securities markets and are largely addressed by laws requiring substantial shareholder disclosure in the case of listed securities.

The main concern of the OECD report is the potential use of nominees for criminal purposes, especially money laundering. It is not surprising that financial criminals will use various corporate devices, including nominees, to obscure, if not completely hide, criminal activity and the proceeds of crime. The risk of using nominees includes the penetration of companies by organised crime and the execution of a variety of financial crimes. The OECD report questions the financial privacy rationale of nominee shareholdings, arguing that since the anonymity aspect of nominees may be misused, the remedy is for increased disclosure, especially in the case of offshore jurisdictions. The OECD critique of nominees is made without giving any weight to the legitimate demands for financial privacy. The OECD report presumes that the mere fact that a corporate instrument may be misused provides sufficient ground for imposing a new regulatory regime. The report provides little empirical evidence to support its underlying assertion that nominee shareholders are a significant problem in cases of money laundering.

Nominee shareholdings are only one of many devices that are open to those who wish to conceal their interests in shares for illicit reasons. In 1981 the Securities Commission of New Zealand[64] identified the following methods of concealing ownership and/or control:

(a) registered holder by express agreement confers rights in relation to shares;
(b) registered holder is bare trustee;
(c) registered holder is active trustee for beneficiaries;

62 OECD, above n 2, p 31.
63 See *Report of the Company Law Committee*, above n 13, para 142.
64 Securities Commission of New Zealand, above n 12, pp 125–8.

(d) use of agency procedures, such as powers of attorney;
(e) vendor pending completion of contract for sale of shares;
(f) option in respect of shares;
(g) financier who has lent money against security of shares;
(h) registered holder is a party to a voting agreement or voting trust;
(i) warehousing of shares; and
(j) control through a string of companies.

It is apparent from the above list, that a nominee shareholding arrangement is only one of many devices that are open to those who seek to conceal their interests. There is the classic nominee situation, sometimes described as a 'bare trust' (see (b) above) and a chain of nominees (see (j) above). Furthermore, the above list is not exhaustive. Developments in structured finance and financial engineering have resulted in a range of instruments, structures or arrangements which may circumvent the very best corporate laws mandating disclosure of interests in shares. Whether nominee shareholdings impose a greater risk of misuse than other corporate devices or financial instruments is an unanswered question. Corporate directors, nominee directors, bearer shares, foundations, derivative instruments and swaps may be used singularly, or in a combination, to conceal ownership and control. Nominee shareholdings do not present the same degree of anonymity as bearer shares, which are prohibited in Australia.[65]

8 Conclusions

When the registered company was first developed in the nineteenth century there was no legislative requirement for the disclosure of beneficial shareholdings. In the latter part of the twentieth century many developed countries passed laws requiring the disclosure of substantial holdings in shares of companies trading in public securities markets. These laws apply to a small number of companies, usually listed on an exchange. There is nothing illegal or unethical in using nominees as part of a private or commercial arrangement. In the case of a nominee, there is no common law principle or doctrine of equity requiring the identification of the ultimate beneficial owner of securities. The traditional justification for laws requiring the disclosure of substantial holdings of listed companies has no application in the case of proprietary or private companies. Any proposal to extend the substantial shareholder disclosure regime to proprietary companies requires separate justification, which has not yet been forthcoming.

Nominee arrangements are now an essential part of the infrastructure of the world's financial markets. The wide varieties of commercial uses of nominees impose practical limits on any increased regulation on nominees. It is too late to suggest that nominee shareholdings be prohibited, since this would undermine an essential component of the markets. Financial privacy provides a motivation for using nominees in shareholder arrangements. Financial privacy is important to individuals who do not wish the world to know of their investments. Financial privacy may also fuel investment by entrepreneurs,

65 See s 254F of the Corporations Act which provides that a company does not have the power to issue bearer shares.

business operators, corporate deal makers and governments. There is an argument that the financial privacy justification for nominee shareholdings should be discarded because nominee shareholdings may be used for illicit purposes. This argument ignores the legitimate demands for financial privacy. Nominee shareholding arrangements have existed for over 160 years and are only one of many devices that are open to those who wish to conceal their interests in shares for illicit reasons.

Articles

Penetrating foreign nominees: A failure of strategic regulation?

*Dr David A Chaikin**

The widespread use of nominees[1] in the financial services markets raises important questions as to the effectiveness of the tracing or disclosure notice provisions in the Corporations Act 2001. In this article I examine how the Australian courts have dealt with contraventions of the tracing notice requirements by foreign nominees. The failure of the Australian corporate regulator's tracing powers to penetrate the Swiss nominees in ***ASC v Bank Leumi*** *has created a precedent which has undermined the strategic enforcement objective of detecting insider trading and other abusive market conduct. The tracing notice powers are unlikely to be effective in unraveling corporate criminal misuse of foreign nominees. The judicial system for imposing remedial orders for violations of corporate law has no deterrent effect in cases where the beneficial shareholders' desire for secrecy is the highest priority. On the other hand, recalcitrant foreign nominees face the risk that their clients may lose entitlement to maintain their shareholding if they do not comply with a tracing notice. The judicial remedies for tracing notice violations are most effective in removing a secret shareholding from the market. This assists the strategic policy goal of maintaining a fully informed market.*

1 The policy of substantial shareholder disclosure and enforcement

In nearly all advanced economies which have sophisticated, liquid and efficient share markets, there are laws requiring the disclosure of substantial interests in shares of public or listed, companies.[2] For example, in 1972 Australia introduced a statutory regime for the disclosure by persons of 'substantial holdings' in the securities of listed companies. Under the

* Ph D in Law (Cambridge), LLM (Yale), BCom/LLB (UNSW), Senior Lecturer in Business Law, School of Business, Faculty of Economics and Business, University of Sydney, Barrister (NSW).

1 There is no definition of a nominee in the Australian Corporations Act. The classic nominee is a shareholder who is registered with a company, and who holds the bare legal title to the share, and is under a legal obligation to deal with the shares for the exclusive benefit of another person. See D Chaikin, 'Nominee shareholders: Legal, commercial and risk aspects' (2005) 18(3) *Aust Jnl of Corp Law* 288.

2 See, eg, EU Large Holdings Directive which requires that the legislation in EU countries impose a minimum disclosure standard for listed companies of 10% in the case of substantial shareholdings. See also Securities Exchange Act 1934 Regulation 13d-1(b)(i) (USA).

Australian law a disclosure obligation arises when a person has a relevant interest in shares which carry 5% or more of votes. Disclosure is made to the company and the relevant exchange.[3]

The Eggleston Committee's justification for shareholder disclosure was as follows:

> shareholders are entitled to know whether there are in existence substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend.[4]

It is not only existing shareholders that have a legitimate expectation of substantial shareholder disclosure. Investors who are contemplating the purchase of shares consider that the identity of the current or potential controllers of the business of the company is a very important piece of investment information.[5]

Policy discussions of a law requiring substantial shareholder notification have often occurred in the context of takeovers. A key justification for substantial shareholder disclosure is to ensure that changes in control of a listed company take place in a fully informed, efficient and competitive market.[6] This requires that bidders or potential bidders in a takeover of the company be identified.

Another justification for a law requiring the disclosure of substantial share holdings is that it may facilitate the identification of insider trading[7] or market manipulation of shares. The idea is that the disclosure of significant trading in shares may provide a trigger for an investigation into abusive share practices.

The need for an effective mechanism to police the substantial shareholder law has been recognised by the enactment of a special investigatory power. Since 1981 a listed company in Australia has been empowered to issue disclosure or tracing notices to its shareholders. The tracing power may also be used by the Australian Securities and Investment Commission (ASIC). It has been extended to facilitate the tracing of the beneficial ownership of shares[8] that are held under a nominee arrangement.[9]

The internationalisation of the securities markets and the widespread use of

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3 For example, the Australian Stock Exchange which has 1774 companies with a domestic market capitalisation of $975 billion as at 30 June 2005. See <www.asx.com.au> (accessed 31 March 2006).

4 Company Law Advisory Committee to the Standing Committee of Attorneys-General, *Second Interim Report*, Chairman R M Eggleston, Commonwealth Government Printing Office, Canberra, February 1969, para 4.

5 S R Bishop, 'Pre Bid Acquisitions and Substantial Shareholder Notices' (1991) 16 *Australian Jnl of Management* 1 at 2.

6 See ASIC Policy Statement 159, *Takeovers, compulsory acquisitions and substantial holding notices*, November 2004, at 159.270–271.

7 See Explanatory Memorandum for the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983, para 371.

8 The tracing of beneficial ownership of shares refers to the investigatory process of ascertaining the identity of the real owners of the company. See D Chaikin, 'Asset Tracking in Australia' in B A K Rider and A Ashe (Eds), *International Tracing of Assets*, looseleaf service, FT Law & Tax, 2002.

9 A nominee arrangement is one where the registered shareholder is not the beneficial owner

nominees in the financial services markets raise important questions as to the effectiveness of the tracing or disclosure notice provisions in the Corporations Act 2001 (Cth). The Australian tracing or disclosure power faces its major challenge where the shares are held by a foreign nominee who is protected by foreign secrecy laws.[10] There is the question of the applicability of the Australian law to persons who have no physical presence in Australia. There is also the potential conflict between an Australian law requiring a foreign nominee to disclose the identity of its client and a foreign secrecy law which forbids such disclosure.

In this article I examine how the Australian courts have dealt with contraventions of the tracing notice requirements by foreign nominees. The leading case is *ASC v Bank Leumi* (*OAP* case)[11] where the Federal Court comprehensively dealt with a range of extraterritoriality issues pertaining to Swiss nominees who had refused to disclose the identity of the owners of a 38% stake in Offset Alpine Printing Group Ltd (OAP). I will argue that the failure of the Australian Securities Commission (ASC), the predecessor to ASIC, to penetrate OAP in 1995 has created a precedent which has severely hampered the investigatory objects of the statutory regime.

2 Disclosure or tracing notice requirements

Section 672A(1) of the Corporations Act provides that ASIC and a listed company have the power to trace the beneficial ownership of the shares of a listed company by issuing tracing or disclosure notices. The tracing power is drawn in the widest possible terms. There is no significant precondition for exercising the power, for example, that there is a suspicion that a person has failed to make a substantial holding disclosure.

A disclosure or tracing notice in s 672A may be issued to a member of the company who may well be a nominee. Subsequently it may be issued to any person identified in a previous disclosure, as having a relevant interest in, or having given instructions about, voting shares in a company.

Where a person has been given a direction under s 672A, the following information must be disclosed:

(a) full details of that person's relevant interest in the shares, as well as the circumstances giving rise to that interest;
(b) the name and address of any other person who has a relevant interest, together with details of the nature of that person's interest and the circumstances that gave rise to that interest; and

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of the shares. For a discussion of the legal devices that conceal beneficial ownership, including nominee shareholdings, see Chaikin, above n 1, at 297–302.

10 Foreign secrecy laws are laws that impose a criminal penalty for violation of foreign banking or corporate confidentiality laws. See D Chaikin, 'Policy and Fiscal Effects of Swiss Bank Secrecy Laws' (2005) 15 *Jnl of Revenue Law* 55 available at <http://www.bond.edu.au/law/rlj/contents/Vol15.pdf>.

11 *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 69 FCR 531; 139 ALR 527 (Full Fed Ct); (1995) 18 ACSR 639; 134 ALR 101 (Sackville J).

(c) the name and address of any other person who has given the person instructions about (i) the acquisition or disposal of the share, (ii) the exercise of any voting or other rights attached to the shares, or (iii) any other matters relating to the shares.[12]

The tracing notice power is designed to obtain shareholder information in a speedy fashion. The person who replies to a direction under s 672A must provide the information within two business days after the person has been given the direction.[13] This time limit imposes major practical difficulties on foreign nominees who have no standing instructions from their clients as to how to respond to a tracing direction.

A failure to comply with a disclosure notice is a criminal offence, which is punishable by a fine and a maximum imprisonment of six months, or both. Contraventions of the disclosure notice requirement also give rise to potential civil penalties. A person who contravenes s 672A is also liable to compensate any person who suffers loss or damage as a result of the contravention. There are a large number of remedies that a court may apply in relation to a contravention.

3 Overview of the *OAP* case

In 1995 the Australian Stock Exchange (ASX) commenced an investigation into the shares of OAP, a listed company which specialised in printing. The ASX was concerned that substantial shareholding notices had not been filed in circumstances where OAP was conducting an on market buy-back scheme under which OAP could acquire up to 2,485,015 of its shares, representing approximately 10% of its capital.

The ASX made a complaint to the ASC which sought to identify the beneficial ownership of OAP, by issuing tracing notices[14] to five Australian nominee companies. Those companies identified Bank Leumi Le-Israel (Bank Leumi), a Swiss bank,[15] and EBC Zurich AG (EBC), a Swiss finance company, as the holders of 16.97% and 22.25% respectively of the issued capital of OAP. The ASC then issued secondary tracing notices[16] to the Swiss nominees which refused to supply any information on the ground that this would breach Swiss bank and commercial secrecy laws.

Subsequently, at the request of the ASC, the Federal Court issued interim freezing orders against the secret share block in OAP on the basis that the Swiss financial institutions had failed to comply with ASC's tracing notices and had failed to disclose that they were substantial shareholders in OAP.[17] The effect of the freeze orders was that the Australian nominee companies

12 Corporations Act s 672B(1).

13 Corporations Act 2001 s 672B(2). An application may be made to ASIC to modify the time limit under s 673, but ordinary confidentiality requirements of nominees do not provide a reason for delaying a response. See ASIC Policy Statement 86, *Beneficial Ownership Notices*, at PS86-33.

14 Under s 718 of the Corporations Law (now s 672A of the Corporations Act 2001).

15 Bank Leumi Le-Israel is the Swiss subsidiary of Bank Leumi, Israel's second largest commercial bank. EBC Zurich is a non-bank subsidiary of Bank August Roth AG, a Swiss bank. See G Woernle, *The Wernlin Director*, Wernlin, Geneva, 2000.

16 Under s 719 of the Corporations Law (now s 672A of the Corporations Act 2001).

17 ASIC Media Release 95-65, 'Offset Alpine Printing Group Ltd', 4 May 1995.

were prohibited from disposing of the shares or dealing with them without the permission of the court.

In the ensuing proceedings, Justice Sackville (the trial judge) held that Bank Leumi and EBC had breached the law by failing to comply with the tracing notice provisions even though compliance with the requirements would entail a risk of breach of Swiss secrecy laws.[18] His Honour ordered that the secret share parcels be sold but refused to vest the shares or the proceeds of the shares in the ASC as a mechanism for 'flushing out' the beneficial shareholders. Sackville J's judgment was upheld on appeal to the Full Federal Court (Lockhart, Foster and Lehane JJ).

4 Extraterritorial application and enforcement of corporate securities laws

An enforcement model in relation to foreign nominees must first deal with the issue whether and the extent to which the Corporations Act applies to conduct outside Australia. There is a common law presumption that legislation does not operate extraterritorially.[19] This may be rebutted. For example, s 5(4) of the Corporations Act extends the Act to 'natural persons, whether resident in Australia or not and whether Australian citizens or not, all bodies corporate, whether formed or carrying on business in Australia or not, and acts and omissions outside Australia'.

Judges in Australia have applied the corporations legislation extraterritorially to foreign entities, including Swiss banks. For example, in 1983 the Supreme Court of South Australia[20] held that the failure of Bank Cantrade AG Zurich, a Swiss bank, to lodge a substantial shareholder notice amounted to a contravention of s 137 of the Companies (South Australia) Code even though disclosure of the information would violate Swiss bank secrecy laws. In 1986 the Supreme Court of Victoria[21] held that the tracing

18 Sackville J also found that EBC contravened the substantial shareholder disclosure provisions of the Corporations Law, but that Bank Leumi did not breach these provisions because Bank Leumi held its shares as a bare trustee. Under s 609(2) of the Corporations Act a bare trustee is exempted from the obligation to disclose a substantial interest in the shares of a listed company. The reason for the exemption is that a bare trustee has no interest in the registered shares of a company apart from holding those shares on behalf of the beneficiary. See Chaikin, above n 1, at 294–5.

19 See *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 363 per O'Connor J; 14 ALR 701. See also para 21(b) of the Acts Interpretation Act 1901 (Cth) which mirrors the common law presumption.

20 See *Corporate Affairs Commission (SA) v Orlit Holdings Ltd* (1983) 8 ACLR 164 per Milhouse J. The secret beneficial owners of the 15.58% share parcel in Orlit Holdings which were purchased on instructions of Bank Cantrade were never revealed. Although the court found that Bank Cantrade had violated Australian law, it refused to impose an order restraining the sale of the secret share parcel, because this would unfairly prejudice the new owners of the shares as well as the Australian nominee companies, which would suffer reputational damage if they failed to deliver the script pursuant to an agreement to sell the shares.

21 *Re North Broken Hill Holdings Pty Ltd* (1986) 10 ACLR 270. In this case R Brierley used 13 separate nominee companies in seven countries to prevent the directors of North Broken Hill Holdings Ltd (NBH) from discovering Industrial Equity Ltd's (IEL) strategic stake in the company. NBH then issued a series of successive tracing notices which led it on a tour of the world's tax havens. After three months in which NBH issued notices to nine nominee

notice legislative requirement[22] applied to Bank Julius Baer & Co AG, a Swiss bank, even though it was neither registered nor carrying on business in Australia.

In the *OAP* case, Justice Sackville observed that 'considerable caution must be exercised before construing legislation so as to impose duties on foreigners which create a risk that they may be required to contravene a foreign law'.[23] The foreigners in the *OAP* case were Swiss financial institutions which had no physical presence in Australia and whose only known connection with Australia was that they had instructed Australian nominees to purchase shares on their behalf.

Justice Sackville examined expert evidence on Swiss secrecy laws before deciding whether there was any legislative limit to the compliance obligation.[24] There was no doubt that Bank Leumi, as a Swiss bank, was subject to Art 47 of the Swiss Federal Banking Law 1934. This provision imposes a criminal liability on a bank which discloses confidential information concerning its clients. There are exceptions[25] to Swiss bank secrecy, but none of these applied in the instant case. Bank Leumi's assertion that its client had refused to consent to the release of the information was accepted at face value by the Federal Court.

Since EBC was a finance company and not a bank, it could not rely on Art 47 of the Swiss Banking Law. EBC relied instead on Art 273 of the Swiss Penal Code[26] which imposes a criminal offence on persons who obtain a business secret in Switzerland in order to give it to a foreign government. Justice Sackville ruled that if EBC supplied the ASC with the requisite information there was a risk that it would violate Art 273 at least where EBC held the shares in OAP for a Swiss domiciliary.[27]

Justice Sackville did not have to decide whether there would be or should

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companies in the Cook Islands, Netherlands, Guernsey and Liberia, NBH still had not discovered the identity of the ultimate beneficial owner. Fullagar J's interlocutory order vesting the share parcel in the National Companies and Securities Commission flushed out IEL as the secret beneficial owner.

22 Under s 261 of the Companies (Vic) Code.

23 (1995) 18 ACSR 639 at 663; 134 ALR 101. At the time of the *OAP* case the court had to consider the effect of s 110 of the Corporations Law which was the predecessor to s 5(4) of the Corporations Act 2001.

24 In the *OAP* case there was a conflict of expert evidence as to whether there was a general practice among Swiss banks to seek their client's consent to the disclosure of information prior to agreeing to act on their behalf in securities trading. Justice Sackville found that there was no such general practice. His Honour was persuaded by the fact that the experts for Bank Leumi (Dr Schurman) and EBC (Dr Nobel) had 'rather more impressive qualifications and greater experience in (Swiss) banking law' than the ASC expert (Mr Weherli). None of the experts were subject to cross-examination.

25 There are three exceptions to Swiss bank secrecy: (a) if the customer consents to disclosure; (b) where Swiss law provides, for example under Swiss anti-money laundering legislation; and (c) where the bank is ordered by a competent Swiss court to provide disclosure. See Chaikin, above n 10, at 55–78. See, generally, M Aubert, *Swiss Bank Secrecy*, Stampfli & Cie, Berne, 1995.

26 For a detailed discussion of Art 273 of the Swiss Penal Code and other Swiss 'economic espionage penal laws', see D Chaikin, 'The Impact of Swiss Mutual Assistance on Financial and Fiscal Crimes' (2006) 16 *Jnl of Revenue Law* (forthcoming).

27 Sackville J also held that the service by the ASC of the tracing notices on the Swiss financial institutions by fax was authorised by the Corporations Law, even though the service of the

be a different result, if the client of the Swiss financial institution was a domiciliary, citizen or resident of Switzerland, Australia or a third country. His Honour held that foreign corporations, irrespective of the characteristics of their clients, were required to comply with tracing notices, even though this would create a 'real and appreciable risk' of the corporations contravening foreign law. He considered that any other conclusion would render the scheme of compulsory disclosure unworkable.[28]

5 Whether Swiss financial institutions should be excused?

Under the corporations law[29] the court may excuse a contravention of the substantial holder or tracing notice requirements. In determining whether to excuse a contravention, the court may take into account whether the contravention is due to a person's 'inadvertence or mistake', or that the person is not 'aware of a relevant fact or occurrence or to circumstances beyond the person's control'.[30]

In the *OAP* case Bank Leumi and EBC argued that they had taken all steps available to them under Swiss law to comply with the tracing notices in that they had sought unsuccessfully to obtain permission from their clients to provide the required information. They contended that if they had breached the Australian law, this was by reason of circumstances beyond their control.

Justice Sackville undertook a balancing exercise in deciding whether to excuse the Swiss nominees.[31] His Honour took into account the following circumstances favourable to the Swiss financial institutions:

- 'if a foreign corporation finds itself unable to comply with the requirements of Australian law, because it has been unavoidably placed in a position where to do so would conflict with the law of the

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notices violated Art 271 of the Swiss Penal Code. Article 271 prohibits the exercise of powers reserved for the public authorities in Switzerland. For an analysis of Art 271, see Chaikin, ibid.

28 (1995) 18 ACSR 639 at 665; 134 ALR 101.

29 Under s 743 (1) of the Corporations Law in the *OAP* case (now s 1325D of the Corporations Act 2001).

30 Under s 743 (3) of the Corporations Law in the *OAP* case (now s 1325D(4) of the Corporations Act 2001).

31 The case by case balancing exercise approach is one that has been used by courts in the United States when considering whether to excuse a foreign party who is resisting a US investigatory agency's subpoena on the ground that a foreign law forbids production of the documents in issue. See, eg, *Garpeg Ltd v United States* 583 F Supp 789 (SDNY 1984). See also American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, para 442(1)(c), which provides that in determining whether to issue an order requiring the production of information abroad, a US court should take into consideration the following matters: the importance to the investigation or litigation of the documents requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; the extent to which non-compliance with the request would undermine important interests of the United States; and the extent to which compliance with the request would undermine important interests of the state where the information is located.

country in which it does business, an Australian court would regard this as a very powerful reason to excuse a contravention of Australian law'.[32]

- the risk that the enforcement of Australian law might 'violate principles of international law'; and
- that the Swiss financial institutions had acted in good faith and were not a 'party to a deliberate attempt to circumvent Australian laws'.

Justice Sackville stated that these favourable matters were outweighed by the following factors:

- that contraventions related to a significant shareholding of 38% of the shares of an Australian listed company which should not be 'lightly excused';
- the predicament of the Swiss financial institutions was not 'wholly beyond their control' — they could have chosen to acquire Australian shares only on behalf of clients who were prepared to waive Swiss secrecy laws;[33] and
- there was an additional discretion in the court 'to limit the relief available to the ASC, so that neither Leumi nor EBC is compelled by the court order to provide the information sought in their secondary notices'.

In the particular circumstances of the case, Sackville J declined to exercise the statutory power to excuse the contraventions of Australian law. In the enforcement outcome of this case, the refusal of the court to exculpate the Swiss nominees did not have any deleterious consequences on the Swiss nominees. This was because ultimately the contest in the *OAP* case concerned the appropriate judicial remedy for contravening the tracing notice requirement.

6 Remedies for breach of corporate securities laws

Under s 1325(A) of the Corporations Act the court may make any order (including a remedial order) it considers appropriate if a person has contravened the substantial shareholding disclosure provisions or the tracing of beneficial ownership provisions. A remedial order is defined in s 9 of the Act and includes 16 different types of orders. It may be used to achieve various regulatory outcomes. The most powerful remedies, which may also be viewed as sanctions, are those that are directed against the shares themselves. For example, where there has been a breach of the law, a shareholder may be deprived of its shareholding and key shareholder benefits, such as the exercise of voting rights, the right to receive dividends, and/or control over the sale of the shares.

Remedial orders may be imposed once a breach of the law has occurred,

32 (1995) 18 ACSR 639 at 687; 134 ALR 101.

33 Under Swiss law a client of a Swiss bank may waive bank secrecy. The waiver is only valid if it is voluntary and not compelled by a foreign law enforcement agency or foreign court. See *Minpeco SA v Conticommodity Services Inc* 116 FRD 517 (SDNY 1987). See also Chaikin, above n 10, at 63.

however technical the breach.[34] The remedial orders have the potential to secure compliance by foreign nominees with corporate regulatory requirements. The reason is that for the purposes of private international law, the shares of a listed Australian company are property located within the Australian jurisdiction.[35] Shares of a corporation are susceptible to legal control by the judicial authorities in Australia, even though the person interested in the shares is overseas or unidentifiable.

The effectiveness of judicial remedies in the case of foreign nominees was raised in the *OAP* case where the ASC sought orders[36] which were designed to unmask the 'real owners' of the secret share parcel in OAP. The ASC applied for orders specifically enforcing compliance by Bank Leumi and EBC with their obligations under the tracing notice provisions. It also sought orders vesting the shares or their proceeds in the ASC, until the Swiss companies had made the requisite disclosure in relation to the tracing notices.

If the orders sought by the ASC had been granted by the court, the beneficial shareholders faced the risk that their share investment would be permanently frozen, in effect confiscated, if their Swiss nominees did not reveal their identity. The Federal Court refused to make the orders sought by the ASC.

Sackville J expressed the view that the relief granted must take into account the following matters:[37]

(a) an order cannot be made if it 'unfairly prejudices any person';
(b) the relief should advance the principal objective of the law, namely the creation and maintenance of an 'informed market for shares in listed Australian companies'; and
(c) an order should 'intrude to the least extent feasible upon principles of international comity, including the principle that a foreign corporation and its officers should not be required, by orders made by an Australian court, to perform acts that would or might infringe foreign law'.

His Honour considered that although a foreign corporation may breach Australian law, it is an appropriate exercise of discretion to take into account that the specific relief that is sought, for example, ordering disclosure of beneficial ownership in response to a tracing notice, may breach a foreign law. As the Full Federal Court stated in upholding Sackville J's judgment: 'it is, in general terms, unexceptionable, as an exercise in discretion to refuse specific relief if that relief would compel a breach of the law'.[38] This may be correct as a matter of judicial discretion, however, the policy question is whether an

34 It does not matter how technical the breach is. See *North Broken Hill Holdings Pty Ltd* (1986) 10 ACLR 270 at 286 where Fullagar J, referring to the powers of the court, stated: 'the legislature deliberately chose a small and high-pressure trigger for what is a very powerful and potentially destructive gun.'

35 See, generally, M Ooi, *Shares and Other Securities in the Conflict of Laws*, Oxford University Press, 2003.

36 Under s 742 of the Corporations Law. Note that the remedial orders that were available in 1995 were not as numerous as those that are available under the current law, but this does not affect the analysis or the utility of the *OAP* case.

37 (1995) 18 ACSR 639 at 690; 134 ALR 101.

38 (1996) 69 FCR 531 at 545; 139 ALR 527.

Australian court should give judicial recognition to foreign bank secrecy laws which may be inimical to Australia's national interest.

The Federal Court's decision in the *OAP* matter was complicated by the fact that a series of unconditional offers had been made for the shares in OAP after the ASC had commenced legal proceedings against the Swiss nominees. Justice Sackville held that each of the competing bidders for shares in OAP would suffer unfair prejudice if orders were made preventing the shares presently held by Bank Leumi and EBC from being made available for sale. This would occur if, for example, the court ordered the shares to be vested in the ASC, to be held by it until disclosure was made by Bank Leumi and EBC of the information sought in the tracing notices.

Sackville J considered but rejected an alternative course advocated by the ASC, to allow the shares to be sold to the highest bidder (thereby causing no prejudice to the offerors) and to freeze the proceeds of the sale until the identity of the beneficial shareholders was made known. His Honour found that the ASC proposal was punitive in that it would punish the beneficial shareholder rather than affecting the principal objectives of the legislation.[39]

Justice Sackville was of the opinion that the remedial powers did not include the power to make an order designed to 'punish those who, rightly or wrongly, might be suspected of sheltering behind Swiss secrecy laws'. Similarly, Justice Lehane of the Full Federal Court considered that it was an appropriate exercise of discretion to take into account whether an order might punish beneficial shareholders for their 'failure to make a disclosure which their nominees, but not (or anything that appears) they themselves had an obligation to make'.[40]

The judges did not explain what they meant by punitive measures. In the circumstances of this case the only relevant punishment would be the forced disclosure of the identity of the ultimate beneficial shareholder. By refusing to adopt an aggressive remedial order, Justice Sackville appears to have recognised that the clients of Swiss financial institutions have a legitimate right to financial privacy.[41] Since there was no evidence before him as to the motive of the beneficial shareholder,[42] he assumed that the undisclosed shareholder(s) were acting in good faith in relying on Swiss commercial secrecy laws.

The Federal Court also took into account the degree of culpability of the foreign nominees. Justice Sackville said that there was no evidence that Bank Leumi or EBC had 'acted dishonestly or in a manner that can be characterised as reckless'.[43] Similarly, Justice Lehane considered that the Swiss nominees had not acted in bad faith or with the deliberate object of circumventing Australian laws.[44]

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39 (1995) 18 ACSR 639 at 692, Sackville J considered that the maintenance of an informed market was one of the principal aims of the law, while the discovery of the ultimate beneficial owner was a 'subsidiary objective'.

40 (1996) 69 FCR 531 at 545; 139 ALR 527.

41 For an example of a US court recognising the legitimacy of Swiss commercial privacy, see *Minpeco SA v Conticommodity Services Inc* 116 FRD 517 at 524 (SDNY 1987).

42 (1995) 18 ACSR 639 at 689; 134 ALR 101.

43 Ibid, at ACSR 692.

44 (1996) 69 FCR 531 at 545. Justice Lehane distinguished the case of *North Broken Hill*

On one view, the enforcement remedy in the *OAP* case may be regarded as reasonable and proportional to the seriousness of the violation and the culpability of the financial intermediaries. It can hardly be said that non-compliance with a tracing notice is a serious offence compared with allegations of securities fraud or insider dealing. Culpability could not be assumed merely by the fact that the ultimate beneficial owners of the OAP shares were concealing their identities under Swiss secrecy laws. Furthermore, Australian courts, in contrast to some courts in the United States,[45] are not prepared to make a finding of bad faith on the basis of an assumption that a foreign financial institution must have knowledge of Australian corporate securities law requirements concerning shareholder disclosure and tracing notices.

On the other hand, the judicial view of culpability in the *OAP* case was based on very limited evidence which did not include any testimony from the Swiss financial institutions or cross examination of the Swiss bank expert evidence. For example, there was no evidence as to the Swiss nominee's knowledge of Australia's substantial shareholder disclosure laws and tracing notice requirements. This had the inevitable result that the Swiss nominee's claim of bona fides could not be forensically tested.

The relationship of Australian corporate securities requirements to foreign laws is a matter that was directly addressed by the courts in the *OAP* case. Justice Sackville gave considerable weight to Swiss secrecy laws in fashioning an appropriate remedy. The Full Federal Court rejected the view that the remedy ordered by Justice Sackville amounted to the giving of primacy to Swiss law over Australian law. The connections with Switzerland were substantial. Both Bank Leumi and EBC's conduct in complying with the ASC's tracing notices would require them to take action in Switzerland. That is, compliance by the Swiss financial institutions would require them to identify their clients by accessing their private banking network computers in Switzerland.

Australian courts give considerable weight to matters of international law and international comity. For example, the judicial remedy in the *OAP* case was consistent with the general principle of international law[46] that a State should moderate its enforcement jurisdiction where its law and the law of another State impose conflicting obligations on an individual. The balancing exercise conducted by Justice Sackville is one which courts in the United

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Holdings where there was evidence as to the identity of the beneficial shareholders and motives for refusing to give their nominees permission to disclose their identity; 139 ALR 527. In *North Broken Hill Holding* (1986) 10 ACLR 270 at 284, Fullagar J referred to the equitable owner of the secret share parcel as one who has 'deliberately set out to deceive the sharemarket, has deliberately set out to buy and has bought millions of shares on a market uninformed (and thus deceived), and has by so doing deliberately set out to flout in a very big way the spirit of the law'. His Honour went on to say that: '(IEL)'s intention in the end is likely to have been to buy NBH shares for less than they are intrinsically and potentially worth, or to sell them later on for more than their present price or both.'

45 See, eg, *SEC v Banca Della Svizzer Italianaa* 92 FRD 111 at 117–19 (SDNY 1981) where Judge Pollack assumed that the Swiss bank had acted in bad faith by 'invading American securities markets knowing that it would be relying on the non-disclosure laws of Switzerland'.

46 See American Law Institute, above n 31, para 442(1)(c).

States[47] and England[48] have utilised in dealing with the challenge of foreign nominees and foreign secrecy laws.

7 Business, legal and regulatory significance of the *OAP* judgments

What was the business outcome?[49] The unknown shareholders placed 9.29 million shares in OAP on the market at $2.84. There was a takeover contest for OAP which was won by the Independent Print Media Group, a joint venture between the Hannan and J B Fairfax families, with an offer of $2.72 a share, valuing the unknown Swiss share parcel at approximately $26.3 million.

It was reported in *The Financial Review*[50] that $26.3 million in proceeds from the sale were later frozen by the Australian Taxation Office (ATO) and finally became available for distribution, after payment of tax in 1997 under an ATO settlement. The net proceeds of the shares were then distributed to the Swiss financial institutions which presumably passed them to the secret shareholders.

In the *OAP* case there was no identification of the ultimate beneficial owner of a significant shareholding in an Australian listed company by using the tracing notice powers under the corporations legislation. This caused considerable disquiet to the corporate regulator as is shown by recent revelations. In 2003 ASIC launched a new investigation into the events of 1995 relating to the beneficial ownership of OAP, following reports in *The Financial Review*[51] that Swiss prosecutors in an unrelated matter had discovered the identity of the secret owners of OAP. The new ASIC investigation has involved a request by the Australian Government to the Swiss authorities for assistance based on an allegation that the secret shareholders committed perjury in Australia in 1995.[52] In 2006, newspaper reports[53] suggested that the ASIC had obtained Swiss bank records concerning the beneficial ownership of the OAP shares by relying on the 1991

47 See D Chaikin, 'Securities Laws and Extraterritoriality in the United States' in B A K Rider (Ed), *Regulation of the British Securities Industry*, Oyez, London, 1986, pp 174–88.

48 The English courts have applied a balancing approach but have also placed importance on the sovereignty of the foreign country and the legitimate interests of professional confidentiality. See, eg, *MacKinnon v Donaldson, Lufkin & Jenrette Securities Corp* [1986] 1 Ch 482 at 493–4; [1986] 1 All ER 653. See, generally, L Collins, *Essays in International Litigation and the Conflict of Laws*, Oxford University Press, 1997.

49 See M Kidman, 'Offset mystery deal', *The Age*, 15 December 1995; M Kidman, 'Swiss gnomes quitting Alpine', *Sydney Morning Herald*, 21 December 1995.

50 N Chenoweth, S Elam and R Graffagnini, 'Rivkin's Swiss bank scandal', *The Financial Review*, 29 October 2004.

51 S Elam and N Chenoweth, 'How a Zurich DA prised open Rene's secret world', *The Financial Review*, 29 October 2003.

52 ASIC Media Release 03-348, 'Offset Alpine Printing Group', 30 October 2003; Minister of Justice and Customs Press Release, 'Assistance sought from Swiss authorities on Rivkin probe', 30 January 2004.

53 J Garnaut, 'ASIC gets its hands on Rivkin's Swiss records', *Sydney Morning Herald*, 19 January 2006; J Garnaut, 'Rivkin's Swiss secret', *Sydney Morning Herald*, 19 January 2006. See also 'Swiss to send bank papers to Australia', *Swissmoney news*, 23 December 2005.

Australia/Swiss Mutual Assistance in Criminal Matters Treaty.[54]

The Australian corporate securities regulator has sought to play down the significance of its failure to penetrate foreign nominees by using the tracing powers. It has said[55] that no precedent has been established by the Federal Courts' decisions in the *OAP* case, and that individuals could not hide behind Swiss laws when buying Australian shares. This view may be tested by examining a number of cases that have occurred since the OAP judgments where the tracing powers have been used.

(i) *ASC v EBC Zurich AG (1995)*[56]

In 1995 the ASC obtained from the Federal Court orders freezing 3,680,000 shares in Allegiance Mining NL and Dome Resources NL for their failure to comply with the tracing and substantial shareholder provisions of the Corporations Law.[57] The two parcels of shares which were the subject of the freeze order were registered in the name of National Nominees on behalf of EBC Zurich AG, the Swiss finance company which had figured prominently in the *OAP* case.

In contrast to the *OAP* case, the proceedings in the *EBC* case were in substance not defended and no expert evidence was adduced as to the effect of Swiss law on a Swiss company complying with the particular requirements of the Australian Corporations Law. In these circumstances, Sackville J ordered:

- EBC to comply with the tracing notice and substantial shareholder notice obligations;
- that if EBC fails to comply with the orders, the shares should vest in the ASC until sold by it; and
- that the ASC is at liberty to decline to make any payments out of the proceeds of sale to any person claiming entitlement to the proceeds unless that person provides the information requested by the tracing notice.

Justice Sackville's orders in the *EBC* case were orders that his Honour had refused to grant in the circumstances of the *OAP* case. The reason for this appeared to be that the 'Swiss commercial secrecy defence' had not been raised in the *EBC* case, so that there was no issue whether the orders would compel EBC to violate Swiss law or whether such orders would amount to a 'punishment' of the secret shareholders.

In the upshot, EBC did not lodge substantial shareholding notices or comply with the tracing notices given to it by the ASC, as required by the orders of Justice Sackville. Instead, EBC entered into negotiations with the ASC as to the disposition of the matter and obtained new orders from the

54 For a discussion of the Swiss law on mutual assistance, see Chaikin, above n 26, and D Chaikin, 'Mutual Assistance in Criminal Matters: A Commonwealth Perspective', report published in the *Memoranda of the Meeting of the Commonwealth Law Ministers*, Commonwealth Secretariat, London, 1983.

55 M Kidman, 'ASC to act on "identity" problems', *Sydney Morning Herald*, 19 September 1997.

56 Unreported, FCA, Sackville J, NG3461/95, 14 December 1995, BC9501502.

57 ASC Media Release 95-139, 'Shares Frozen — Allegiance Mining NI and Dome Resources NL', 30 August 1995.

Federal Court to the effect that the sale of the parcel of shares in Allegiance Mining NL and Dome Resources NL be sold on or before 30 June 1997 and that the proceeds of the sale (after deduction of the costs of sale and the ASC costs) be transferred to EBC.

On 31 March 1997 EBC reached a settlement with the ASC[58] whereby EBC acknowledged to the Federal Court that it had breached the provisions of the Corporations Law, and gave an undertaking to the court that it would not in the future knowingly contravene the provisions of the Corporations Law. Under the settlement the ASC agreed to pay EBC the proceeds of the sale of the relevant share, in accordance with the Federal Court orders.

The terms of the settlement between the ASC and EBC have in theory imposed a new risk on EBC which may be held in contempt of court if it violates its undertakings to the court. As a practical matter this risk is minimal in that EBC is outside the jurisdiction of the Australian courts. There is also a possibility that any settlement agreement may be evaded. There is nothing to prevent EBC from using an associated legal entity to act as a foreign nominee for its clients so as to avoid the Australian corporations law.

(ii) *ASIC v Merkin Investments (2001)*[59]

In this case Bligh Ventures Pty Ltd (Bligh) became concerned as to the identity of a significant parcel of its shares in circumstances where it had become the subject of a takeover play. ASIC issued tracing notices under s 672A of the Corporations Law but was unable to discover the beneficial ownership of a 9.43% share parcel in Bligh. Eventually Merkin Investments Pty Ltd (Merkin), a Vanuatu registered holding company, filed a substantial shareholding notice and declared that it was the holder and beneficial owner of the Bligh shares.

The main issue in dispute was whether Merkin had continued to contravene the tracing notice requirements by failing to give proper disclose.[60] Under the Corporations Act, Merkin was obliged to disclose its knowledge of other person's relevant interests or other person's who have given instructions 'to the extent to which it is known'.[61] Merkin's statutory obligation was limited to its actual knowledge of those interests or instructions.

Merkin disclosed that its registered shareholders were Teak Ltd and Pine Ltd, both companies based in Vanuatu, while its directors were two corporate entities based in Vanuatu and Nauru. It contended that its registered shareholders were nominees for unknown third parties, so that it could not identify its own beneficial shareholders. It also claimed that it did not know the identity of the party or parties who gave instructions to purchase Bligh shares, and did not know the identity of the party or parties with whom its shareholders acted as bare trustees or nominees.

58 ASC Media Release 97-67, 'ASC settles Zurich proceedings', 25 March 1997; A Lampe, 'ASC gives up on the Swiss', *Sydney Morning Herald*, 26 March 1997.

59 (2001) 38 ACSR 648; 19 ACLC 1481.

60 Disclosure is required of the matters referred to in s 672B(1)(b) and (c) of the Corporations Act.

61 Section 672B(1A) of the Corporations Law provides that the person required to respond to the ASIC tracing notice need only disclose the requisite information 'to the extent to which it is known' to the person required to make the disclosure.

ASIC made a complex argument[62] which asserted that since Merkin must know the identity of its own 'directing mind and will', it must be in a position to know and therefore disclose the identity of its beneficial shareholders. The Supreme Court of Victoria did not accept ASIC's argument. Mandie J found that there was likely to be an ultimate client of Merkin, but that there was insufficient evidence to show that the client communicated directly to Merkin so that Merkin would know its identity. The court observed that:

> The client or clients may or may not be known to the corporate directors and shareholders of Merkin . . . the evidence does not enable the court to conclude that the knowledge of the unknown client or clients is the knowledge of Merkin. Evidence as to the chain of command or the precise relationships involved is not before the court and I am not satisfied, in the absence of such evidence, that knowledge of the identity of the person or persons having relevant interests (whom I have described as the client or clients) should be attributed to Merkin. Submissions were made in relation to the concepts of 'the directing mind and will' and the attribution of knowledge of that directing mind and will to the company, but it seems to me that the evidence here is insufficient to invoke those concepts.[63]

Although Merkin was not in continuous violation of the law, it had been in default. The Supreme Court refused to excuse Merkin for its past violation of the law because Merkin had failed to provide any satisfactory explanation as to why it had not complied with the Corporations Act.

Justice Mandie also held that the ignorance of a foreign nominee of its beneficiary client may provide a basis for a remedial order. His Honour ordered the Bligh shares to be vested in ASIC, the shares to be sold on public tender, and that, after deducting the costs of the sale and ASIC's costs on an indemnity basis, the residual proceeds be paid to the Australian nominee on behalf of Merkin.[64] His Honour refused to confiscate the profits of the shares because this would be 'unduly punitive'. This view echoes the opinion of Sackville J in the *Offset Alpine* case, where his Honour considered that the remedial orders should not be a form of punishment

Merkin may be viewed through two lenses. On one hand, it provides another illustration of the ineffectiveness of the tracing notice provisions to discover the ultimate beneficial owner of an Australian listed company. It shows that a foreign nominee may make corporate arrangements so that it can claim ignorance of the identity of its clients who have relevant interests in shares of an Australian company. On the other hand, the beneficial owners of Merkin paid a price for their non-disclosure in that they were not allowed to keep their shareholding interest, which may have been very important if the purpose of the secret shareholding was to obtain control of the corporation. It is not clear whether the order to pay indemnity costs would deprive the ultimate beneficial owners of Merkin of their profits in holding shares in Bligh.

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62 ASIC's argument was based on a long line of inferences which if accepted in their entirety would suggest that on the balance of possibilities Merkin must know the identity of its beneficial shareholder. See (2001) 38 ACSR 648 at 656–7.

63 Ibid, at 658.

64 ASC Media Release 01-268, 'Supreme Court vests Bligh Venture shares in ASIC', 2 August 2001.

(iii) *In the Matter of the Village Roadshow Ltd (2004)*[65]

In this case the Takeovers Panel (Panel), applying the principles set out in the judgments in the *OAP* case, held that Swiss bank secrecy laws did not relieve two Swiss banks, Schroders AG and Swissfirst AG, from their obligations to comply with a tracing notice issued by Village Roadshow Ltd under s 672B of the Corporations Act. The Panel gave the Swiss banks another opportunity to identify their clients, but they refused to do so, relying on Swiss bank secrecy. The Panel held that the continuing contraventions of the tracing notice requirements by the two Swiss banks and 001Invest World Currency Fund Ltd of Bermuda, which in 'aggregate' concerned 10.2% of the total number of ordinary shares in Village Roadshow, resulted in the market being misinformed, and were sufficient to constitute 'unacceptable circumstances'.[66]

The Panel made final orders that the undisclosed shareholdings in Village Roadshow be vested in ASIC, and then sold on an orderly basis by an independent broker, with the proviso that none of the shares be sold to their previous owners or associates.

It was reported[67] that in May 2004 Deutsche Bank, as the ASIC appointed broker, had sold the secret parcel of 23.9 millions shares for $A41 million which was distributed to the Swiss banks and the Bermudian company, after the deduction of the costs, fees and expenses of the sale, including those incurred by ASIC in complying with the Panel's orders.

The Panel in its annual report[68] has contended that the decision in the *Village Roadshow* case illustrates the effectiveness of the sanctions powers available to the Panel. This contention assumes that the beneficial owners of the shares in Village Roadshow were interested in continuing to maintain their investment in the company. However, the secret shareholders in Village Roadshow were dissatisfied with the company and its proposal to buy back $360 million of preference shares. The outcome was that the secret shareholders were able to maintain their anonymity and to retrieve their investment with profits intact.

It appears that the sanctions imposed for contraventions of Australian corporate law have had little deterrent effect[69] on the behaviour of Swiss

65 *In the matter of Village Roadshow Ltd* [2004] ATP 4 (12 February 2004). See website of the Takeovers Panel: <http://www.takeovers.gov.au>.

66 Section 657A(1)–(3) of the Corporations Act sets out the circumstances in relation to the affairs of a company which the Panel may declare to be 'unacceptable circumstances'. The circumstances are: '(a) unacceptable having regard to the effect of the circumstances on: (i) the control, or potential control, of the company or another company; or (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or (b) are unacceptable because they constitute, or give rise to, a contravention of this Chapter (6) or of Chapter 6A, 6B or 6C.' See also Panel Guidance Note 1, Unacceptable Circumstances.

67 See 'Australia sells shares held by Swiss banks', *Swissmoney news*, 14 May 2004.

68 Review by the President of the Takeovers Panel, *The Year Ahead*, Annual Report, 2004.

69 See the statement by Fullagar J in *Re North Broken Hill Holdings Ltd* (1986) 10 ACLR 270 at 286: the court is empowered to make any order 'calculated to conduce to the attainment of purchases on an informed market or calculated to set aside now and discourage in the future purchases made on an uninformed market'. See also judicial statements that the remedies may be designed to prevent defaulters from enjoying the benefits of their contraventions: *National Companies & Securities Commission v Monarch Petroleum NL*

financial institutions. For example, one of the defaulting Swiss banks in the *Village Roadshow* matter in 2004 was Swissfirst Bank which has a direct connection with EBC Zurich. The latter Swiss finance company had agreed in 1995 not to contravene Australian corporate law as part of its settlement with ASC. Swiss corporate records[70] reveal that in 1995 EBC Zurich was a subsidiary of the Swiss private bank August Roth AG. In late 1999 the Swissfirst group acquired August Roth AG renamed it Swissfirst Bank and then deregistered EBC Zurich.

(iv) *In the Matter of the Gribbles Group Ltd (2004)*[71]

In this case ASIC applied to the Panel for a declaration of unacceptable circumstances because of alleged breaches of the tracing and substantial holding provisions of the Corporations Act by parties associated with EC Medical Investments NV (ECMI). ECMI was a Dutch company which had a 43.1% shareholder stake in Gribbles Group Ltd (Gribbles).

ASIC's enforcement action precipitated the disclosure of the underlying beneficial shareholders in Gribbles. On 16 July 2004, seven days after ASIC's application to the Panel, various foreign trusts and foreign companies filed notices as substantial holders of shares in Gribbles while ECMI lodged a notice of change of interests of a substantial holder. These disclosures showed that ECMI was controlled by a web of foreign companies and trusts for the benefit of the children of Mr Wallace Cameron, the chairman and chief executive officer of Gribbles. Subsequently, the Panel[72] consented to the withdrawal of ASIC's application on the basis that the alleged unacceptable circumstances had been remedied by ECMI's disclosures. In the meantime, ASIC launched an investigation into the adequacy of the notices filed by ECMI and the other shareholders.

In ASIC's media release[73] the corporate regulator stated that its strategy in making an application to the Panel was to seek an order vesting the Gribbles share parcel in it 'in the event that the ultimate owners of that parcel are not disclosed to the market'. There is an ambiguity in this statement in that it might suggest that ASIC is seeking the permanent vesting of the shares or the proceeds of those shares. However, the Panel's powers to make orders under s 657D are less extensive than the court's powers to make orders under s 1325A of the Corporations Act. Although the Panel has the power to issue remedial orders, which includes vesting shares in ASIC, this can only be done if the Panel considers it appropriate for one of the purposes spelt out in

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[1984] VR 733 at 741 per Nicholson J; *ASC v Mt Burgess Gold Mining Co NL* (1994) 62 FCR 389 at 394–5 per Lee J; 15 ACSR 714; *Gjergja & Atco Controls Pty Ltd v Cooper* [1987] VR 167 at 215–16 per Ormiston J; *ASIC v Terra Industries* (1999) 92 FCR 257; 163 ALR 122 per Merkel J.

70 Public records of the Swiss companies were examined by the author on 10 February 2005.

71 *In the Matter of the Gribbles Group Ltd* [2004] ATP 15 (27 July 2004).

72 Takeovers Panel Media Release, 'The Gribbles Group Limited: Panel Accepts undertaking', 16 July 2004; Takeovers Panel Media Release, 'The Gribbles Group Limited: Panel consents to withdrawal of application by ASIC', 21 July 2004.

73 ASIC Media Release 04-222, 'ASIC refers Gribbles shareholder to Panel', 9 July 2004; ASIC Media Release 04-235, 'ASIC investigates Gribbles shareholder', 20 July 2004.

s 657D(2).[74] A key purpose for making a remedial order is to 'protect the rights or interests of any person affected by the (unacceptable) circumstances'.

The *Gribbles* case provides an illustration of the factual circumstances where enforcement action by ASIC is likely to be effective against a foreign nominee. This case is different from the *OAP* case in that the main commercial priority of the secret shareholders in Gribbles was to maintain their investment stake for the purpose of mounting a management buy-out. The vesting of the shares in ASIC would have destroyed this commercial priority. The underlying beneficial shareholders in Gribbles were prepared to provide disclosure even if this had other adverse commercial and tax consequences.[75] In November 2004 Mr Cameron sold the family stake in Gribbles for $121 million after a successful takeover of Gribbles by rival Healthscope.

8 Sanctions and strategic enforcement

Under the theory of strategic enforcement the regulator may use a mixture of enforcement options to secure compliance and deter violations of the law. One idea that has become well accepted is the model of pyramid enforcement[76] whereby the regulator may escalate the sanctions in order to encourage compliance with statutory obligations.

Contraventions of the substantial shareholder disclosure and tracing notice requirements give rise to various sanctions under the Corporations Act. There are a range of enforcement options including the imposition of criminal and civil penalties, civil claims for compensation, and remedial orders that may be issued by a court or the Panel.

Criminal sanctions may be viewed as near the top of a pyramid of enforcement options. Although a criminal contravention of the substantial shareholder or tracing notice provisions is not too difficult to prove in that the offence is one of strict liability,[77] it is virtually unknown for a criminal prosecution to take place. In the case of a foreign nominee, there is an additional problem of securing criminal jurisdiction over an accused person who is located in a foreign country. If the accused does not voluntarily submit

74 The Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement) that it thinks appropriate to:

(a) protect the rights or interests of any person affected by the circumstances; or (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or (c) specify in greater detail the requirements of an order made under this subsection; or (d) determine who is to bear the costs of the parties to the proceedings before the Panel.

75 R Urban, 'Tax probe includes Cameron companies', *Sydney Morning Herald*, 1 November 2004. See also <www.gribbles.com.au> (accessed 10 October 2005).

76 See I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992; H Bird, D Chow and I Ramsay, *ASIC Enforcement Patterns*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2002.

77 Corporations Act 2001 s 671B(1A) (substantial holding information), s 672B(1B) (tracing notice). See also s 1311 and Sch 3. In relation to a tracing notice offence, a defendant also bears an evidential burden in relation to matters in s 672B(1A) (that is, the knowledge requirement in respect of other person's relevant interests). See also s 13.3(3) of the Criminal Code.

to jurisdiction, the Australian authorities will consider extradition. However, extradition is not permissible under Australia's extradition law and treaties in that the substantial shareholding and tracing notice offences are punishable for less than the statutory minimum requirement, namely, 12 months imprisonment.[78]

Other sanctions do not appear to be effective against foreign nominees. For example, ASIC may seek the imposition of civil penalties for contraventions of the substantial shareholder notice or tracing notice requirements. The civil penalty regime requires ASIC to prove its case on the balance of probabilities. This may provide some deterrence to local nominees, but it has no practical application to foreign nominees who have no assets in Australia.

There is also the possibility of a party seeking damages for losses suffered as a result of contravening the substantial holder disclosure[79] or tracing notice requirements[80] of the Corporations Act. In securing a civil remedy there is the problem of proving loss or damages. In the case of foreign nominees, there are the additional difficulties of service of process out of jurisdiction and enforcing a judgment against a party which has no assets in Australia.

The notion that enforcement remedies may be strategically escalated does not work in the case of foreign nominees which contravene the tracing notice requirements. In practice ASIC has only one 'effective gun' against recalcitrant foreign nominees, that is to apply for one of the judicial remedies under Ch 6 of the Corporations Act. The most severe sanction which the court may impose is the vesting of the shares or interest in the shares in ASIC.

In theory the vesting of the shares provides the greatest deterrent against breach of the law by foreign nominees in that it may amount to a confiscation of the shares themselves.[81] The courts have rarely vested the shares absolutely in a corporate securities enforcement case[82] and, as the *OAP* case illustrates, the courts will invariably require ASIC to return the proceeds of the sale of the shares to the foreign nominee. Indeed, it is difficult to envisage any circumstance where the court would confiscate a shareholder's investment even for the most flagrant and deliberate violation of the substantial shareholder or tracing notice laws.

9 Conclusions and recommendations

ASIC's tracing powers are subject to serious limitations in ascertaining the ultimate beneficial owners of listed companies in Australia. The *OAP* case demonstrates that the tracing powers in the Corporations Act are ineffective in

78 See the definition of 'extradition offence' in s 5 of the Extradition Act 1988 (Cth).

79 Corporations Act 2001 s 671C.

80 Corporations Act 2001 ss 671C and 672F.

81 For a discussion of confiscation of shares for substantial shareholder violations, see D Chaikin, 'Cracking the Nominee in New Zealand' (1988) 8 *Commonwealth Law Bulletin* 814.

82 See, eg, the exceptional case of *Re North Broken Hill Holdings Pty Ltd* (1986) 10 ACLR 270 where Fullagar J vested a parcel of 21.4 millions shares (valued at approximately $65 million) in the National Companies and Securities Commission. The shares were to be sold over a six month period and the proceeds paid to the government. This decision was reversed on appeal by the Full Federal Court on the ground that the tracing notice did not strictly comply with the prescribed legislative form: See *Crosley Ltd v North Broken Hill Holdings Ltd (No 2)* [1987] VR 119.

identifying beneficial holders where the nominee is located overseas in a secrecy jurisdiction. If the foreign nominee refuses to comply with a tracing notice, there are few options available to unmask the secret shareholders.[83] This enforcement gap may encourage foreign nominees to be used in the avoidance of the substantial shareholder disclosure requirements.

The remedies that the courts and the Takeovers Panel have applied to uncooperative foreign nominees have had no deterrent effect in cases where the beneficial shareholders' desire for secrecy is the highest priority. However, recalcitrant foreign nominees face the risk that their clients may lose entitlement to maintain their shareholding if they do not comply with a tracing notice. The sanction of disgorgement of shares will ensure that the hidden ownership of Australian listed companies cannot be maintained. The regulatory technique of tracing notices is likely to be most effective in preventing a secret shareholder from unlawfully taking control of an Australian listed company. This furthers the strategic policy goal of maintaining a fully informed market, especially in the context of takeovers.

Given the widespread use of nominees in Australia's capital markets, there is no easy solution in dealing with foreign nominees who contravene Australian corporate law. One preventative strategy would be to impose new statutory obligations on a registered shareholder whenever that shareholder acquires an interest on behalf of another person, including a non-resident. The registered shareholder may be required to inform the other person of Australian corporate regulatory requirements, including those pertaining to substantial shareholdings disclosure and tracing notices. If this was a prescribed requirement, ASIC may be in a stronger position to challenge the bona fides[84] of the foreign nominee and its client.

Another proposal would be for the legislature to specifically empower the courts to freeze the shares or proceeds of shares held on behalf of a foreign nominee until there was compliance with the tracing notice. This was the remedy that ASC failed to obtain in the *OAP* case. Given the wide judicial discretion in this area, it is doubtful whether the courts would impose this remedy without further legislative guidance. This raises the question whether the Parliament should expressly declare in the Corporations Act that foreign secrecy laws are inimical to Australian interests and that the courts should ignore foreign privacy laws when moulding judicial remedies. This proposal has serious implications for Australia's international relations, international comity and the rights of financial privacy. Further study is required as to the impact of foreign secrecy laws on Australian corporations legislation before the enactment of any such proposal.

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83 The main option is to apply to the foreign country for assistance in identifying the beneficial shareholder for the purpose of a criminal investigation. This will usually be done through a mutual assistance request based on a treaty.

84 See statement of Lehane J in the *OAP* case (1996) 69 FCR 531 at 546; 139 ALR 527:

> A nominee company which is fully aware of the requirements of Australian law and of the remedies available for breach may not evoke much sympathy if it persists in a practice of acquiring shares on behalf of clients without obtaining instructions which would permit disclosure of their identity if required.

17 March 2017

Ms Jodi Keall
Senior Adviser
Financial System Division
Treasury
100 Market Street
Sydney NSW 2000

E-mail: beneficialownership@treasury.gov.au

Dear Ms Keall

Increasing Transparency of the Beneficial Ownership of Companies

Chartered Accountants Australia and New Zealand (**Chartered Accountants**) welcomes the opportunity to provide a submission regarding the consultation paper on increasing transparency of the beneficial ownership of companies.

Australia needs a new business register which should include data on associates

It is well known that Australia's aging ASIC registries need to be replaced and, now that a Government decision has been made not to privatise the ASIC registries, a multi-agency project is underway to determine how best to modernise the registries.

Chartered Accountants agrees that, on public policy grounds, a beneficial ownership register (**BOR**) as part of a modernised whole of government business registry will assist in the administration of tax and other laws.

There are many reasons for this view. For example, a BOR could reduce the ability of unscrupulous persons to operate 'phoenix companies', undertake money laundering, participate in terrorism financing, invest corrupt proceeds in Australia, and exploit a variety of Federal and State \ Territory laws (such as the laws relating to political donations).

It could also give Australian policy makers and regulators greater insights into who owns strategic assets in Australia and who is bidding for Government contracts.

Put simply, our community should not be blind-sided by opaque company ownership arrangements.

Let's sort out who will take the lead on Australia's new business registry

It seems to us that the Government is at a cross-roads in deciding the direction of whole of government initiatives such as the new business registry and, what we see as a sub-set of the new registry, the BOR.

It can either adopt the lower-cost route of modernising the existing ASIC registries (with current data coverage and functionality), or it can choose to make a *significant* investment in digital transformation of the regulation of entities, with new authentication procedures, enhanced cyber security safeguards and data collection functions which incorporate new policies such as the BOR.

There does not appear to be a middle road here. Any piecemeal (or layering) approach to such investment is likely to attract criticism from the business sector if, year-by-year, it is confronted with additional compliance costs as the functionality of the new registry gradually expands.

As we have said before in previous submissions, a whole of government approach to business modernisation is required, with Cabinet-level ministerial oversight and responsibility.

A Cabinet-level decision is also required as to which government agency should lead and co-ordinate (together with the Digital Transformation Agency) the business registry modernisation project. This is important to our organisation because of our strong desire to engage in the design, development and implementation stage.

	Chartered Accountants recommends that the Government should update the business community, perhaps as part of the up-coming Federal Budget, on the project to replace ASIC's aging business registries. We would hope that the opportunity will be taken to announce that Australia will move to a whole of government business registry model which modernises and streamlines the way Australia does business. This new registry should include information on persons and entities associated with registrants to reflect the thinking behind the BOR proposal. The lead agency for implementing the new registry should also be identified so that appropriate consultations can commence with organisations such as ours.

The role of the accounting profession in Australia's new registry arrangements

For our members, the actual mechanics of how the new register and the BOR will operate is an important issue in terms of the role accountants might play in the future collection and maintenance of data regarded as highly accurate in the eyes of regulators.

Not only are accountants generally involved in the establishment of entities and know the identities of those individuals involved (i.e. they are sources of truth when it comes to authentication), they typically handle the *on-going* accounting and tax affairs of the entity and those in the ownership structure.

Chartered Accountants strongly believes that accountants, governed by strong ethical principles and with appropriate accreditation (if considered necessary) have a leading role to play in new registry arrangements, including a BOR.

	In modernising the way Australia does business, the role of trusted intermediaries should be factored into the design of new systems. New, online systems may give the impression that compliance is easier, but the validity of data received by regulators remains a key concern. Professionals such as Chartered Accountants have an important continuing role to play in providing authentication and risk assurance to regulators in a wide range of topic areas, including the proposed BOR.

Better data usage first, more red tape second

Most (but not all) of the community benefits of a BOR involve identifying people whose conduct is corrupt, criminal or at the very least, dubious.

Such persons are unlikely to fully comply with any self-reporting requirements associated with a BOR. If they do "comply", the reported ownership structure may include persons or opaque entities which are "fronts" for those who really pull the strings. As a consequence, the proposed 'self-reporting' regime for identifying beneficial ownership outlined in the consultation paper may not result in better law enforcement.

Traditional law enforcement strategies for dealing with those with little regard for the law have relied on the capture of data, the timely and efficient sharing of such data amongst relevant agencies, and robust data analytics monitored by well-trained and experienced individuals. Australia already has a variety of data sources on beneficial ownership and it is unclear to us how well these current arrangements are working, and whether they can be made to work better without imposing greater regulation on the community.

As we have said many times, Australia should follow New Zealand's lead and publish the detailed research and thinking of government officials behind new policy proposals such as the BOR[1]. Whilst we appreciate the background information in Treasury's Consultation Paper, it lacks any detailed insights into what's wrong with existing processes and why. The Q&A style in the Consultation Paper suggests a Policy in search of a Policy Rationale approach.

In the absence of any analysis of systemic failure in current data collection and sharing arrangements therefore, we believe that better data verification, usage and exchange between Government agencies could enable the creation of a central BOR which has the potential to be more effective, and less costly for legitimate Australian businesses, than the proposed self-reporting regime.

It is noted that the Financial Action Task Force (**FATF**) Recommendation 24[2] does not require companies to provide beneficial ownership information. Rather, it states that "countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a

[1] New Zealand calls these "Officials' Papers".
[2] http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

timely fashion by competent authorities". In meeting this aim, the interpretative note to Recommendation 24 states that "countries should ensure that either:

a) Information on the beneficial ownership of a company is obtained by that company and made available at a specified location in their country; **or**

b) There are mechanisms in place so that the beneficial ownership of a company can be determined in a timely manner by a competent authority"[3] and in doing this countries can use *existing information* such as information held by other competent authorities and stock exchanges[4]. [Emphasis added]

	The introductory sections of the Treasury Consultation Paper, whilst helpful, do not in our view adequately address the need for a BOR. The various agencies which support the establishment of a BOR should be more transparent about any failings in the current data collection and analysis system and how these shortcomings hamper their work.

How can a beneficial ownership register be effective if it only applies to companies?

An informed discussion about the beneficial ownership of companies cannot occur without some consideration of trusts and other types of legal entities which can appear in a company's ownership structure (some of which may not be recognised in an Australian legal context).

Failure to address this issue in the design of a BOR means that the policy intent could be easily frustrated by inserting a trust or other type of opaque entity in the ownership chain.

In saying this, we readily acknowledge the practical difficulties facing policy-makers here. For example, there are several different types of trusts and regulation of trusts occurs primarily at State and Territory level.

Nonetheless, Australia *already* collects information about certain types of trusts (e.g. closely-held trusts[5]) and participates in exchange of information programmes with a variety of countries. How such trust-related information could be integrated into the proposed BOR needs to be considered as part of the current consultation process.

As an alternative, there is also a question whether the ATO's systems can better create beneficial ownership structures. We are aware from presentations by Inland Revenue in New Zealand that the tax administration software currently being installed by Fast Enterprises Inc (USA)[6] includes associate-tracking functionality applicable to a range of entities, including trusts.

[3] Paragraph 7 on page 87 of http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf
[4] Paragraph 8(c) on page 87 of http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf
[5] This information is collected from trust and beneficiary tax returns, as well as the ultimate (trustee) beneficiary reporting rules which came into effect on 1 July 2008. The ATO's Private Groups and High Wealth Individual (PG\HWI) unit also collects information of the structures used by this segment of the taxpayer population.
[6] https://www.fastenterprises.com/wp-content/uploads/2015/12/NZ_NBR-BusinessTransformation.pdf

Also, rather than focusing on the collection of trust-related BOR information, another long-standing (albeit complex) policy option would be to consider the existing tax collection mechanism for trusts[7].

	The proposed BOR will be ineffective in its current form as it focuses entirely on companies and does not address the impact of trusts and other entities in the ownership chain. Consideration should be given to how existing trust information (collected at Federal, State/Territory and international levels) could be integrated into the proposed BOR.

More preparatory work required

Before placing additional information demands on companies, Chartered Accountants thinks it would be worthwhile considering the opportunities (e.g. compliance cost savings) that could arise by:

- Aligning the definitions and methodologies used in the various beneficial ownership tests at all levels of Government. This does not necessarily mean alignment in the level of detail required, but rather uniform treatment, for ownership tracing purposes, of shares held by, say, a complying superannuation fund, a listed company or a charity[8].

- Conducting a stocktake of existing data sources and considering the potential for better utilisation of data that already exists within government circles (Commonwealth and State / Territory).

- Actually constructing ownership chains through existing data as part of a project to identify where the real knowledge gaps of particular concern to regulators arise.

- Having key agencies analyse existing data to identify 'problem' structures or 'black-list' countries which do not share ownership data on request, then applying more detailed requirements to these whilst allowing relief from reporting (or a 'light touch') in other contexts to those entities which are generally considered to be highly compliant[9].

[7] Recommendation 36 in the Henry Tax Review was that: The current trust rules should be updated and rewritten to reduce complexity and uncertainty around their application. http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/papers/Final_Report_Part_1/chapter_12.htm

[8] Refer for example to the simplified rules for tracing the beneficial ownership of loss companies in Division 165 of the *Income Tax Assessment Act 1997*.

[9] For example, consideration of the Panama Papers leaks might lead to a conclusion that a BOR is required for inbound investors from, say, a particular jurisdiction (as distinct from inbound investors from New Zealand where the ownership data is readily available because of existing trans-Tasman co-operative arrangements.)

	Chartered Accountants recommends that: 1. A review of the concept of beneficial ownership across both Federal and State legislation be undertaken with a view to standardising the definition and/or methodologies for determining beneficial ownership in order to minimise compliance costs and facilitate information exchange between government agencies. 2. Treasury publish a research paper (prepared in conjunction with relevant agencies) highlighting how Australia's inadequacies in existing data collection and analysis on beneficial ownership is hampering regulators. 3. Treasury identify what steps could be taken to better utilise existing data sources to establish a BOR.

Listed companies

Given the substantial disclosure requirements already applicable to Australia's publicly listed companies and widely held companies, the practical difficulties company and share registry officials would encounter in gaining additional traced shareholding data beyond that already held, and the relatively low risk status of shareholdings in such companies in the eyes of regulators, we believe it is worth considering a carve-out for publicly listed and widely-held companies from any new BOR requirements.

Such a carve-out has already been considered appropriate in the tracing of beneficial ownership tests applicable to tax loss companies in this segment of the taxpayer population.

	Australia's listed and widely held companies should not be required to contribute to the BOR any information in addition to that which they currently provide to regulators. This existing information should be placed on the BOR as part of the establishment of Australia's new business registry.

Closely-held companies

For private, closely held companies, we again point to the availability of existing sources of data to establish the BOR. Opportunities should then be provided to entities in the ownership structure to update or correct this data as part of an annual, streamlined reporting process.

In terms of "carrot" and stick" approaches to the maintenance of such data, we have already discussed with ATO Deputy Commissioner Michael Cranston (Private Groups and High Wealth Individuals) the role which this segment of the taxpayer population and their professional advisers can play in voluntarily keeping such data up to date in return for a lower ATO risk rating under the Risk Differentiation Framework.

	The new business registry should include facilities for closely-held companies to update existing data on beneficial ownership arrangements to the extent that such information is reasonably known to company shareholder / directors. Companies which keep their details up to day would receive a lower risk rating from regulators.

The offshore problem

It seems to us that the key concern with beneficial ownership involves closely-held companies whose ownership structure extends offshore. Apart from the point (already made) about the use of trusts and other entities to obfuscate the ultimate beneficial owners, the key policy objective here should be to enhance Australia's international exchange of information arrangements as part of the current world-wide trend towards greater cross-jurisdiction information sharing and the demise of tax secrecy jurisdictions[10].

Of itself, a BOR maintained in Australia will do little to address the offshore problem.

Not only that, Australian companies required to incur additional compliance costs associated with the new BOR will rightly point to the fact that, once again, predominantly compliant domestic entities are being targeted so that the odds of a regulator catching-out the occasional offshore tax evader etc have somehow been enhanced.

	Australia should continue to take a lead role in OECD efforts to convince those remaining secrecy jurisdictions to change their domestic tax secrecy laws and collaborate with other nations to share tax-related information. In terms of our own bilateral arrangements, Australia should progress implementation of new Tax Information Exchange Agreements with those countries with whom we do not have a double tax agreement.

Data: public or private?

The consultation paper indicates that most immediate (basic) beneficial ownership data is already currently available publicly – albeit at a small cost[11]. The consultation paper is silent as to whether the proposed BOR will be made public.

We understand the desire for increased transparency which emanates from some journalists, media organisations, researchers and organisations who feel that it is necessary to shine a light on the tax affairs of large companies and high wealth individuals. However,

[10] There are many drivers here as noted in the Treasury Consultation Paper. For example, there is the OECD's work on BEPS, the FATF standards, and the United Kingdom's initiative for the systematic sharing of beneficial ownership Information.

[11] Some advocates of greater transparency have pointed out that this small cost escalates substantially where the initial ASIC search necessitates extending the search to each associated entity. We understand that ASIC has costs to cover, but perhaps in this electronic age and with a modernised business registry, consideration could be given to a single search fee which covers a corporate group, not each individual entity in that group.

Chartered Accountants is already on the record in stating our opposition to the domestic transparency rules applicable to Australia's large private companies[12].

We believe that the demands of transparency advocates needs to be balanced against individual privacy rights (i.e. the shareholders of private companies), the need for commercial confidentiality, and maintaining Australia's business friendly reputation.

Overall therefore, we think it is appropriate that the BOR for private company groups should only be accessible by government agencies unless the relevant entity has granted written authorisation for the information to be released[13].

	Chartered Accountants recommends that the central BOR for private companies be kept confidential unless an entity has authorised the release of information.

Further parts of our submission

- **Appendix A** contains our responses to some of the particular questions posed in the consultation paper.
- **Appendix B** outlines how the tax law deals with beneficial ownership and tracing issues.
- **Appendix C** lists some recommendations by the Senate Economics Reference Committee inquiry into Insolvency in the Australian Construction Industry regarding verification and enforcement of information by ASIC.
- **Appendix D** provides information about Chartered Accountants Australia and New Zealand.

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I would be happy to discuss any aspects of our submission with you. I can be contacted on (02) 9290 5609 or by email at michael.croker@charteredaccountantsanz.com.

Yours faithfully,

Michael Croker
Tax Leader Australia
Chartered Accountants Australia and New Zealand

[12] We refer here to the transparency reporting rules requiring the ATO to annually disclose very basic (we would say misleading) tax and financial information about Australian-owned resident private companies with total income of $200 million or more. Refer Section 3C *Taxation Administration Act 1953*.

[13] Allow an entity to authorise service provider (known as a reporting entity under the anti-money laundering legislation) to authorise the release of specified information by BOR to the service provider.

Appendix A - Specific questions

Public companies

1. ***Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exemption apply to companies listed on all exchanges or only to specific exchanges?***

Given that the consultation paper does not propose any particular new requirements to report on beneficial ownership, it is a little difficult to respond to the first question.

That said, it appears from reading the consultation paper that there may be the following concerns:

- Listed companies do not have to record in their register of shareholders whether or not shares are beneficially held[14]; and

- Listed companies (and other public companies) do not have to report the same level of shareholder changes to ASIC as do private companies[15]. That said, a person must notify a listed company if the person has, or ceases to have, a 'substantial holding' in the company as well as ASIC (or other relevant regulator). In addition, both ASIC and listed companies have the power to issue a tracing notice which requires disclosure of all relevant interests within two days

The mutual evaluation report of Australia by FATF noted that Australia's National Threat Assessment "made a distinction between corporate entities that can be used to conceal crime wealth and ownership, and public companies where shares can be purchased using proceeds of crime. The first scenario was given a high threat rating, the second a medium threat rating."[16]

If the purpose of the BOR is to assist in reducing the ability of undesirable persons influencing companies to undertake money laundering and terrorist financing, it is hard to imagine situations where a shareholder - who is not already known to government entities through a perusal of the significant shareholder information - in a publicly listed company on the ASX could influence the public listed company.

If the purpose of the BOR is to assist in identifying assets where the proceeds of money laundering are stored, then it appears that the existing tracing provision may already address this issue.[17]

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[14] The consultation paper notes on page 3 that: "There is, however, scope to increase the transparency of beneficial ownership, because while shares are often held non-beneficially in Australia there is no legal obligation for all companies to collect and report shares held in this manner or the identity of the beneficial owners to ASIC….All companies other than listed companies must record if shares are beneficially held or not. The identity of the beneficial owner is not required to be recorded."

[15] At page 4 of the consultation paper it is noted that: "only proprietary companies must report to ASIC any subsequent changes in member details…[but] a person must notify a listed company if the person has, or ceases to have, a 'substantial holding' in the company, and any change in their substantial holding of more than 1 per cent". At page 5 it is noted that the public company must also make this information available to the Australian Stock Exchange and in its annual report.

[16] Page 108 http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf

[17] It is also noted that if identifying assets that are the proceeds of money laundering is the aim then attention may be better focused on the ultimate beneficial owners of land in Australia. The FATF evaluation of Australia noted that "Australia is seen as an attractive destination for foreign proceeds, particularly corruption-related proceeds flowing into real estate from the Asian Pacific region" - refer page 7 http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf

If the purpose of the BOR is to identify those shareholders who indirectly hold taxable Australian property then we would have thought that ATO's existing data on a company's underlying assets (i.e. whether the company is "land rich") and foreign shareholder profile would give a fairly good idea of which companies to monitor.

In short, it is difficult to envisage what benefits would arise from imposing further reporting requirements on Australian publicly listed companies.

Also, requiring listed public companies to have higher tracing levels for all beneficial owners could be difficult and costly to implement.

Finally, we note that:

- Project Mercury (a sub-project of Project Wickenby) found that approximately 40% of the ASX market was owned by foreign entities and that appropriately 47% of the ASX market was held by Custodial Service Providers (CSP) and nominee companies.[18] Our calculations indicate that approximately 30% of the ASX listed companies are owned by Australian superannuation funds.[19] A number of highly regulated foreign pension funds also invest in ASX listed companies. The combination of highly regulated Australian and foreign superannuation funds would account for a substantial proportion of the nominee and CSP holdings. As such, it does not appear to be an area that is at high risk and worthy of further regulation.

- The income tax law already recognises that companies listed on an approved stock exchange are worthy of a lighter touch in terms of monitoring ownership.[20]

2. *Does the existing ownership information collected for listed companies allow for timely access to adequate and accurate information by relevant authorities?*

Relevant government agencies are best placed to comment.

Beneficial owner

3. *How should a beneficial owner who has a controlling ownership interest in a company be defined?*

The discussion of beneficial ownership and in particular the mechanics for determining beneficial ownership should try to integrate and streamline provisions across a range of Federal and State / Territory legislation.

The income tax legislation already requires the identification of beneficial owners in a variety of situations and has addressed a number of issues that arise when tracing beneficial ownership. We see benefit in Government leveraging this tax framework so that there is a consistent understanding across legislation about how the Government would apply beneficial ownership in the creation of its own data base. **Appendix B** outlines those tests and how various tracing issues are resolved.

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[18] Page 107 http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf

[19] ASX total market at 30 June 2016 was $1.619tr. APRA regulated funds had $1.292tr in assets on same date with $309bn in ASX listed equities. SMSFs had (ATO estimate) $621bn of which $187bn was ASX listed equities. So Australian super funds own about 30% of ASX. Or to put it another way constitute at least 64% of the nominee and CSP shareholding of ASX listed companies.

[20] Approved stock exchange has defined in section 995-1 ITAA 1997 by reference to regulations. The regulations list various stock exchanges by country.

4. ***In light of these examples given by the FATF, the tests adopted by the UK (see Part 3.2 above) and the tests applied under the AML/CTF framework and the Corporations Act, what tests or threshold do you think Australia should adopt to determine which beneficial owners have controlling ownership interest in a company such that information needs to be collected to meet the Government's objective?***

   A Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?
   B Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exerted via means other than owning or having interests in shares, or by a position held in the company? If so, how would those types of control be defined?

See response to Question 3.

5. ***How would the natural persons exercising indirect control or ownership (that is, not through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?***

Identification and enforcement in this scenario is highly problematic, as evidenced by various attempts in the income tax law. There are practical limits on what an entity (or their adviser) actually knows about *actual* beneficial ownership, let alone indirect control, especially where the ownership trail leads offshore.

We suspect the best that can be achieved here is self-reporting, supported perhaps by a mandatory disclosure regime where specified information about indirect control or ownership comes to the attention of the entity (or their adviser).

The ATO would have grappled with this issue in undertaking its investigations and we urge Treasury to seek ATO input.

6. ***Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the ultimate beneficial owner?***

The majority of the information currently collected by ASIC and the ATO relates to the immediate (first tier) ownership of entities.

There are good, practical reasons for this (i.e. entities should not be asked for information they cannot obtain, or could only obtain if they received remarkable levels of co-operation from shareholders).

Given the Government's emphasis on reducing red tape, digitally transforming government (particularly through the better use of existing data), and the fact that criminals etc will not self-report appropriately, it appears to us that the Government should focus on enhancing existing data and improving its analytics capability rather than imposing more burdens on legitimate businesses.

This approach would need to be supported by data sharing with other jurisdictions which have themselves embraced a BOR. Note however that, as soon as Australia seeks to extend its data collection rules offshore, there still remain a small number of jurisdictions

where details of beneficial ownership cannot legally be revealed, or disclosure is prevented for other reasons such as claims for legal professional privilege.

7. *Do there need to be special provisions regarding instances where the relevant information on a beneficial owner is held by an individual who is overseas or in the records of an overseas company and cannot be identified or obtained?*

We note that, where information is held overseas, Australia already has exchange of tax information provisions in its double tax treaties which encompass beneficial ownership information. Australia also has Tax Information Exchange Agreements with a number of non-treaty countries.

In the latest evaluation of Australia by the G20 Forum on Transparency and Exchange of Information, Australia was rated "compliant"[21]. ASIC also has a number of international exchange of information agreements[22]. Of concern however is that whilst Australia may be compliant, the vast majority of countries were rated only largely compliant.

From *informal* discussions with ATO officials, we understand that the inability to get information from *certain* overseas jurisdictions is a real issue. This was also noted in the FATF review of Australia where: "it was acknowledged that authorities have encountered difficulties, in particular, to access information on foreign trusts established in jurisdictions such as the Cook Islands, Jersey and Panama, and other off-shore trust jurisdictions."[23]

We therefore reiterate our earlier comments about the need for published position papers on the extent of current problems being experienced in establishing beneficial ownership, particularly in the context of information held overseas. For example, the ATO has yet to issue a detailed report on its work on the Panama Papers leaks, work which we understand has taken ATO officials to jurisdictions such as Hong Kong.

One policy option to explore in this context is a "black-list" approach to the design of any new legislation, depriving entities with links to such jurisdictions from eligibility for Australian tax or commercial entitlements.

8. *Should there be exemptions from beneficial ownership requirements in some circumstances? What should those circumstances be and why?*

As noted earlier, listed and widely-held companies pose little risk and should be considered for exemption for beneficial ownership reporting requirements. Similar comments apply to shares held by Australian superannuation funds, offshore pension funds, Australian charities and mutual associations.

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[21] 22 countries out of 113 countries was rated compliance - http://www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings/#d.en.342263

[22] 7.37. ASIC can exchange information with 102 foreign counterparts under the International Organisation of Securities Commissions (IOSCO) Multilateral Memoranda of Understanding (MMOU) Concerning Consultation and Cooperation and the Exchange of Information (enforcement). ASIC can exchange information with 64 foreign counterparts under an additional 80 bilateral MOUs covering supervision and enforcement. ASIC's MOUs and the MMOU allow for the exchange of information recorded in ASIC's registers. ASIC can exchange information recorded in ASIC registers with foreign counterparts and other agencies, including law enforcement agencies, whether or not there is an MOU. This includes publicly available information. If the information is not publicly available on ASIC's registers but is held by ASIC in relation to its registry function, ASIC can release the information pursuant to section 127(4) of the ASIC Act and, if an MOU exists, pursuant to the terms of the MOU. http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf

[23] Page108 http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf

Inbound investors which claim sovereign immunity pose special issues when considering BOR exemptions because claims for such immunity are generally handled through a confidential, private ruling process managed within the ATO[24]. The establishment of a BOR could provide a welcome opportunity to make such sovereign immunity decisions more transparent to the Australian community.

Details of Beneficial owner

9. ***What details should be collected and reported for each natural person identified as a beneficial owner who has a controlling ownership interest in a company?***
10. ***What details should be collected and reported for each other legal persons identified as such beneficial owners?***
11. ***In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?***

Australia's dividend imputation and TFN mechanism already provides substantial levels of assurance about existing shareholder data. We would have thought that existing ASIC data would also provide information about controlling interests.

Refer to earlier comments about situations where the shareholding trail leads offshore.

Rather than requiring entities to collate and report detailed information about individual shareholders (i.e. full name, TFN, address), data that is already held by government should be collated and cross referenced (see earlier comments about the possibility of increased government investment in an improved business register). If this information is then efficiently data-matched to income flows by the ATO and cash flows by AUSTRAC and the overall data expertly analysed, then it raises a legitimate question as to whether a BOR needs to issue information requests.

Collection and storage

12. ***What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?***
13. ***Should each company maintain their own register?***
14. ***How could individual registers being maintained by each company provide relevant authorities with timely access to adequate and accurate information? What would be an appropriate time period in which companies would have to comply with a request from a relevant authority to provide information?***
15. ***What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?***
16. ***What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?***
17. ***Should a central register of beneficial ownership information also be established?***

[24] https://www.ato.gov.au/General/ATO-advice-and-guidance/In-detail/Private-rulings/Supporting-documents/Sovereign-Immunity/

18. *In particular, what do you see as the relative compliance impact costs of the two options?*

Companies should not be compulsorily required to individually maintain beneficial ownership information. If a central BOR is to be established, it should be built on currently available data, with closely-held entities able to correct the register for any errors or omissions.

Operation of a central register

19. *Who would be best placed to operate and maintain a central register of beneficial ownership? Why?*

It is unclear to us whether a new or existing Government organisation would need to establish and maintain a central BOR. Much depends on whether any existing agency has the expertise and/or technological capacity to undertake the task of integrating the current vast and disparate information sets.

ASIC may not be the appropriate entity to hold the central BOR (its remit is limited to companies) if the Government decides that an *effective* BOR needs to encompass a range of types of legal entities. ASIC clearly has a role to play however, in verifying corporate information which it would supply to the operator of the registry.

Perhaps the most logical choice for operating and maintaining the registry is the ATO, leveraging off the Commissioner of Taxation's "other" role as the Australian Business Registrar (**ABR**)[25]. This would fit with our vision for a modernised whole of government business registration system.

Also, the ATO already possesses vast amounts of beneficial ownership and other relevant data although we are not in a position to comment on how *effectively* that data is used. The legislation underpinning the current ABR needs to be modernised in various ways (e.g. by enabling the collection of BOR and associate data, cyber security safeguards, conditional registration powers, and better identity authentication processes for applicants).

There is also the significant issue of expertise to consider. For example, the ATO was identified in 2013 as a lead agency for the Centre of Excellence in Data Analytics and since at least 2011 has built a substantial "Smarter Data" unit under the leadership of Deputy Commissioner Greg Williams. ASIC no doubt would claim similar levels of expertise.

> AUSTRAC may be able to fulfil the BOR role as it already collects and collates financial intelligence to help fight serious and organised crime and terrorism financing. However AUSTRAC was not set up as a central registry and it would seem to us that substantial changes in process, objectives, and resources would be required to manage and maintain the BOR.

[25] Note however that there could be merit in separating the Commissioner's roles such that the new BOR is seen as independent from the ATO. We would be happy to further consider the pros and cons of this. For example, the ATO's current digital transformation plans may mean that its resources would be stretched too far if it was also required to create and maintain the central BOR (others might argue that the new BOR would complement and enhance the ATO's abilities). Having the ATO hold the new BOR may also raise privacy concerns in some quarters.

20. *What should the scope of the register operator's role be (collect, verify, ensure information is up to date)?*

The central register operator should be empowered to verify (through whole of government authentication procedures), cross-check data and initiate 'audit' inquiries.

Whilst we acknowledge the self-interest aspect, we have put to the ATO many times the central role that trusted intermediaries (accountants for example) can play in identity authentication, reporting and maintenance of data to government agencies. Chartered Accountants would be happy to discuss this further, including what can be done from an ethical and accreditation standards viewpoint to help regulators feel confident about the veracity of the BOR and other data received from our profession.

21. *Who should have an obligation to report information to the central register? Should it be the company only or also the persons who meet the test of being a relevant 'beneficial owner'?*

Refer earlier comments.

Government entities which already have the data should report information to the central BOR. For closely-held entities, the most practical approach would be for the company to report along with its other statutory reporting and tax filing obligations (e.g. lodgement of the annual income tax return).

22. *Should new companies provide this information to a central registry operator as part of their application to register their company?*

See response to Question 20.

We would have thought that ASIC (or any new operator of a revamped national business register to replace the old ASIC registries) would be providing this data to the BOR as an automatic flow-on from the initial registration process.

23. *Through what mechanism should existing companies, and/or relevant beneficial owners, report?*

See response to Question 20.

Ensuring accurate and current information

24. *Within what time period (how many days) should any changes to previously submitted beneficial ownership information have to be reported to a company (where registers are maintained by each company) or the registry operator (where there is a central register)?*

We recommend that any reporting obligation be aligned with existing annual reporting and tax filing procedures and timeframes. If there was to be an exception to this, any additional reporting should be triggered by an exceptional event impacting the companies share register (e.g. modelled on the *corporate change events in Division 166 of the ITAA 1997).

25. *If reporting to a central register is required, should this information be included in the annual statement which ASIC sends to companies for confirmation with an obligation to review and update it annually?*

See response to Question 21.

26. What steps should be undertaken to verify the information provided to a central register by companies or their relevant beneficial owners? Who should have responsibility for undertaking such steps?

See earlier comments (Question 20) about the role which trusted intermediaries can play here.

In keeping with existing tax policy, a self-assessment (or in this case, self-notification) process should apply. Beneficial ownership information so provided to the central BOR would then be verified by cross checking data between various government agencies (both domestically and internationally).

Any discrepancies would result in contact from the BOR to the shareholder/directors of the closely-held entity. Sanctions would need to apply to the provision of false or misleading information to the BOR.

27. *Should beneficial ownership information be provided to one relevant domestic authority and then shared with any other relevant domestic authorities? Please explain why you agree or disagree.*

Yes – see above.

28. *Should beneficial ownership information be automatically exchanged with relevant authorities in other jurisdictions? Please explain why you agree or disagree.*

There is a strong case for having robust exchange of beneficial ownership information between countries. As noted elsewhere in our submission, the ATO (and other relevant agencies) should publish its research on whether *current* information exchange arrangements are working satisfactorily.

Now is certainly an opportune time for addressing any gaps in Australia's Tax Information Exchange Agreements, with a number of "secrecy jurisdictions" coming on board with the OECD – G20 push in recent months[26].

In relation to Australia's State or Territory jurisdictions, we envisage that these jurisdictions would automatically stream data about beneficial ownership to the central BOR and have corresponding automatic access. We appreciate that this requires Commonwealth – State/Territory collaboration, but note the substantial mutual benefits which would flow from this exercise (e.g. for the States and Territories, in establishing payroll tax groups, eligibility for corporate reconstruction stamp duty relief etc).

[26] For example, the Cayman Islands recently passed legislation to create a centralized platform for sharing beneficial ownership information on Cayman companies with UK authorities. The Financial Services and the Treasury Bureau recently issued a paper for public consultation on its proposal to introduce a regime under the Companies Ordinance requiring Hong Kong incorporated companies to keep a register of people having significant control over a company.

Sanctions

29. *What sanctions should apply to companies or beneficial owners which fail to comply with any new requirements to disclose and keep up to date beneficial ownership information?*

As reflected in earlier comments, we do not support a "stick" approach to the establishment of a new BOR. Rather, we support the collation of existing data held by government agencies and streamlined annual processes for closely-held companies to correct the record.

Sanctions should apply to those obliged to supply information to the BOR but who fail to do so.

Transitional period

30. *How long should existing companies have from when the legislation commences to report on their beneficial owners? What would be an appropriate transition period?*

Refer response to Question 12-18.

Impact on companies and shareholders

31. *Do you foresee any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?*

32. *What types of compliance costs would your business incur in meeting any new requirements for record-keeping and reporting of beneficial ownership information?*

33. *If you are already required to comply with AML/CTF obligations, how do you see any new requirements to collect beneficial ownership interacting with those existing obligations?*

34. *If companies had access to the additional beneficial ownership information collected, could this reduce companies' compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?*

35. *Could any changes be made to streamline or merge existing reporting requirements in order to reduce the compliance costs for businesses?*

As outlined in our covering letter, the compliance costs for legitimate businesses (especially Australian-owned companies) are potentially substantial if the BOR concept is implemented without careful consideration of the current risks, existing data sources and the use made of it by Government agencies, the costs and benefits.

Tracing notices

36. ***Are the current substantial holding disclosure provisions sufficient to identify associates which may have the ability to influence or control the affairs of a company? What changes could be made to improve their operation?***
37. ***Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies?***
38. ***In your experience, are there issues or obstacles (specific to obtaining ownership information) which currently arise when using tracing notices? If so, what are those issues or obstacles? What other changes could be made to improve the operation of these provisions?***
39. ***In order to improve and incentivise compliance with the tracing notice regime should ASIC have the ability to make an order imposing restrictions on shares the subject of a notice until the notice has been complied with?***
40. ***What other changes could be made to improve the operation of these provisions?***

See earlier comments.

Nominee shareholders

41. ***Who uses nominee shareholding arrangements, and for what purpose?***
42. ***How often are nominee shareholding arrangements used?***
43. ***What do you see as the benefits of nominee shareholding arrangements? Are there any negative aspects of their use?***
44. ***Should further obligations be introduced in order to increase the transparency of the beneficial owners of shares held by nominee shareholders?***
45. ***Are you aware of practical obstacles which would make increased reporting in respect of shares held by nominee shareholders problematic?***

See earlier comments.

The commercial rationale for nominee shareholding arrangements is generally well understood. Secrecy is no doubt one reason which concerns regulators.

The extension of beneficial ownership disclosure requirements to offshore nominee shareholding arrangements would be particularly problematic and needs to be addressed by the enhanced international exchange of information arrangements referred to earlier.

The practical obstacles associated with tracing through nominee shareholding arrangements have already been identified in the design of existing tax laws such as the tracing of the beneficial ownership of loss companies. Nominee arrangements have also been recognised in the context of dividend flow-through treatment (i.e. under the former inter-corporate dividend rebate provisions and the current franked dividend regime). It would be a strange outcome indeed if these current legislative approaches were countervailed by the introduction of more stringent BOR data collection and disclosure requirements.

Bearer share warrants

46. ***Who uses bearers share warrants, and for what purpose?***
47. ***How often are bearer share warrants used?***
48. ***What do you see as the benefits of bearer share warrants? Are there any negative aspects of their use?***
49. ***Should a ban be introduced on bearer share warrants?***

Similar comments to nominee shareholders (see above).

Appendix B – Tax beneficial ownership tests

The tax law in Australia has a number of provisions that require entities to prove ultimate beneficial ownership. These provisions include:

- Carry forward of revenue and capital losses by companies (Division 165D ITAA 1997)
- Carry forward of revenue and capital losses by trusts (Schedule 2F ITAA 1936)
- Companies deducting bad debts (165-120 ITAA 1997)
- Controlled foreign corporation (CFC) provisions
- Exemption for gains from the disposal pre-capital gains tax (CGT) assets
- Trustee beneficiary non-disclosure tax rules[27]
- There are also provisions to do with proving ownership, such as the 40 day holding rule for access to franking credits[28].

Certain provisions in Australia's double tax agreements also require beneficial ownership to be established[29].

A discussion of some of these ownership tests is provided below.

Companies carrying forward revenue and capital losses

Section 165-10 of the Income Tax Assessment Act 1997 (ITAA 1997) states that a company cannot deduct a tax loss unless it satisfies the conditions in section 165-12 ITAA, which about continuity of ownership or section 165-13 ITAA which is about continuity of business.

Section 165-12 of the Income Tax Assessment Act 1997 broadly requires that, during the relevant time period, the same person(s) hold more than 50% of the voting rights, rights to dividends, and rights to dividends. In determining this reference is to be had to sections 165-150, 165-155 and 165-160 ITAA all of which make reference to 'beneficially own'.

The tax act then explores a variety of scenarios that have arisen in applying this beneficial ownership test. For example:

- Share splitting – sub-section 165-165(2) ITAA 1997
- Unit splitting – sub section 165-165(3) ITAA 1997
- Consolidation of shares – sub section 165-165(4) ITAA 1997
- Consolidation of units – sub section 165-165(5) ITAA 1997
- Arrangements relating to beneficial ownership to avoid tax liabilities e.g. redeemable shares – section 165-180 ITAA 1997
- Shares that stop carrying rights – section 165-185 ITAA 1997
- Shares that start carrying rights – section 165-190 ITAA 1997
- Shares held by government entities, charities, complying superannuation funds and management investment schemes – section 165-202 ITAA 1997
- Companies where no shares have been issued – section 165-203 ITAA 1997
- Death of a share owner – section 165-205 ITAA 1997
- Trustees of family trusts – section 165-207 ITAA 1997

[27] Refer Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 2) 2007 and trustee beneficiary reporting rules contained in Schedule 4, Tax Laws Amendment (2007 Measures No. 4) Act 2007.
[28] Refer Division 1A of Part IIIAA of the ITAA 1936.
[29] Refer OECD Model tax convention and the 2012 proposed revisions to the meaning of "Beneficial Owner" in Articles 10, 11 and 12. http://www.oecd.org/ctp/treaties/Beneficialownership.pdf

- Companies in liquidation – section 165-208 and 165-250 ITAA 1997
- Dual listed companies – section 165-209 ITAA 1997
- Shares held by fixed trusts –Subdivision 165-F ITAA 1997

Bad debt provisions for companies

These broadly reflect the tax loss provisions for companies. Section 165-120 ITAA 1997 states a company cannot deduct a bad debt unless it meets the conditions in section 165-123 ITAA[30], which in turn, refers to the same persons during the relevant period having more than 50% of the voting rights, rights to dividends, and rights to dividends. Again, in determining this reference is to be had to sections 165-150, 165-155 and 165-160 ITAA all of which make reference to 'beneficially own' as has been discussed above.

Trusts carrying forward revenue and capital losses

Schedule 2F of the Income Tax Assessment Act 1936 (ITAA 1936) restricts the extent that a trust can claim previous years losses as a deduction against current year income. The rules are designed to ensure that the person(s) who bore the economic loss are the same person(s) that are benefiting from utilising the loss.

The design of these rules distinguishes between fixed trusts, non-fixed trusts and excepted trusts (broadly family trusts, complying superannuation funds and deceased estates). Fixed trusts are then further divided between ordinary fixed trusts, listed widely held trusts, unlisted widely held trusts, unlisted very widely held trusts, and wholesale widely held trusts.

All fixed trusts (and non-fixed trusts which have certain fixed entitlements) face a 50% stake test. Fixed trust is defined at section 272-65 ITAA 1936 as where persons have fixed entitlements to all of the income and capital of the trust (i.e. vested and indefeasible). The 50% stake test is broadly satisfied where the same individuals beneficially hold between them more than 50% of the income and capital entitlements at the relevant times (section 269-50 and 269-55 ITAA 1936). Division 272 then specifies what are fixed entitlements.

Non fixed trusts generally face a pattern of distribution test (Subdivision 269-D of Schedule 2F on the ITAA 1936). There are rules dealing with:

- When an individual receives different percentages – section 269-70 ITAA 1936
- Incomplete distributions – section 269-75
- Death or breakdown of marriage – section 269-80
- Arrangements to pass the distribution test – section 369-85

In addition to this there are also rules about what constitutes control of a non-fixed trust – section 269-95.

Family trusts face a family trust distribution tax if distributions are made outside of the designated family group. A family trust election and/or an interposed entity election may need to be made and lodged with the ATO as part of this process.

[30] There is also a choice of claiming a bad debt deduction through claiming satisfaction of the same business test or satisfying the Commissioner that it would be reasonable to grant such a deduction.

Controlled foreign corporation provisions

The controlled foreign corporation (CFC) provisions require Australian taxpayers to include in their taxable income, their share of certain income earned by foreign companies that they control even though it has not been distributed to them. Section 340 ITAA 1936 broadly defines a controlled foreign company as a company where:

- A group of 5 or fewer Australian holds or is entitled to acquire 50% or more of the interests in the company; or
- There is a single Australian resident whose direct and indirect interests in the company is not less than 40% as long as the company is not controlled by a group of entities not including the subject Australian resident or any of its associates; or
- The company is in fact controlled by a group of 5 or fewer Australian residents either alone or together with their associates.

Complex tracing rules through controlled entities (including controlled foreign trusts) apply.

Appendix C – Recommendations re ASIC

The Senate Economics Reference Committee in its report on Insolvency in the Australian construction industry[31]

Recommendation 17

7.38 The committee recommends that ASIC look closely at its record on enforcement and identify if there is scope for improvement, and if legislative changes are required to advise government.

Recommendation 18

7.39 The committee recommends that the government ensure that ASIC is adequately resourced to carry out its investigation and enforcement functions effectively.

Recommendation 34

11.39 The committee recommends that automated cross-agency data sharing should trigger an alert when an individual: declares bankruptcy; is convicted of fraud; is disqualified as a director; or liquidates a company. This alert should require the relevant state or territory regulator to satisfy itself that the licence holder remains a fit and proper person.

Recommendation 35

12.37 The committee recommends that the government, through the work of the Legislative and Governance Forum for Corporations establish a beneficial owners' register.

Recommendation 36

12.38 The committee recommends that section 117 of the *Corporations Act 2001* (C'th) be amended to require that, at the time of company registration, directors must also provide a Director Identification Number.

Recommendation 37

12.39 The committee recommends that a Director Identification Number should be obtained from ASIC after an individual proves their identity in line with the National Identity Proofing Guidelines.

Recommendation 38

12.40 The committee recommends that the *Australian Securities and Investment Commission Act 2001* (C'th) be amended to require ASIC to verify company information.

Recommendation 39

12.41 The committee recommends that ASIC and Australian Financial Security Authority company records be available online without payment of a fee.

31 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report

Appendix D – Who we are

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations.

We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international markets.

We are a member of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance and Chartered Accountants Worldwide which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents 788,000 current and next generation accounting professionals across 181 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications to students and business.

SUBMISSIONS ON BENEFICIAL OWNERSHIP OF COMPANIES

By Niall Coburn

I thank the Australian Government for allowing me to make Submissions on "Increasing Transparency of the Beneficial Ownership of Companies". I provide an overview of the international direction and the concerns I have about the current loopholes in the system. I do not address your questions as I prefer to provide an overall overview that may be helpful for you. After considering other Beneficial Ownership requirements internationally, it is submitted that Australia should follow the UK approach which is line with the FATF Guidelines as our systems are very similar, it would need that we would not need to "reinvent the wheel". Additionally, the UK has been granted other powers to divest assets where false information has been provided.

As set out in my Submissions, Australia should play a greater role in ensuring that offshore jurisdictions that have a questionable approach to transparency and shell corporations and other associated entities, have more pressure applied to bring them into line with international best practice. There would be no point of the major G20 countries improving Beneficial Ownership requirements only to allow loopholes to occur in these offshore jurisdictions exposed by the Panama Papers.

1. Introduction

The Panama Papers raised difficulties about beneficial ownership disclosure and the operation of offshore jurisdictions that are "plugged" into the international banking community. The important point is the steps governments have taken thus far to deal with these concerns.

In mid-February 2017, the arrest of Mossack Fonseca founders, Jurgen Mossack and Ramon Fonseca, highlighted continued concerns about alleged international money laundering and corruption scandals. In an unusual set of events the Panamanian attorney-general has launched an action regarding Mossack Fonseca's operations in Brazil.

These events will be one of the main discussion topics at the upcoming G20 Summit in Hamburg. Chancellor Angela Merkel presented the main G20 topics to Cabinet in December 2016, calling for greater cooperation between governments and for transparency in beneficial ownership.

2. Background of abuse of shell companies

In April 2016, 11.5 million documents were leaked from Mossack Fonseca, a Panamanian law firm and corporate service provider, via an anonymous source. The documents pinpointed weakness in offshore jurisdictions and revealed a "lackadaisical" approach to beneficial ownership requirements. The information related to 240,000 shell companies which were represented by Mossack Fonseca; most were incorporated in the British Virgin Islands (BVI).

The recent arrests took place as international governments were attempting to deal with loopholes in beneficial ownership requirements revealed by the Panama Papers. They also

coincided with other high-profile corruption investigations, into Unaoil and into Rolls-Royce's payout of £671 million to settle bribery and corruption claims, which have left regulators wondering what else might emerge from the woodwork.

3. The approach of UK, Europe to the Panama Papers

In April 2016, David Cameron, then-UK Prime Minister, announced the creation of a cross-agency task force to analyse all the information available from the Panama Papers.

It is unclear how many investigations the Panama Papers have so far prompted in the EU. The European Parliament set up a committee of inquiry in November 2016 but it has yet to produce an interim report. The reactions of individual member states' national parliaments and authorities to the Panama Papers have varied widely. While most member states held debates in Parliament, the Netherlands, Belgium and the United Kingdom all created dedicated bodies to investigate the revelations.

Belgium, Denmark, France, the Netherlands, the UK and other governments are examining matters from a taxation perspective to establish what revenues may be due to their countries. The upcoming G20 Leadership Summit is expected to reinforce the European countries' determination to increase transparency and improve the beneficial ownership rules to combat illicit activities.

France is seeking to implement the EU Fourth Money Laundering Directive (4MLD) by September 2017, nine months ahead of the mandate deadline. Under 4MLD, member states must centralise data and corporate ownership, increase scrutiny of domestic politicians, assess their exposure to money laundering and terrorist financing and amend their rules on suspicious activity reporting for banks, attorneys, real estate agents and casinos. 4MLD will also strengthen EU governments' powers to seize assets and bolster their oversight of virtual currencies and prepaid cards.

4. US approach to the filling in loopholes in Beneficial Ownership

The Financial Crimes Enforcement Network (FinCEN) has issued final rules under the Bank Secrecy Act, headed "Customer Due Diligence Requirements for Financial Institutions". These new rules came into force last week and clarify and strengthen customer due diligence requirements for banks, brokers or dealers in securities, mutual funds and futures commission merchants, introducing brokers in commodities and real estate vendors.

The rules contain explicit customer due diligence requirements and include a new requirement to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and exemptions.

The rules to a certain extent lift the corporate veil on who actually owns companies and entities which establish themselves in the United States. They also require the identification of the natural persons behind companies which are used to pay in cash for high-end residential real estate in some parts of the country. Until these rules were introduced it was unclear who was acting behind shell companies.

The U.S. Department of Justice has launched a number of criminal investigations into various individuals and companies highlighted by the Panama Papers. It is thought that the department is mostly interested in tax avoidance schemes exposed by the leak. Here too, it is unclear how many investigations are being conducted. Preet Bharara, the U.S. attorney for Manhattan, said he had "opened a criminal investigation regarding matters to which the Panama Papers are relevant".

5. Reaction in Asia-Pacific: Hong Kong and Australia

In January, the Hong Kong government launched a consultation paper on enhancing the transparency of beneficial ownership of Hong Kong companies. Under the proposals all Hong Kong incorporated companies would be required to obtain and hold beneficial ownership information which would be available for public inspection. Given that the Mossack Fonseca office in Hong Kong accounted for more than 29 percent of its work worldwide, with high-level links to China's elite, much work remains to be done.

In Australia, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the federal government's financial intelligence agency, is part of a coordinated national response to the Panama Papers. AUSTRAC is working with the Serious Financial Crime Action Taskforce (SFCT) to examine more than 1,000 Australian entities identified in the leaked information from Mossack Fonseca, in an attempt to uncover those Australian entities involved in money laundering, tax avoidance or other serious financial or organised crime.

6. Mossack Fonseca fined in the British Virgin Islands - the need to fill in international loopholes

In November 2015, the BVI Financial Services Commission (FSC) investigated Mossack Fonseca. It identified eight breaches of anti-money laundering legislation and fined the firm $440,000, the largest penalty ever issued by the offshore financial regulator.

The FSC was unaware what was happening in its own backyard, and the extent to which corrupt money was being funnelled through its jurisdiction. The fine has been criticised as being manifestly low. BVI also resisted calls from Cameron's government to introduce a central register of the owners and beneficial owners of shell companies, although it has recently passed legislation requiring administration firms, such as Mossack Fonseca, to require the BVI law enforcement agencies to make information more easily accessible online. Given the G20 initiatives, offshore jurisdictions may be unable to survive in future unless they lift their compliance standards in line with international expectations.

Submissions:

7. The requirements for improved Beneficial Ownership -

Professor Joseph Stiglitz, a Nobel Prize-winning economist, and Mark Pieth, a Swiss anti-corruption expert, have called for a complete overhaul of the offshore economy in their report, "Overcoming the Shadow Economy", which was prepared for Panama's parliament but then released to other governments and organisations at the end of 2016.

Stiglitz and Pieth have said too little was being done to bring "pariah and rogue states" within international "norms".

"These secrecy havens only exist because the U.S. and Europe allow it: they could not function if they were cut off from our financial system," Stiglitz said.

Stiglitz and Pieth suggested a number of amendments to international regulation:

- National governments should establish registers of the names of directors, registered agents and beneficial owners for all entities incorporated in the country and for all trusts and foundations established within the country. They said it was "crucial" to progress to publicly searchable registers.

- In addition to the supervision of banks and business entities, a state must also adequately supervise intermediary service providers, such as lawyers and accountants and others who act as "enablers".

- In the real estate sector, "beneficial ownership disclosure should be made mandatory, and enforced, for all large real estate cash transactions", the report said. Full and public disclosure of the beneficial owners should be a condition for registering ownership.

- In addition, the Criminal Finances Bill recently introduced in the UK House of Commons introduced the concept of "unexplained wealth orders". These orders will allow agencies tracking financial transactions to force the owner of an asset to explain how they obtained the funds to purchase it. Unexplained wealth orders would also help reveal the owners of real estate.

- All regulatory institutions which administer the exchange of information and supervise financial institutions and associated service providers (accountants, registered agents, attorneys, etc.,) must meet the highest professional standards and have adequate independence and budgetary resources to carry out their duties. It is important to ensure that there are no conflicts of interests affecting government employees and public officials tasked with oversight.

- All countries, and especially developing ones, should participate in all relevant multilateral regulations where international tax and transparency norms are set. In doing so, they should demonstrate a willingness to adopt higher standards of transparency.

8. Efforts must reach beyond beneficial ownership -

Governments appear to be taking a piecemeal approach to address beneficial ownership issues in their own jurisdictions rather than coming together to devise a coordinated international approach. As well as dealing with beneficial ownership issues, governments must also deal with problems in offshore jurisdictions themselves by overhauling the regulation of their economies and then closely monitoring their compliance.

The evidence suggests that there has been no slowdown in the level of money laundering. For example, politically exposed persons (PEPs) should in theory be fairly easy to scrutinise, but despite the plethora of compliance and regulations governing offshore jurisdictions, PEPs still appear to find it relatively easy to launder funds.

As just two examples, the Panama Papers uncovered a £1.6 billion money laundering scheme run through Switzerland and the British Virgin Islands in which a St Petersburg cellist and friend of Vladimir Putin is a standing beneficiary for the fortune amassed by the Russian president. In the second example, UK private bank Coutts and Mossack Fonseca provided services to a member of the Brunei royal family accused of stealing billions of dollars from his own country through offshore trusts in Jersey. These examples illustrate the limited due diligence carried out on clients and the ease with which large funds continue to be laundered internationally.

9. Dealing with offshore jurisdictions -

The British Virgin Islands (BVI) remain a UK overseas dependency territory but is one of the world's most problematic jurisdictions in terms of compliance. The UK is trying to ensure the BVI introduces appropriate compliance measures along the lines of those developed internationally. It may have to use a strong trade arm if the BVI fails to see the light.

The UK itself has high standards regarding beneficial ownership and has established a register of people with relevant beneficial interests in a company as part of its implementation of Financial Action Task Force (FATF) standards. It has also developed the concept of people with significant control (PSCs), which requires disclosures of PSCs in a register.

These standards need to be extended to the British Virgin Islands, and there need to be public registers of beneficial owners of each corporation, trust, foundation or other entity in every country and the requirement for shell companies and file annual reports of their beneficiaries and the amount of tax they have paid.

10. Making offences for enablers and conflicts -

Many administration companies such as Mossack Fonseca, as well as lawyers and accountants, act as the "enablers" of illegal and questionable operations, but little has been done to deal with these operations. There is also a conflict of interest in the BVI's dealings with administration firms, which are by far the largest source of income to its economy. It is difficult to see how it will take effective action on the one hand without cutting out its major source of income on the other.

11. Dire measures to improve Beneficial Ownership -

The priorities for the G20 summit due to take place in Hamburg in July 2017 have recognised the need for further measures to fight money laundering and illegal financial flows, not least following the release of the Panama Papers.

Greater cooperation between government agencies will be essential, and more transparency is needed, particularly regarding the beneficial ownership of corporations, trusts, foundations and other legal arrangements. The problem is the need to bring offshore jurisdictions to heel and ensure they adhere to high international standards within tight timeframes.

12. International political willpower -

When one considers the seriousness of the loopholes regarding the disclosure of beneficial ownership, the operation of shell structures in offshore jurisdictions and the billions of dollars that governments lose in terms of taxation, the need for a coordinated effort on the part of international governments becomes clear. At the moment, each government appears to be dealing with domestic weaknesses. Greater international political willpower must be brought to bear on offshore jurisdictions to prevent them from corrupting the financial system.

13. Need for a co-ordinated approach

Governments are making some headway on beneficial ownership but little has been done to address inadequate compliance, loopholes in beneficial ownership rules and money laundering weaknesses in offshore jurisdictions. Governments appear to have made piecemeal attempts to address problems in their own jurisdictions rather than coming together to devise a coordinated international approach. If Australia is to adopt new Beneficial Ownership Rules, we should learn from countries such as the UK who have those rules already in place and seem to be working effectively.

14. Conclusion

To remain consistent, having regards to the above, Australia should adopt the same approach as the UK to Beneficial Ownership that also allows for orders to seize and divest property or assets when there has been a failure of transparency or the information provided was false.

Author Biography:
Niall Coburn *is the Asia-Pacific regulatory intelligence expert for Thomson Reuters. He is a barrister and former director of enforcement at the Dubai Financial Services Authority and senior specialist adviser to ASIC. He's also the Author of Insolvent Trading and Corporate Investigations published by Thomson Reuters in 2002. These Submissions are made in a personal capacity and are not part of Thomson Reuters opinion.*

Monday 20 March 2017

Computershare Investor Services Pty Limited
ABN 48 078 279 277
Yarra Falls, 452 Johnston Street Abbotsford
Victoria 3067 Australia
GPO Box 2975 Melbourne
Victoria 3001 Australia
DX Box 30941
Telephone 61 3 9415 5000
Facsimile 61 3 9473 2500
www.computershare.com

Ms Jodi Keall
Senior Advisor
Financial Systems Division
100 Market Street
Sydney NSW 2000

Dear Jodi,

Computershare's Response to the 'Increasing Transparency of the Beneficial Ownership of Companies' consultation paper (Consultation Paper)

We appreciate the opportunity to provide our feedback on this Consultation Paper and look forward to further engagement as you progress this initiative.

Computershare (ASX: CPU) is a global market leader in share registration and transfer agency, employee equity plans, mortgage servicing, proxy solicitation and stakeholder communications. We also specialise in corporate trust, bankruptcy, class action and a range of other diversified financial and governance services.

Founded in 1978, Computershare is renowned for its expertise in high integrity data management, high volume transaction processing and reconciliations, payments and stakeholder engagement. Many of the world's leading organisations use our services to streamline and maximise the value of relationships with their investors, employees, creditors and customers.

Computershare is represented in all major financial markets and has over 16,000 employees worldwide. In Australia, we employ approximately 1,700 staff across a range of national locations.

Both locally and globally, Computershare has long been an advocate of ownership transparency and it recognises the importance of such transparency in promoting confidence in financial markets. Our experience in proxy solicitation, communications services and registry maintenance gives us valuable insight into the tools available to help achieve this policy goal.

Whilst we acknowledge and agree with the Minister's comments about improving transparency of ownership and control as a means of countering the misuse of companies for illicit activities, there are additional benefits that we see will flow to both issuers of securities as well as their investors (and the market more broadly). Computershare has participated in numerous consultations and discussions here in Australia and internationally that have examined various issues relating to investor transparency. We note that the Consultation Paper outlines a number of international examples. In light of this, we have attached as Appendix 1 Computershare's response to the UK's Department for Business Innovation and Skills consultation from September 2013, in which we addressed the UK's own discussion paper on Transparency and Trust and considered very similar issues to those that have been canvassed in Treasury's Consultation Paper.

We note that Computershare has considered Treasury's Consultation Paper from its own unique perspective as a provider of registry related services to issuer clients, drawing on its local and international experience of transparency and shareholder disclosure issues. Rather

than respond to each individual question, we have structured our response to address a number of broad themes that we see arising from the Consultation Paper.

1. Listed entities to be exempted from additional disclosure requirements

Computershare takes the view that entities listed by any approved securities market operators should be exempt from the proposed new disclosure requirements, on the basis that the existing substantial shareholder disclosure regime applicable to such listed issuers is adequate and introduction of additional obligations would be unduly burdensome. (Note: we have used the term 'listed entities' to cover different types of listed structures, including Trusts, Listed Investment Companies, and funds, as well as companies.)

As the Consultation Paper highlights, there is a strong international precedent for this approach, and the UK position is particularly relevant in light of the substantial similarities between UK and Australian disclosure requirements for listed entities. We therefore believe that the current regime already delivers an appropriate reporting framework and adequate level of transparency for listed entities and that their exclusion from any new requirements to report on beneficial ownership is warranted on that basis.

2. Information on beneficial owners

We appreciate the difficulty in establishing an appropriate definition for 'beneficial owner with controlling interest in a company' in the context of Treasury's contemplated legislative change initiative. In our view, the definition of 'beneficial owner' should address the natural person with not only economic interest but other forms of control over an entity, including voting rights. Whilst we do not take a view on the appropriate mechanism(s) to determine control, we do note that the European amendments to the 4th Anti Money Laundering Directive currently under discussion are expected to reduce the percentage ownership threshold from the current 25% to 10% for certain companies ('Passive Non-Financial Entities').

Establishing the definition of a 'beneficial owner with a controlling interest in a company' is an interesting and challenging task, as there are a number of ways that securities can be 'controlled'.

Take for example an Australian Superannuation Fund that has its own Corporate Governance unit. The Super Fund may have appointed an external fund manager with a mandate to manage $50 million of funds by investing in various securities. Clearly this is one example of control. Then when the listed entity has its annual general Meeting, the Super Fund may take back the voting rights attached to those shares and will, through its own views, cast its votes. This is another example of control.

Should the fund manager wish to buy more shares or sell shares in the company – it is up to them as per their mandate – they are exercising control over those shares. However, when certain resolutions are put forward and the trustee or custodian of the Super fund then votes – they are exercising control over those shares.

3. Nominee/Custodian transparency & process

Computershare has long advocated on behalf of its clients for improvements to the often opaque account holding structures that are maintained by many custodian and nominee organisations. These 'omnibus' accounts see the assets of often large, institutional investors

co-mingled together and recorded as one single holding on an issuer's register in the nominee/custodian's name as legal owner of the securities (with the investors maintaining beneficial ownership).

We highlighted this issue in our response to the Corporations and Markets Advisory Committee (CAMAC) consultation in December 2012 (Appendix 2). Whilst the CAMAC consultation was focussed on Annual General Meetings and shareholder engagement, many of the issues that were highlighted stemmed from the use of omnibus holdings and the lack of transparency that arises as a consequence.
We note investors have varying reasons for their chosen securities account structure, and we agree that they should retain the flexibility to have their investments registered in the name of another party such as a nominee or custodian. It is however important to highlight that investors (particularly institutional investors) have the option to use designated nominee accounts rather than pooled accounts, where the securities of multiple investors are not commingled. While this option does not facilitate direct identification of the beneficial owner to the issuer, it is a relevant and potential solution to the lack of transparency created by the use of pooled accounts. Computershare believes that those institutions that continue to prefer holding via a nominee should be encouraged to use designated accounts instead of pooled accounts, and that Treasury should consider the designated account as the default structure (at least for institutional shareholders), which in turn should deliver increased transparency of beneficial ownership.

Should investors prefer to still hold their assets in a pooled account, then we see a strong argument that the reporting obligations and costs should also sit with that investor or their custodian/nominee, rather than the issuer. Transparency, whether it is needed to counter illicit activities or whether it is aiding better, more informed dialogue between issuers and their investors, is hampered by the use of these omnibus accounts.

In view of the use of nominee account structures, we recommend that Treasury carefully consider the allocation of responsibility for disclosure in formulating its approach to any platform for legislative change. For example, we would not consider it equitable to require issuers to conduct regular beneficial owner disclosure searches pursuant to s.672 of the Corporations Act, given the cost implications for issuers. Where investors choose to use nominee structures that obscure their ownership position, there should be an obligation on the investor to disclose their identity and non-compliance should be subject to appropriate sanctions.

We note that while s672 provides issuers with a statutory right to require disclosure of beneficial ownership, the process for obtaining such disclosures remains highly manual and time-consuming. It also makes it highly problematic and does not readily enable issuers to determine ownership 'as at' a certain date, which may impact effectiveness as a regulatory tool. To enable issuers to effectively utilise this tool in the contemplated context (and more broadly), consideration should be given to enhancing the practicability of the relevant legislative provisions and establishing market standards to facilitate efficient, timely and electronic disclosure processes.

4. Central registers

We note that at present the records of beneficial owners obtained by issuers through s.672 disclosures are held either directly by the issuer or on their behalf by their agent. To require issuers to report their beneficial owner data to a central register will likely drive up

administrative costs and as such, these costs would need to be properly quantified and evaluated before any enabling legislation is passed.

In the event that Treasury does consider, on balance, that a central register is required for reporting and sharing the information with relevant parties, it would be appropriate for Treasury to consider outsourcing the administration of this to a private operator. It is highly likely that the content requirements for such a central register would be similar to those of ordinary securities registers, and thus with a number of existing commercial providers already able to fulfil this function in the Australian market, it is anticipated that significant synergies could be obtained from an outsourced approach. Some 99.5% of ASX listed entities utilise the services of a commercial share registrar such as Computershare, which illustrates that the requisite systems, skills and expertise are readily available in the marketplace. This would ensure that these services would be subject to the usual competitive pressures and deliver commercially attractive and innovative solutions to the relevant regulators and the market place.

We look forward to engaging with Treasury (and, where appropriate, broader stakeholders) on the issues addressed in our response and others that arise during the course of the ongoing consultation project. Thank you for the opportunity to make this initial submission.

If you have any questions in relation to our detailed comments, please contact me at Greg.Dooley@Computershare.com.au or at (02) 8216 5513.

Yours sincerely,

Greg Dooley
Managing Director
Computershare Investor Services

Computershare Investor Services PLC
The Pavilions
Bridgwater Road
Bristol
BS99 6ZZ
Telephone +44 (0) 870 889 3113
Facsimile +44 (0) 870 703 6116
DX 78139 Bristol
Textphone users please call +44 (0) 870 702 0005
www.computershare.com

16th September 2013

Department for Business Innovation & Skills

By email to: transparencyandtrust@bis.gsi.gov.uk

Dear Sir/Madam

Response to the 'Transparency & Trust: Enhancing the transparency of UK company ownership and increasing trust in UK business' discussion paper

We are pleased to submit comments on behalf of Computershare Investor Services PLC (Computershare) to the above discussion paper.

The Computershare group is a global provider of share registration, employee equity plans, proxy solicitation and other specialised financial, governance and communication services. Many of the world's largest companies employ our services and solutions to manage their relationships with investors, employees, and other stakeholders. For more information, please visit www.computershare.com.

We have long been an advocate of ownership transparency and recognise the importance of transparency in promoting confidence in financial markets. Our experience in proxy solicitation, communications services and registry maintenance gives us valuable insight into the tools available to achieve the policy goals effectively.

Beneficial ownership & requirement to disclose (Sections 2.18-2.20, 2.26-2.34; Q 1,5,6)

In the event that companies are required to take steps to identify their beneficial owners, as defined, clarity on the respective responsibilities of the companies and of investors will be critical. In considering a requirement on companies to actively identify their beneficial owners, it is necessary to take into account their capacity to achieve this. Drawing on our experience in this area, we have commented below on the process for obtaining disclosure under s.793 and the responsiveness of intermediaries and investors. We believe that where companies are required to investigate their beneficial ownership, responsibility should continue to rest with the intermediaries and investors for complying with such disclosure requests.

We also note that there are proposals in relation to the 4th Anti-Money Laundering Directive to reduce the percentage for defining ownership and control to 10%, rather than the 25% level considered in the discussion paper. It is important that the relevant standard for disclosure is determined, to allow companies to fully understand the impact of the proposed requirements.

Methods of disclosure (Sections 2.26-2.34, 2.45-2.49, 2.50-2.54; Q4, 13 - 17)

We agree that an extension of Part 22 of the Companies Act to all companies is appropriate to enable companies to more fully understand their beneficial ownership structure. Where such rights are already

enjoyed by companies they are highly valued, acting as a powerful mechanism to enable a company to understand who has an interest in their shares.

It is important to understand that whilst the substance of the powers under Part 22 is very useful, there are some areas of concern in relation to the system for utilising these powers. These fall into two areas:

1. **Compliance by investors**: Issues with enforcement, particularly in connection with overseas investors, who do not always understand the obligation to respond, along with timeliness can be a particular challenge. Whilst the Companies Act does contain strong penalties for non-compliance with a disclosure request made under s.793, including the possibility of imprisonment or a fine (or both), in our experience these penalties are rarely imposed. A review of the enforcement regime in connection with non-disclosure may therefore be advisable.

   Such factors need to be adequately reflected in any proposals and in particular in determining the obligations an issuer might have in connection with disclosure timescales and accuracy of the response made by investors. In our view, companies should not therefore be held responsible for any lack of response by investors to a s.793 disclosure request, or for the accuracy of the response made by investors.

2. **The process and mechanisms for requiring s.793 disclosure**: Additional challenges arise from variance in format and content of s.793 enquiries by respondents and companies. Consideration should be given to a whether a more standardised approach would benefit the market, particularly where such information is potentially required for onward submission to Companies House.

   Currently, responses can be in jpeg, Word, Excel, PDF, paper or indeed any other format, and there are no minimum content standards. The data returned may require considerable further analysis to ensure adequate identification is made. As disclosure requests are sent in the first instance to CREST nominees, responses are often received from the corporate entity operating that nominee, without necessary containing any correlating information tying the response back to the nominee's shareholding. In that case, industry knowledge is required to ensure responses are reconciled back to the registered share positions.

   A greater level of standardisation in the format of responses to s793 enquiries will create efficiencies for the market in respect of associated processes; reduce the risk for inaccuracies and add consistency to the register of beneficial owners. At a minimum, the requirement to provide the responses in electronic format should be introduced. We also note that work has been undertaken by the T2S Taskforce on Transparency and there are continuing market discussions regarding standardised messaging for issuer disclosure requests.

Registry Maintenance (Sections 2.39-2.44, 2.55-2.57, 2.61-2.64; Q11, 19, 22)

Based on our extensive experience in shareholder registry, both in the UK and globally, we understand the desire for a consistent approach. Having said that, the information currently stored on a legal register (the Register of Members) differs from the information typically provided in response to s.793 enquiry. The legal register contains details of the names (including any account designations) and addresses of members, the date on which each person was registered as a member, the date on which they ceased to be a member and the number of shares held. A s.793 response would not typically, for example, include details of when a beneficial holder acquired the shares, though this can be requested by a company as part of their original s.793 enquiry. BIS should satisfy themselves that the Act gives companies the ability to ask for the relevant information in their s.793 enquiry. If the Act does not currently provide such scope, it would need to be amended accordingly.

On a related note, we would like to flag changes under consideration as part of negotiations on the 4th Anti Money Laundering Directive which have the potential to impact the data held on the legal register.

Under proposals tabled by several member states (Article 29 – paragraph 1 – 1a, see amendments 183-187 of the latest draft from the Committee on Economic and Monetary Affairs), it is proposed that the legal register should in future include dates of birth and nationality for individuals, and company number and jurisdiction of incorporation for corporate or legal entities. The aforementioned information is not currently held on the UK legal register of members. If these requirements are carried through in the EU Directive and thus ultimately must be incorporated into UK law, we suggest consideration of the appropriate balance between the potential regulatory benefit derived from the additional data compared to the challenges of data collection, particularly for the several million existing registered shareholders in the UK.

We agree that the register of beneficial owners should be publicly available. Presently, where a company employs s.793, a 'register of interests' is already maintained and available for public inspection subject to a 'proper purpose' test (see Section 811 of the Companies Act). We believe a similar approach should be adopted for beneficial ownership in the context contemplated by the discussion paper, for consistency and to minimise risk of information in the registry being used for fraudulent purposes.

We believe that the responsibility for maintaining the register of members for public companies should remain with an issuer or their appointed agent. The content of public registers is dynamic, with transfers of title and other changes to shareholder data required to be managed continuously. While it may be argued that private companies with small, stable shareholder bases should have their register of members publicly available at Companies House, we do not believe this would therefore be appropriate for public registers. We look forward to reviewing and commenting on any proposals you might make in due course regarding a policy change to the register of members.

Bearer Shares (Q27-30)

We agree with the proposal to phase out the use of bearer shares, to enhance transparency in share ownership, subject to a suitable transition period being established for those already in circulation. We believe that an 18-24 month window would be appropriate to allow for a managed phasing out of existing bearer instruments and their conversion into registered format. You may also wish to consider the position of debt securities, which commonly trade in bearer form.

Please contact me on 0870 889 3113 or at michael.sansom@computershare.co.uk if you require any further information in relation to our response.

Yours faithfully

Michael Sansom
Head of Industry Relations
Computershare Investor Services

Computershare Investor Services Pty Limited
ABN 48 078 279 277
Yarra Falls, 452 Johnston Street Abbotsford
Victoria 3067 Australia
GPO Box 2975 Melbourne
Victoria 3001 Australia
DX Box 30941
Telephone 61 3 9415 5000
Facsimile 61 3 9473 2500
www.computershare.com

Friday 21 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

Dear Mr Kluver,

RE: The AGM and shareholder engagement

Computershare welcomes the opportunity to respond to the Corporations and Markets Advisory Committee's (CAMAC) 14 September 2012 discussion paper *The AGM and shareholder engagement.*

Computershare is the global market leader in transfer agency and share registration, employee equity plans, proxy solicitation and stakeholder communications. Today, we service 100 million shareholder and employee accounts on behalf of 14,000 corporations. We manage around 480 Annual General Meetings in Australia on behalf of listed and unlisted companies, providing meeting services including proxy collection, shareholder registration and voting services for more than 60% of ASX200 companies.

Computershare has lobbied for and consulted on change in this area in other jurisdictions, including North America and the United Kingdom and has long taken an active interest in AGM reform in Australia. We believe that the depth and breadth of our experience and our insights into shareholder thinking and behaviours will help CAMAC formulate its recommendations to the Australian Government.

Our response addresses a number of questions for consideration and also puts forward one additional substantive policy recommendation that we believe is within the scope of CAMAC's review. We suggest that institutions and nominees should actively be encouraged to use designated accounts rather than pooled accounts, so as to facilitate direct communication and engagement between shareholders and companies, in particular institutional shareholders. This change would significantly improve the communications and voting process by removing one or more unnecessary layers of intermediation in the voting process.

We welcome the opportunity to participate in further discussions, including any round table discussions or papers, and look forward to working with CAMAC to promote positive change in our industry.

Sincerely,

Greg Dooley

Managing Director
Computershare Investor Services

Computershare

2.2 ISSUE 1: SHAREHOLDER ENGAGEMENT

2.2.3 Aspects of engagement – the role of institutional shareholders

Computershare believes that institutions and nominees should be encouraged to use designated accounts instead of pooled accounts and the Federal Government should consider the designated account as the default for institutional shareholders. We have been campaigning for some time now on what we believe is an obvious solution that will fix a number of the issues highlighted in the CAMAC discussion paper.

The difference between pooled and designated accounts

A pooled account is the combination of client assets held through an omnibus account in the name of the custodian or its nominee, rather than in individual accounts for each underlying client. For example, HSBC Custody Nominees (Australia) Limited or National Nominees Australia Limited.

A designated account is the segregation of underlying investors into individual accounts on the share register. For example, QIC Limited <c/- National Nominees Limited> or INVIA Custodians Pty Limited <Sample Superfund>.

Designated or segregated accounts can be established within CHESS and directly on the share register, facilitating direct communications and voting between companies and shareholders.

Issues surrounding pooled accounts

Any review of the AGM and shareholder engagement must include a review of the mechanics of the proxy system and, more importantly, the institutional proxy system in Australia. The current practice of custodians and nominees holding institutional investors in pooled account structures rather than in designated accounts named on the company register, in order to reduce their own internal operational costs, is causing market inefficiencies including:

- Over-voting
- Transparency issues
- Timeframe concerns

Over-voting

Over-voting occurs when more shares are instructed to be voted than the actual number of shares owned by a registered shareholder. It can occur when there is an imbalance between the perceived voting entitlements of individual investors whose shares are pooled with other investors and/or traders within a nominee and the actual (lesser) shares and voting entitlements held by the nominee on the share register.

In the 2012 season Computershare recorded in excess of 150 over-votes which had an impact on 79 meetings. This meant that votes were either disregarded in their entirety or that significant rework was required by all parties to ascertain the true voting position. The custodian/nominees generally represent the largest holders on a company's register (an average of 40-60% of the issued capital). The use of

pooled accounts (which lead to over-voting) is unintentionally disenfranchising beneficial holders and impacting on companies.

Transparency issues

Pooled accounts cause several issues relating to transparency:

- Pooled accounts do not facilitate a direct audit trail or confirmation process between the company and shareholder, whereas a designated account can facilitate certainty of the vote lodged and is readily traceable.
- Pooled accounts rely on offshore manual rekeying of meeting information (including meeting resolutions and vote exclusion details) which can introduce errors and misinterpretation.
- Companies do not automatically know who has the voting rights and who is making voting decisions under a pooled account structure. This is further compounded when stock is lent.

Computershare believes that these issues will become more prominent and more costly for companies and shareholders as institutional shareholders, superfunds and pension funds increasingly vote their shares and make their vote preferences public.

Concerns about timeframes

We note the current debate about increasing or changing the existing timeframes for voting entitlements and proxy close. Rather than making a wholesale change that has an impact on the entire industry, this issue can be resolved by the use of a designated account, as the cut-offs imposed by each link in the voting chain would no longer be required.

Recommendation: Institutions and nominees should be encouraged to use designated accounts and consideration should be given to making designated accounts the default for institutional shareholders. Rather than market participants such as custodians pushing for changes to the legislative environment to overcome the lack of transparency caused by the administrative approach they adopt, they should be asked to explain why they cannot use designated accounts to solve the identified issues.

2.4 ISSUE 3 – THE AGM

2.4.2 Current functions and format

Technical amendments to the Corporations Act

Computershare also proposes a number of technical amendments to the Corporations Act to allow for the more efficient conduct of meetings and to address some inconsistencies that presently exist within Part 2.G of the Corporations Act. These recommendations are:

- Addressing inconsistencies within Part 2.G of the Corporations Act
- Allowing the Corporations Act to adapt to technological changes

Addressing inconsistencies within Part 2.G of the Corporations Act

Computershare notes that certain provisions of the Corporations Act, relating to the conduct of meetings for companies in Part 2.G2, do not appear in the corresponding sections of the Act relating to registered schemes in Part 2.G4. Examples includes section 250BC (transfer of non-chair proxy to chair in certain circumstances) and section 250B (proxy documents). We are not aware of any policy reasons why a listed company and a listed management investment scheme should be treated differently, and these inconsistencies are particularly apparent for a listed entity that has issued a stapled security (which comprises a share in a company stapled to a unit in a scheme).

Recommendation: Address inconsistencies contained within Part 2.G of the Corporations Act.

2.4.3 – Future functions and format

Allowing the Corporations Act to adapt to technological changes

Computershare notes that the Corporations Act currently provides specific requirements regarding the authentication of electronic proxy appointments in section 250B. We believe that by prescribing detailed requirements as to the manner in which electronic authentication can occur, the law does not provide sufficient flexibility for companies to take advantage of technological advances as they occur. For that reason, we propose that amendments are made that allow companies to implement authentication processes in a manner that satisfies a general requirement to be of a high industry standard without prescribing exactly what that requirement must entail. This should also apply to any legislation that is proposed to allow for online voting during an AGM (see also our response to question 5.11 below).

Recommendation: Amendments should be made to the Corporations Act that allow companies to more easily adapt to technological changes.

RESPONSE TO QUESTIONS FOR CONSIDERATION

Computershare has elected to respond only to the questions for consideration where we believe we can provide insight into shareholder thinking and behaviours and/or where our experience in meeting management and proxy processing will be of benefit to CAMAC.

5.3 CONDUCTING THE AGM

5.3.1 Timing

Should there be any change to the statutory time frame for holding an AGM?

Computershare cautions against an extension of the statutory period for holding the AGM where an extension would result in the deadline for holding the AGM falling within the Christmas holiday period. This would hinder shareholder participation rather than encourage it.

In 2012, Computershare managed 112 meetings in the final week of November; this represents 24% of all meetings managed for the year. Rather than extending the deadline, consideration should be given to assisting companies by removing or streamlining some of the current requirements that prevent meetings from occurring earlier.

Recommendation: We don't believe there should be any change to the statutory timeframe. Efficiencies such as those outlined in 5.3.2 should be implemented to assist companies in minimising logistical requirements.

5.3.2 Notice of meeting

How might technology be used to make this notice more useful to shareholders?

Our data shows that shareholders are increasingly using electronic channels for shareholder-related activities. For example, 89% of our surveyed shareholders say they source information directly from company websites, and 50% pay to access online content from news or industry commentator sites. We have also observed that a growing number of shareholders choose to update their information and obtain information from the registry online. In 2011, 64% of the 1.2 million shareholder contacts that we received were carried out via the web.[1] Computershare has observed that in 2011 20.7% of voting shareholders opted to lodge their proxy vote online, when online voting was offered. Indications are that this number will increase to 23.4% in 2012.

Electronic dissemination of AGM documentation

The Simplified Regulatory Reporting Act of 2008 was changed to allow companies to require shareholders to opt in to receiving hard copy annual reports rather than the previous opt out requirements. This change had a positive environmental impact and significantly reduced costs for

[1] Computershare's Securityholder Contact Satisfaction Monitor, January – June 2012

companies without disenfranchising shareholders. Our data shows that 7% of shareholders opt to receive a hard copy annual report.

If there was regulatory change that mandated companies to disseminate meeting information to shareholders electronically, this could lead to more satisfied and engaged shareholders and would promote the use of technology in shareholder engagement.

While there have been some advances in the electronic delivery of information, including Notices of Meeting and Proxy Cards, shareholder communications have predominantly remained paper-based. Nearly 80% of the shareholders we surveyed said they would prefer to receive their AGM communications electronically (email, SMS or digital mail box). However, our data shows that the actual average number of shareholders who receive their Notice of Meeting via email is 18.5%.

Shareholders commented that companies are inconsistent when it comes to sending AGM documentation via electronic means.

Our research and experience shows an increased propensity to receive and source information electronically. This behaviour is consistent with all aspects of shareholder activity. We believe the current opt-out approach for paper-based Notices of Meeting and Proxy Forms should therefore be changed to an opt-in approach. In effect, physical paper mailpacks would only be sent to shareholders who had elected to receive meeting communications in this manner. The remaining shareholders would receive notification by email (currently 18.5%), via digital mail post (new) or by sourcing the information online. Using our annual report experience as a guide, we estimate that physical mail packs for Computershare clients would be reduced by six million per annum without negatively impacting shareholder engagement.

Companies could also consider making use of smartphone capabilities. For example, adding in features such as a 'save meeting in calendar' appointment and using Google or Apple Maps to direct shareholders to the meeting venue. In 2012, 13 of the companies that Computershare manages the register for offered mobile voting applications; 6.71% of holders who voted online lodged proxy votes via this channel.

Recommendation: Adopt regulatory change that allows companies to require shareholders to opt in to receive physical proxy material and the Notice of Meeting.

5.3.3 Notice to shareholders holding shares through nominees

Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?

Computershare does not believe that there should be provisions for companies to send information about an AGM directly to beneficial owners. We do not believe that companies should incur further costs or the administrative burden of communicating with underlying shareholders.

Computershare strongly agrees with the point made in the CAMAC discussion paper about shareholders having the choice to be registered as shareholders directly and thereby receive information directly. Through our role in markets where companies are obliged to send communications directly to underlying shareholders, Computershare has proven experience of the additional cost and administration associated with it. In the UK, for example, under the 'Information Rights' provisions of the Companies Act 2006, at the election of their intermediary, shareholders who hold their shares via a nominee may be entered

onto a 'Register of Relevant Interests' for each UK company in which they hold shares, and thereafter those companies are required to send shareholder communications directly to that shareholder.

The UK Information Rights are currently managed by the intermediary and the take-up is remarkably low due to the high costs involved for all parties. The process does not warrant the expense in the UK, and we believe that the situation would be similar in Australia.

We also note that any material distributed to beneficial owners in relation to an AGM should not include forms for voting. The various nominees through which beneficial owners hold their shares have different timings and processes for receipt of shareholder voting instructions. The nominee should have an affirmative obligation to pass on to its client all AGM information sent by the company to its name-on-register shareholders, and to provide a mechanism for the beneficial owners to provide their voting instructions back to the nominee for lodgement with the Company's register, or otherwise provide the beneficial owner with proxy authority to vote. Where there are further intermediaries in the chain of ownership between the registered nominee and the beneficial owner of the shares, reasonable efforts should be undertaken for each intermediary to pass the information on in a timely manner such that it reaches the beneficial owner. In this regard, we would suggest that CAMAC consider the approach adopted in the Geneva Securities Convention.

Recommendation: Companies should not be required to send information about an AGM directly to the beneficial owners of shares held by nominees. CAMAC should consider the approach adopted by the Geneva Securities Convention in relation to the passing on of shareholder communications.

Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

To ensure the integrity of the shareholder voting process, all participants in the AGM that have the capacity to lodge a vote at the meeting must be capable of showing voting authority that is directly referable to a holding on the share register and capable of being appropriately audited. We therefore believe that a beneficial owner should only be capable of exercising voting authority where they act as a validly appointed proxy of the registered shareholder from whom they derive title, which is the current requirement in Australia.

Australian companies currently have a right to obtain disclosure of their beneficial owners via s. 672A of the Corporations Act. However, we do not believe that this disclosure can be used as a basis for beneficial owners to participate in any voting capacity at the AGM. Such disclosures are snapshots of ownership that are performed at varying times by the responding intermediaries. It would not be feasible – without a substantial investment in infrastructure between companies, intermediaries and institutions – to establish real-time disclosure of beneficial owners in a manner that could facilitate voting. We do not see that such an investment is warranted, particularly in the Australian market structure where shareholders can readily arrange to be directly registered via designated account structures and thus participate in the AGM as a registered shareholder.

It would be unreasonable to require companies to bear any additional cost in facilitating participation at the AGM by beneficial owners for those shareholders who have elected to maintain their shareholding in a pooled account.

We note that there has been discussion internationally on the issue of facilitating access and exercise of rights by beneficial owners. In the European Union, this issue is discussed within the proposed Securities Law Legislation, which has contemplated a right for beneficial owners to directly exercise voting rights.

For the reasons discussed above we have concerns about such an approach. We do, however, appreciate the importance of ensuring adequate arrangements are in place to facilitate the exercise of shareholder rights by beneficial owners.

Recommendation: We recommend that CAMAC look to the provisions of the Geneva Securities Convention with regard to an affirmative obligation on intermediaries that are responsible for administering beneficial owners securities to facilitate the exercise of shareholder rights, including voting. (Note: where a custodian nominee provides an institutional shareholder with a designated account and the shareholder's name is recorded on the CHESS sub-register or the company sub-register, the shareholder will receive their communications directly from the company).

5.8.10 Proxy Voting

What changes, if any, should be made to the current requirements concerning:

- ***the record date and the proxy appointment date***

It is worth noting that the Australian proxy voting processes are better than in any other developed jurisdiction.

In the United States the record date cannot be less than 10 days before the meeting and the record date is often 45 days before the meeting. In our experience this results in 'stale' voting, where the investors have sold out of the stock by the meeting date. In some European jurisdictions, if you want to vote at all, you have to 'block' your shares (deny yourself the right to sell them) for an even longer period before the meeting.

Recommendation: We do not recommend moving the record date as it will introduce concerns about people voting who are no longer shareholders at the time of the meeting.

- ***any other aspect of proxy voting***

Paperless proxy voting

Computershare supports companies having the right to elect to no longer permit receipt of proxies in paper form or by facsimile. Our research shows that 72.9% of surveyed shareholders responded positively to the adoption of paperless voting.

To ensure all shareholders have a readily accessible channel through which to vote, we would also propose that legislation expressly authorises telephone voting (see also our comment below).

Recommendation: Introduce legislation to permit companies to adopt paperless proxy voting.

Confirmation that telephone voting is an acceptable form of electronic voting

Computershare has a facility that allows for telephone voting in many of the jurisdictions where we currently operate and, particularly in North America, lodging a proxy using an IVR phone facility is a commonly used method of voting. Computershare understands that there are currently no legal impediments to lodging proxy votes using a similar facility in Australia, and we believe it would be of benefit if this was either expressly authorised under the Corporations Act or a general provision was

introduced that would allow for companies to accept proxies by whatever channel they choose, provided that there is a general obligation in place to ensure that the authentication processes around delivery of proxies through that channel are of a high standard (consistent with our comment above on electronic proxy appointments).

Recommendation: Expressly authorise telephone voting under the Corporations Act.

Vote confirmation

Through existing online proxy systems, registrars are able to provide name-on-register shareholders with confidence that their voting intention has been received in real time, removing any doubt of lost or late votes. This also provides an audit trail.

Institutional shareholders who are subject to various compliance requirements regarding their proxy voting activities have expressed interest in a confirmation process. In 2009, Computershare introduced vote receipt confirmation for participating custodians which has demonstrated significant efficiencies and transparency of votes lodged. It also gives confidence to their underlying shareholders that intentions have been passed along the voting chain. This process would be simplified if designated accounts were mandated in Australia.

Recommendation: Vote confirmation should be provided as part of electronic voting systems. Custodians and vote service providers remain responsible for confirming votes back to underlying beneficial holders.

5.9 DIRECT VOTING BEFORE THE MEETING

Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

Although there appears to be general industry acceptance that direct voting can be implemented under the current legislative framework, it has not been broadly adopted by listed companies. A reason for this may be that companies are concerned that direct voting is not expressly authorised by legislation. We would therefore support the introduction of legislation that removes those residual doubts. Our preference would be for the authorisation to be general, allowing companies to implement direct voting in a manner that works for them, with the exception that the cut off point for lodgement of a direct vote should align with the proxy cut off point.

Recommendation: Adopt legislation to expressly enable companies to introduce direct voting.

5.11 ONLINE VOTING DURING THE AGM

Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

Computershare welcomes the introduction of online voting during the AGM and sees no reason why online voting could not be regulated in the same way as in-person voting. Our shareholder surveys

support that this concept would promote retail shareholder engagement with 66% of shareholders surveyed saying that they would always or occasionally participate in an online environment.

Consideration will need to be given to the benefits for institutional shareholders who hold shares under a pooled account structure. These shareholders would still be required to vote in advance or nominate corporate representatives to revoke a proxy at the physical meeting. In the event that designated accounts are mandated in Australia, we could leverage off the advances of the E_GEM recently adopted in Turkey. This would only work where institutional shareholders hold their stock directly on the register. Where this is not the case, an underlying shareholder holding their shares through a nominee would not be able to vote online during the AGM unless significant changes were made to current voting processes. Therefore, the current process of institutional shareholders voting well in advance of the AGM would still prevail.

With the adoption of online voting, Computershare could readily provide a platform that allows shareholders to complete the following activities online during the course of an AGM:

- Register for the meeting
- View the live meeting
- Submit votes
- Ask and submit questions
- Share or post comments to social media sites
- Access vote confirmations

We believe that by retaining the current process of voting at the physical meeting and adding the option to vote online, we could provide shareholders with more choice, leading to greater shareholder engagement.

Recommendation: Allow online voting during the AGM.

5.12 EXCLUSIONS FROM VOTING

Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

Issues with voting exclusions on resolutions arise largely as a result of pooled accounts because in those circumstances underlying shareholders who are subject to an exclusion hold their investments with other underlying shareholders who are not. Holding shares in designated accounts would allow for voting exclusions to be managed more easily and would give greater certainty to companies that the required exclusions have been properly imposed.

Recommendation: The use of designated accounts will minimise issues with managing vote exclusions.

5.14 INDEPENDENT VERIFICATION OF VOTES CAST ON A POLL

Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

Computershare does not support a recommendation that independent verification requirements should apply to votes cast on a poll. The Corporations Act already provides a legal framework within which companies must operate their meetings including, for listed companies, disclosing poll results (and proxy results when resolutions are determined by show of hands) to the market and additional obligations regarding the accuracy of all disclosures to the market. A range of remedies are available to relevant persons for breaches of these obligations.

We therefore believe that to impose obligations (that would give a third-party access to sensitive shareholder information contained within proxy forms and voting records) is unwarranted and could lead to additional expense for companies as well as delays in the announcement of meeting results.

Recommendation: No additional verification requirements are required for voting by poll regardless of shareholder numbers.

5.15 DISCLOSURE OF VOTING AFTER THE AGM

Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

While companies are required to lodge with the ASX the results of each resolution put to shareholders at a meeting, there is no requirement to communicate these results with shareholders within a particular timeframe or via a specific channel.

In a recent shareholder survey (see **Appendix A**), 75% of respondents indicated that they were interested in receiving voting results following an AGM. Nearly three quarters of respondents said that they would like the results to be communicated to them via a digital channel (email, digital mailbox or SMS).

Recommendation: Companies should allow shareholders to elect to receive a post-meeting communication that outlines the results of each resolution. To ensure cost effectiveness for companies, this communication should only be required to be made available to shareholders in electronic form.

5.17 DUAL LISTED COMPANIES

Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?

Careful thought needs to be given to voting issues by dual-listed companies. Companies incorporated outside Australia (and dual listed on ASX) need to conform to their own domestic market laws as well as the practice and processes that are customary in the Australian market. Conversely, foreign markets, where Australian listed companies are dual-listed, may follow their own domestic practices (for example,

through the deployment of depositaries) that are different to the rules and procedures that are customary in Australia. Companies need to take care to ensure that their voting procedures can comply with relevant rules and practices so that companies, shareholders and intermediaries have certainty in the voting process. This may not be an issue for CAMAC but is something that needs to be understood and addressed by dual-listed companies to ensure, for example, that appropriate procedures are in place to make sure that the same holder cannot vote the same parcel of shares in each listed market.

5.18 GLOBALISATION

Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

Many markets are considering ways to modernise shareholder communications and the proxy voting system. Because Australia has an advanced market structure and a transparent share ownership system the problems in Australia are not as acute as they are elsewhere, however, improvements could be made. Where overseas holders are direct registered shareholders they should have the ability to vote electronically via their registrar's platform (either by web or IVR depending on the services the company offers). Where overseas shareholders hold securities in a pooled account they have to rely on the nominee to "pass on" their rights. This is an internal matter between the nominee and the shareholder, subject to any further regulation in this area. Rules should be considered that require the nominee to advise the shareholder of the details of the meeting and to vote as instructed, as contemplated by the Geneva Securities Convention. We do not believe that companies should be required to develop or provide special services for beneficial owners given the choices shareholders have to hold their securities in designated accounts if desired.

Please also refer to our comments on question 5.17.

Recommendation: Companies should provide electronic voting facilities for registered shareholders. CAMAC should further consider requiring nominees to pass shareholder communications on to their clients, and to facilitate lodging the voting instructions passed back by beneficial owners.

6. FUTURE OF THE AGM

6.2.2 Options for change

For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?

The physical AGM continues to be a valued forum for those who do choose to attend AGMs. For this reason Computershare is strongly against the abolition of the physical AGM. In its current state, the AGM plays a critical role by giving retail shareholders the opportunity to question the board and management in a public forum. Surveyed shareholders tell us that they value hearing fellow shareholders questioning the board at the AGM. In addition, the value that shareholders place on what they have described in our surveys as physically 'eyeballing directors' and making the board accountable is very real. Our survey revealed that of the shareholders who always or sometimes attend the AGM,

79% said that it enables them to directly assess a board's capacity to govern a company and gives shareholders the ability to ask questions in person.

As per our recommendation to question 5.11, we do support the introduction of online voting at the AGM, however, we caution against taking this to the extreme as they have done in the United States, where some states permit online-only meetings. Our experience in the United States with online-only meetings is that a degree of shareholder scepticism has emerged. For example, shareholders have expressed fears that their questions have been prioritised, rephrased and ignored or responses have been delayed to be answered outside the meeting, and are therefore not on public record. Concerns have also been expressed regarding the transparency of shareholder questions and management's answers, as well as whether or not shareholder questions asked online are visible to everyone at the meeting.

We therefore support the consideration of adopting hybrid meetings – that is, a combination of the physical and online AGM – for all companies on an annual basis as long as it is ultimately the company's choice as to whether they adopt this practice. To ensure the introduction of hybrid AGMs is successful in Australia the technology, systems and service providers need to have robust procedures in place.

Hybrid AGM benefits – for companies

Our experience in the United States indicates that offering virtual participation in AGMs leads to:

- Shareholder participation regardless of physical location – companies have the potential to reach out to more shareholders
- Interacting with more shareholders in real-time – with both online and physical Q&A and response time, companies are better able to gauge shareholder feedback and sentiment
- Improved corporate governance – there is less empty voting resulting in improved corporate governance

Hybrid AGM benefits – for shareholders

There are also benefits for shareholders including:

- The choice of whether to attend in person or to access it virtually
- Real-time access to the board and senior management, regardless of location
- The ability to interact with and hear questions from other shareholders without being in the room
- Provide institutional shareholders and foreign shareholders real-time access without the cost of attendance

Recommendation: Do not abolish the physical AGM, however, do introduce the option of a hybrid AGM at the company's election. There must be clear guidelines as to how hybrid AGMs are to be operated.

In this context, what technological developments might be taken into account in considering the possible functions of the AGM?

Please refer to our comments on 5.11.

23 March 2017

Ms Jodi Keall
Senior advisor
Financial System Division
Department of Treasury
100 Market Street
Sydney NSW 2000

Email: beneficialownership@treasury.gov.au

Dear Ms Keall

Increasing Transparency of the Beneficial Ownership of Companies

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies. They are frequently those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC), and in listed companies they have primary responsibility to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our members have a thorough working knowledge of the operations of the markets and the needs of investors, as well as compliance with the *Corporations Act 2001* (the Act). We have drawn on their experience in our submission.

Governance Institute of Australia welcomes the opportunity to comment on *Increasing Transparency of the Beneficial Ownership of Companies* (the consultation paper) and we thank Treasury for allowing us an extension of time in which to lodge our submission. We have not responded to the detailed questions set out in the consultation paper but provide our general comments.

General comments

a) Listed companies

We note that the consultation paper summarises the existing requirements under the Act which results in the market, including the general public, being informed as to the persons who have a significant level of control or ownership of listed companies. We also note that in the UK companies which are comparable to Australian listed companies are excluded from the obligations to report on people of significant control because of other transparency requirements which apply to them already.

Australian listed companies are already subject to a disclosure regime which appears to meet the G20 objectives, namely:

- Substantial holding provisions which require the holders and associates of holders of a 'relevant interest' in voting shares to report those interests to the company and to the ASX. This relates to voting power of 5% or more in a company, held individually or when aggregated with associates' voting power. The substantial shareholder notices are publicly available.
- The requirement for a company to maintain a share register.
- The requirement of a company to maintain a register of responses to tracing notices in accordance with section 672DA of the Act. As noted in the consultation paper, the tracing notice regime requires disclosure of all relevant interests, whether or not the beneficial owner has a holding of five percent or more. Since the substantial holding provisions cover disclosures of relevant interests of 5% or more, the tracing provisions are more commonly used to ascertain the interests of those holding less than 5% of a listed company.

There are significant penalties for non-compliance with these obligations. A person who does not disclose their substantial holding or does not respond to tracing notices is liable for any loss or damage suffered as a result of their contravention (sections 671C and 672F of the Act). A company which does not correctly maintain a share register may be liable to pay a penalty of up to $9,000, and individuals may be liable for payment of a fine or imprisonment.

In addition to the substantial holding provisions, listed companies are also subject to the Takeover provisions contained in Chapter 6 of the Act which strictly regulate acquisitions of interests exceeding 20%.

Governance Institute recommends that listed companies should be exempt from any new requirements to report on their beneficial owners in light of their existing obligations under the Act to maintain shareholder records, details of substantial holders and responses to tracing notices. This information is currently publicly available and does not need to be recorded on a central register.

b) Unlisted companies

Governance Institute notes that under the Act, companies are required to establish and maintain a register of members which amongst other things must record the specific details of the shares held by each member and whether those shares are held beneficially or not. Details of company members must be lodged with ASIC on registration of the company and proprietary companies must report to ASIC any subsequent changes to members details (with proprietary companies with more than 20 members having to inform ASIC of changes affecting the top 20 members in each class or share).

As noted in the consultation paper, companies may not be aware of the identity of their beneficial owners. We consider that beneficial owners are in the best position to provide and verify information concerning their interests. On a practical level, shareholders are unlikely to respond to an enquiry from the company requesting details of beneficial ownership unless required to do so by law. Governance Institute considers that the cost of any additional legal obligation of companies to make enquiries of their shareholders to ascertain the identity of their beneficial owners is likely to exceed any benefit which could come from the information without any corresponding requirement on the holder to comply and that any additional legal obligation to report beneficial ownership information should be imposed on the holder. This would align the obligations of holders in unlisted companies with those in the listed environment where holders and associates are required to report their interests.

Introducing increased reporting obligations for unlisted companies concerning beneficial owners will necessarily result in additional work having to be undertaken by them. Governance Institute considers that in order to increase the effectiveness of disclosures of beneficial owners and to

avoid duplication and additional work being imposed on companies, owners should be required to notify ASIC directly of interests which they hold when they reach the specified percentage. ASIC already operates a publicly available and centrally located register of company information. Governance Institute recommends that beneficial ownership details be maintained on the existing ASIC register. We consider that it is more cost effective for government to adapt the existing ASIC register and to incrementally build on that capability rather than create a new central register separate to the existing ASIC system.

In the event that obligations are imposed on unlisted companies to collect information from their shareholders concerning beneficial ownership Governance Institute recommends that:

- The obligation to make the disclosure is imposed on the party which has the interest
- That party is required to notify the company of their interest when they reach the specified percentage
- That the obligation to disclose should be limited to beneficial shareholders who are natural persons (as is the case with the UK concept of People with Significant Control)
- There is no requirement for the company to verify the information provided
- The company must then record this information on its own register and notify the information to ASIC
- This information will appear on the ASIC register
- The company's obligation to notify ASIC of beneficial ownership information arises upon registration and within 28 days of being notified of a change by a beneficial owner relating to the specified percentage.

Governance Institute would welcome further contact during the consultation process and the opportunity to be involved in further deliberations.

Yours sincerely

Steven Burrell
Chief Executive

Beneficial Ownership of Companies– IPA Submission

Increasing Transparency of the Beneficial Ownership of Companies
C/o – Ms Jodi Keall
Senior Advisor
Financial System Division
The Treasury
100 Market Street
Sydney NSW 2000

Email: beneficialownership@treasury.gov.au

Dear Minister O'Dwyer

Increasing Transparency of the Beneficial Ownership of Companies

Introductory comments

The Institute of Public Accountants (the IPA) is delighted to provide commentary on the current consultation paper*: Increasing Transparency of the Beneficial Ownership of Companies* (hereafter "BOC")

The IPA is a professional accounting body with members that are recognised for their practical, hands-on skills and broad understanding of the total business environment. Representing a membership of more than 35,000 individuals in Australia and in more than 80 countries, our members and student members are working across a broad range of professional employment and practice, including; industry, commerce, government, academia and private practice. More than 75 per cent of our members work in or with small business and SMEs and are recognised as the trusted advisers to these sectors.

The IPA at the outset commends the government for taking the initiative to consult on this issue. Greater transparency will not only ensure the ability to assist with law enforcement, but would also enhance the amount and quality of information available for research on how corporate structures come to be and operate in Australia and elsewhere. Researchers working within the IPA-Deakin University SME Research Centre have found that the absence of various disclosures related to individuals who hold beneficial interests in companies, has made it difficult, if not impossible, for them to piece together a complete picture of the size, scope and operations of a company or a conglomerate. Moreover, they argue that it is

extremely difficult to trace ownership and inter-locking directorships, which is important for both compliance with relevant laws, and for research. Indeed, prominent legal and finance researchers who have investigated ownership structures of companies in other jurisdictions have long argued that, until the beneficial owners of securities can be properly established, it would be difficult to determine what ownership disclosures are required under securities legislation and by whom (e.g., Feldman and Teberg, 1966; La Porta, Lopez-de-Silanes and Schleifer, 2006, 1999; Claessens, Djankov, Fan and Lang, 2002)[i]. We encourage the government to expedite reforms in this area to improve both the success of law enforcement and also the opportunities for thorough, comprehensive and insightful research.

We note at the outset that the information collected should at all times be accessible by other agencies involved in complex investigations. This may include investigations by the Australian Taxation Office into corporate structuring used in part to evade taxation. All steps must be taken to ensure the technology used to develop and store the proposed register of ownership is able to be accessed easily by investigators in various departments across government agencies.

It is, moreover, important that any registers that are established as a result of the current consultation process are freely available. The current registers maintained by the corporate regulator, the Australian Securities and Investments Commission (ASIC), can only be accessed if users of this information are able to pay the prescribed fee set by the Commission. This makes access to information expensive, and in some cases difficult, for users to obtain all of the information they may require when they wish to identify the parties who have ownership of an entity. This also suggests that the Australian Securities and Investments Commission Act (2001) would need to be amended to enable users to have free access to ownership-related information.

This submission focuses on areas of the discussion paper of specific interest to the IPA and the IPA-Deakin SME Research Centre. We would be pleased to provide any additional remarks on request.

Complete transparency an essential trade-off for the 'legal person'

The Corporations Act 2001 provides the opportunity for an individual or group of individuals to create an artificial person, a company that is able to enter into contracts and debt. These privileges conferred by law should at all times come with a requirement that all owners of an interest in an entity, no matter how small or large, are disclosed on a company register that is accessible to the public. The rights that an entity are provided under law come with a range of responsibilities. One of these should always be full and frank disclosure of those that hold beneficial interests.

This is critical to ensure that business structures are transparent and that investigators and researchers are able to see the linkages between owners of entities more clearly. Such disclosures will provide the necessary details for people in law enforcement seeking to ensure that illegal activities such as tax evasion, money laundering, bribery, corruption and financing activities not in the public interest are detected. As indicated in Blue (1975)[ii] and Muniandy, Tanewski, and Johl (2016)[iii], secrecy is often the primary purpose behind a non-beneficial holding, such that a beneficiary's relationship to a particular nominee company is less apparent. In this sense, it is unclear whether the ownership is for legitimate or illegitimate purposes. While the legitimate nominee shareholding "*should be preserved, full disclosure of the beneficial ownership of all voting shares should be required, both in the general interest of the community, and to discourage illegitimate purposes*" (Blue, p205).

By knowing the identity of beneficial owners, authorities are more readily able to assess whether laws related to company acquisitions have been breached. Such laws include, but may not be limited to, the 20% ownership threshold as stipulated in Chapter 6 of the Corporations Act (takeover provisions), or whether the 3% creeping acquisition clause has been exceeded (also in the takeover provisions), or whether an associate who has a relevant interest is linked to a bidding firm in a takeover offer.

The ability to link directors to other companies as well as a range of related parties is critical for both corporate investigations and research so as to determine whether these links are problematic either legally or ethically. In this sense, the IPA commends the government for having the foresight to consider reforms which would make share ownership more transparent. Moreover, we believe it is important for the government to be in-step with similar initiatives in other jurisdictions such as the UK[iv]and the US, and the suggested initiatives in the BOC consultation paper would go a long way in providing consistency in beneficial ownership disclosures across major jurisdictions. In turn, this would have a significant effect in preventing global misconduct through fraud, money laundering, tax evasion, the use of finance for terrorist causes, drug trafficking and other similar activities.

It is noted that currently fees apply to enable access to various registers either on the database of the corporate regulator or through an information broker. Searches of company records should be made free of charge in the same way as searches of companies are freely available on the web site of the Securities and Exchange Commission[v] in the United States. This would ensure that the average person would be in a position to search without having the imposition of a fee being a barrier to entry for those wishing to understand a company with which they may be engaged either as a supplier, customer or employee. We argue that this initiative would be a practical implementation of an aspect of the reporting entity concept that was established in the Statements of Accounting Concepts developed during the 1980s and 1990s (which now forms part of the AASB's current Conceptual Framework for the Preparation of Presentation of Financial Reports).

The underlying philosophy of the Conceptual Framework includes the need to provide relevant information to users about the reporting entity, which is useful for making and evaluating decisions about the allocation of scarce resources. When financial reports meet this objective they also are a means by which management and governing bodies discharge their accountability to those users financial information. There are two further related concepts that are important in the provision of such information, which would be greatly enhanced if there are further disclosures of the beneficial ownership of shares. Firstly, the need for financial information to be prepared at 'arm's length' i.e., independently and without bias. Knowing the identity of the ownership of companies would give users some assurance that financial reports have been prepared without bias and not toward any particular individual or group of individuals. Moreover, the reporting entity may not simply be an individual entity, but a series of related entities that, when aggregated, could form a group, otherwise known as an 'economic entity'. The concepts of control and significant influence embodied within the Conceptual Framework provide substantial guidance on which entities should be included within an economic entity, for the purposes of preparing consolidated financial statements (sometimes referred to as group accounts). Consolidated financial statements would thus reflect the performance and financial stability of the economic entity (rather than for individual entities), which would provide invaluable information for users of financial statements, and indeed a host of regulatory agencies. Accordingly, we believe that greater disclosures relating to the beneficial ownership of shares would greatly assist this cause. Particularly in determining whether entities have control or significant influence of other entities, or conversely, whether the entity itself is controlled or is significantly influence by other entities. This knowledge would also further assist in assessing whether the financial reports have been prepared at arm's length.

Exemptions for listed Companies

Our starting position on the issue of exemptions is similar to the perspective taken in the UK, where listed companies on the London Stock Exchange (main board) are already required to comply with stringent provisions relating to beneficial ownership. Accordingly, the UK consultation paper on reforms for greater transparency argues that additional beneficial ownership information for listed companies will not provide any further value. This approach is similar to the regime that operates in Australia. For example, the relevant interests and substantial holdings provisions within the Corporation Act[vi], the Notification of Directors interests in securities[vii], both in the Corporations Act and the Australian Securities Exchange Listing Rules. There are also requirements within accounting standards, such as for example, Related Party Disclosures AASB124 and Disclosure of Interests in Other Entities AASB12.

These requirements, however, will not apply to every entity because of the various thresholds that are in place in the Corporations Act. Despite these requirements, however, we believe there might be a strong case for even greater transparency, requiring beneficial ownership information to be disclosed by all Australian companies. For example, for shareholdings less than 5%, when aggregated with other relevant interests including those held by associates, might yield important information, for instance, whether ownership thresholds within the Corporations Act have been breached. We further argue that there are significant advantages in placing full ownership details on the public register, allowing investors, regulators, researchers and the general public access to have a better understanding of who owns and controls companies.

In respect to the timing of the availability of information, it is our view that the existing provisions within the Corporations Act are satisfactory.

Beneficial Owner Definition

The IPA considers that the definition adopted by the Financial Action Task Force (FATF)[viii] to be most appropriate, *i.e., "natural persons(s) who ultimately controls and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement".* The person(s) described in the above definition could also be referred to as a person(s) with significant control (PSC), as is currently the case in the UK.

Tests of Controlling Interest

The five conditions/tests adopted by the UK in defining a PSC, taking into account the concepts in the FATF Guidance[ix], are suitable for adoption within the Australian environment.

The tests in the UK state that a PSC is an individual who;

(i) Directly or indirectly holds more than 25% of shares in the company

(ii) Directly or indirectly holds more than 25% of voting rights in the company

(iii) Directly or indirectly holds the right to appoint or remove a majority of the directors of the company

(iv) Has the right to exercise, or actually exercises, significant influence or control over the company

(v) Where a trust or firm would satisfy one of the first four conditions if it were an individual, any individual holding the right to exercise, or actually exercising, significant influence or control over the activities of that trust or firm. This is not limited to the trustee of the trust.

We believe that existing provisions within the Corporations Act and Accounting Standards will need to be relied upon to aggregate ownership of shares and relevant interests by other related parties and associates. It is noted, however, that aspects of the approach taken by the UK in their definition of a PSC are compatible with the accounting standards on related party disclosures and also the definition of control embedded in the accounting standards on consolidations. In this regard, any work undertaken in Australia in defining a PSC, should concomitantly acknowledge the significant work already undertaken in the UK for the purposes defining and also operationalising a workable definition of a PSC.

Information for individuals deemed to be PSCs

The IPA believes that there is a need to ensure that regulators get sufficient information so as to be able to undertake their statutory obligations under the Corporations Act as well as ensuring that only a minimum amount of information is shown in the public domain. The UK model for the PSCs requires the following information for individuals:

- name,
- service address,
- the country or state (or part of the United Kingdom) in which the individual is usually resident,
- nationality,
- date of birth,
- usual residential address,
- the date on which the individual became a registrable person in relation to the company in question,
- the nature of his or her control over that company, and
- whether restrictions on using or disclosing any of the individual's PSC particulars are in force.

In addition, entities that are PSCs are further required to provide the following information in the UK:

- corporate or firm name
- registered or principal office,
- the legal form of the entity and the law by which it is governed,
- if applicable, the register of companies in which it is entered (including details of the state) and its registration number in that register,
- the date on which it became a registrable relevant legal entity in relation to the company in question, and
- the nature of its control over that company.

It is recommended that the details as required in the UK model for PSCs are similarly required and collected in Australia, and be made available for public viewing via an online

registry, subject to some restrictions relating to personal information (such as for example, private addresses and telephone numbers). A limited amount of information consisting of the following would meet the necessary requirements for public access:

- Name
- service address,
- the country or state (or part of the Australia) in which the individual is usually resident,
- nationality,
- date of birth,

The five components of information mentioned above should be sufficient for members of the public to get a degree of comfort about the identity of individuals with beneficial interests in a company. Investigators, however, would still be able to access the more detailed information.

We note that nothing has come to our attention that would suggest the disclosures required of entities that are PSCs in the UK would be inappropriate in Australia.

Operations of a central registry for disclosure

The corporate regulator in Australia already has a registry for company details used for recording and storing company information. The existing system should be modified to the extent required in order to accommodate the changes in disclosure requirements for PSCs.

It is critical to ensure that all of the information on this register is readily available to regulators participating in investigations of entities irrespective of the nature of those investigations.

Collection and storage of details of beneficial ownership

Any obligations placed on companies to compile data related to beneficial ownership should be designed so that they align with other compliance duties. Companies should be required to compile and maintain details of individuals that have beneficial ownership of entities in the same manner as they are required to maintain and revise details of basic company details such as the entity's name for example. These details should be compiled when an entity is first incorporated and maintained for the life of the entity. It should also be the responsibility of the entity to ensure that the details are lodged with the corporate regulator and updated as ownership details change.

Any changes to the details of beneficial ownership should be lodged within the same timeframe that a company must lodge changes to company details such as adding or removing directors or amending contact details. Those changes are required to be lodged

within 28 days of a decision being made to change a director or company secretary. Changes in beneficial ownership should be lodged within a similar timeframe.

Companies are also obliged to check details kept on the register of the regulator at least once a year, which will usually take place on the anniversary date of the company's initial registration. The review of board membership, entity details and details of individuals that hold a beneficial ownership in these entities should be reviewed and revised as required at the same time. This would streamline the compliance process for an entity rather than have separate disclosure processes that would take more time. Existing Form 484 could be modified for online lodgement to ensure the details of beneficial owners are captured appropriately.

It is noted, however, that a beneficial owner is not a formal office bearer such as a director or a company secretary and as such details such as their dates of birth and addresses should not be disclosed to members of the public. The name and the fact they meet the definition of a PSC must be disclosed in order to meet the underlying disclosure objectives.

Sanctions

The UK disclosure regime has several sanctions in place for a failure to comply with legal requirements. There are criminal offences in the UK[x] and Australia should similarly apply such criminal sanctions. While the penalties imposed in the UK include fines and prison sentences of up to two years, Australia's current enforcement regime only incorporates fines for failure to lodge on time. For example, a failure to lodge changes to company details up to one month after the anniversary date of company registration in Australia is $76.00, whereas the fee for late lodgement of a document that exceeds a month is $316.00.

Whether fines of this nature serve as a sufficient incentive for timely lodgement of sensitive information is an issue that merits further exploration by the government. This is one way of ensuring that the registers are complete and authorities are able to access required information to continue their investigations.

Transitional arrangements

Companies will need to be given a period of time to understand new disclosure rules and gather the information for compliance purposes. An initial period of three months with the ability to extend lodgement requirements by a further month on request with the relevant regulatory agency, should be sufficient for entities to gather the appropriate details from those deemed to the PSC.

Impact of measures on entities

Any changes in regulation comes with the need for entities to update their systems for information collection so that collecting the changing details becomes routine over time.

Entities will need to work out the best way of ensuring they maintain their own internal register

The IPA welcomes the opportunity to discuss further any of the matters we have put forward in our submission. Please address all further enquires to myself (tony.greco@publicaccountants.org.au or 0419 369 038).

Yours sincerely,

Tony Greco FIPA

General Manager Technical Policy

Institute of Public Accountants

Endnotes

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KPMG submission

Treasury Consultation Paper

Increasing Transparency of the Beneficial Ownership of Companies

13 March 2017

Contacts: Grant Wardell-Johnson

+ 61 2 9335 7128

Gary Gill

+ 61 2 9335 7312

David Morris

+ 61 2 9455 9999

Executive Summary

We welcome the opportunity to comment on the Treasury consultation paper on *Increasing Transparency of the Beneficial Ownership of Companies* published by Treasury.

We support the policy objective of preventing the misuse of organisational structures for illicit activities.

However, converting this into law that achieves the admirable policy objective in a meaningful way without significant compliance costs and without creating significant expectation gaps will be challenging. Our submission highlights some of the challenges, potential expectation gaps and raises questions over the level of transparency required.

In our view, further analysis is needed before concluding that a beneficial ownership register is the preferred solution and if so, what type. Notwithstanding, our submission also comments on a number of the specific proposals outlined in the consultation paper.

KPMG recommendations are as follows:

Recommendation 1:

Achievement of the policy objective, namely assisting in preventing the misuse of organisational structures for illicit activities, would benefit from more detailed consideration of the design options through a multi-stakeholder engagement process.

Recommendation 2:

A combination of using existing information already collected by regulators (with possible modifications thereto) and/or imposing obligations at the company and shareholder levels to access natural person, beneficial ownership information appears to be the preferred high level design options.

Recommendation 3:

(a) Australian listed companies should be exempt from the new requirements.

(b) Further multi-stakeholder consideration should be given to extending the exemption to a wider group of Australian and foreign owned companies.

Recommendation 4:

(a) Defining beneficial ownership should be consistent with internationally agreed principles.

(b) Where feasible, the detailed rules, should seek to leverage off pre-existing domestic models and other international models.

(c) Designing the optimal detailed rules is likely to require trade-offs and option analysis.

Recommendation 5:

(a) Beneficial ownership information should be collected at the company level and consistent with Recommendation 2, obligations to report information should be imposed at both the company and shareholder levels.

(b) It would be preferable if the information collected was reported to a central regulator.

(c) It would also be preferable if a centralised beneficial ownership register was established, however consistent with Recommendation 1 and 4, this requires further cost/benefit analysis as against less ambitious options.

Recommendation 6:

(a) Beneficial ownership information should be capable of being shared between relevant domestic and international authorities.

(b) Regulated financial institutions and other service providers required to undertake customer due diligence could also benefit from access this information, albeit there are a number of inter-dependencies.

(c) Longer term, we consider that confidential access rights and protocols to a centralised register of information has a better chance of delivering the optimal outcomes.

Detailed comments

1. General

1.1 KPMG welcomes the opportunity to comment on the Treasury Consultation Paper (CP) *Increasing Transparency of the Beneficial Ownership of Companies* released on 13 February 2017.

1.2 Our submission focuses on a number of key issues rather than attempting to provide specific responses to each of the 48 questions.

1.3 At the outset, we wish the make a number of general observations:-

- We support the policy objective of preventing the misuse of organisational structures for illicit activities;
- There is, of course, always an implementation risk with such policies. That is, those engaged in illicit activities will either ignore the new rules or exploit loopholes, which could result in a disproportionate compliance burden to legitimate companies, compared with companies who will attempt to circumvent such polices. Thus converting the admirable policy objectives into well designed law can be challenging;
- The Financial Action Task Force (FATF)[1] acknowledges that one of the three possible methods for ensuring the ready availability of beneficial ownership information is the use of existing information collected (which presumably also covers modifications to, or better use of, current information and associated access and exchange powers). However, whilst the CP presents an outline of Australia's current framework, there is little empirical evidence that a gap analysis has been performed and why the proposed beneficial ownership register is the better solution;
- At this stage, we would caution against the endorsement of a measure that:-
  - is limited to corporate vehicles (i.e. it does not address trusts, partnerships and other legal structures or contractual arrangements) and thus is open to exploitation,

[1] The FATF has set global standards for increasing beneficial ownership transparency

- is mainly focussed on domestic transparency (i.e. it does not address the greater challenges faced by Australian regulators in tracing offshore beneficial ownership) and is thus only a partial solution,
- has not been the subject of a multi-stakeholder engagement process, including a rigorous cost/benefit analysis as against other possible design options.

1.4 In this regard, we note the United Kingdom's implementation of its Register of People with Significant Control (UK PSC Register), took three years to develop and involved design modifications along the way, various impact assessment studies, extensive consultation processes and various specific issue working groups.

1.5 **Recommendation 1**

Achievement of the policy objective, namely assisting in preventing the misuse of organisational structures for illicit activities, would benefit from more detailed consideration of the design options through a multi-stakeholder engagement process.

1.6 Notwithstanding the above recommendation, we have included below our specific comments on the CP's proposals for a beneficial ownership register of Australian companies.

2. Beneficial ownership register of Australian companies

2.1 **FATF implementation guidance and possible high level approaches.** The FATF suggests 3 methods (including a combination thereof) for ensuring regulatory authorities have relevant ownership information detailing the natural persons who ultimately have a controlling interest in a company:-

- Require companies or company registries to obtain and hold accurate and up to date information on beneficial ownership;
- Require companies to take reasonable measures to obtain and hold up to date information on beneficial ownership; and
- Using existing information, including information obtained by regulatory bodies, tax authorities as well as potentially information obtained by financial institutions and service providers required to undertake customer due diligence.

Conceptually, the first method appears to be the preferred option as it requires companies to know their beneficial owners. It therefore has less inherent risk than the second method, that is, a 'reasonable measures' criteria may create loopholes to be exploited by illicit companies. On the other hand, where the beneficial owners are not

participants in the company's management, the company will be beholden to the known shareholders to provide relevant and timely information (particularly in circumstances where the regime uses a broad associate-inclusive definition).

As noted earlier in section 1 of this submission, it is not apparent from the CP whether the third option, namely, the use of existing information sources (or modifications thereto) may already provide the solution.

We do note, however, the Australian Taxation Office (ATO) already asks beneficial ownership questions in the company tax return (albeit currently limited, but clearly capable of being modified); both the income tax laws and tax administration practices have a long history of grappling with the pitfalls of beneficial ownership rules and developing tracing solutions – these might be capable of being leveraged; and, the ATO already has a legislative framework that facilitates wide domestic information gathering powers and an extensive international exchange of information network.

When coupled with the existing Corporations law requirements, Australian Securities and Investments Commission (ASIC) powers, the Australian Business registry as well as possible enhancements to some or all or the above, the anecdotal evidence suggests that at least a partial solution might already exist through existing information sources and channels available to the regulatory authorities. However, we also acknowledge that special consideration would need to be given to the implications of this method under various privacy and secrecy rules.

2.2 **Recommendation 2**

A combination of using existing information already collected by various regulators (with possible modifications thereto) and/or imposing obligations at the company and shareholder levels to access natural person, beneficial ownership information appears to be the preferred high level design options.

2.3 **Which companies could be out of scope?**

Certain Australian owned companies

Given the levels of transparency that already applies to Australian listed companies, it is appropriate to grant beneficial ownership register exemptions to such entities. Even if relevant authorities may encounter some difficulties with the existing ownership information collected for listed companies, a risk based approach is likely to conclude that the compliance costs are not justifiable.

We consider this exemption could apply to companies listed on specifically approved exchanges, which may include the ASX and Chi-X (for Australia), the New York Stock Exchange and the NASDAQ (for the US), the London Stock Exchange (for the UK), etc., without creating undue exploitation risks. If residual concerns remain, regulations could provide for exchanges to be 'black listed' in exceptional circumstances.

Further, wholly owned subsidiaries of approved listed entities could be offered an exemption without undue concern. Thus, some form of beneficial ownership register exemption 'class order' for subsidiaries of entities listed on approved exchanges (including listed trusts), possibly extending to entities where the these listed entities exert significant influence and or majority ownership, appears worthy of consideration.

We also suspect there are likely to be other types of non-listed Australian companies/groups that may warrant a similar exemption class order. For example, they might be subject to appropriate regulatory oversight or, their ownership structure strongly infers there will no natural persons who ultimately control the company/group (e.g. companies controlled by large superannuation funds/collective investment vehicles; companies owned by governments; companies with certain ownership restrictions, financial institutions licenced by APRA and ASIC, etc.).

In summary, consideration should be given to exemption class orders for a range of Australian owned companies, not just Australian listed companies.

Certain Foreign owned companies

It is noted the obligations to maintain a register under the UK PSC Register rules do not apply to foreign companies (even those with operations in the UK). Presumably, this approach was based on considerations of territorial nexus and to avoid a doubling up of any FATF obligations introduced in other jurisdictions.

For Australian companies that are ultimately controlled by foreign owned entities listed on approved exchanges (or controlled by foreign governments), a risk based assessment may also conclude that such entities could be worthy of an exemption class order.

In addition, other Australian companies that are foreign owned may be worthy of an exemption class order on the basis that beneficial ownership information is already in

the hands of Australian agencies, or could be obtained if needed. Possible examples include companies that are subject to ATO country by country reporting obligations or are required to ensure general purpose financial reports are filed with the ATO.

Further consideration should therefore be given to a range of foreign owned companies that could be worthy of exemption class orders under a sensible risk based approach.

Exemption trade-offs and inter-dependencies

The potential benefits of the above risk based approach and broad exemption class orders is to reduce the associated compliance costs for companies where the risk of their misuse is lower. However, we acknowledge there are potential downsides with this approach, namely:-

- Less utility in any central register of information for regulators and regulated entities required to undertake customer due diligence, if their statutory obligations have a higher onus of proof in establishing beneficial ownership;
- Sections of the community may perceive that any lessening of existing statutory obligations on regulators and regulated entities to accommodate lower end user compliance costs is a 'watering down' of a zero tolerance approach to illicit activities;
- Some statutory obligations of regulators and regulated entities might not be capable of being changed because they are set by international consensus (e.g. Common Reporting Standards);
- There could be transitional and ongoing costs for regulators and regulated entities that may offset any end user compliance savings.

Thus, even if a domestic beneficial ownership register of companies was immediately pursued notwithstanding Recommendation 1, a multi-stakeholder engagement process is still needed for the design of this register.

2.4 **Recommendation 3**

(a) Australian listed companies should be exempt from the new requirements.

(b) Further multi-stakeholder consideration should be given to extending the exemption to a wider group of Australian and foreign owned companies.

2.5 **Defining beneficial ownership**. The FATF plays a key role in facilitating a set of agreed international standards for combating various forms of illicit activity. Moreover, Australia is committed to implementing the FATF's recommendations and Australia stands to benefit from the international exchange of information that is based around broadly comparable standards.

Accordingly, in our view, the FATF guidance should:

- Inform the high level principles which underpin any Australian regime;
- Help define the natural persons who have a controlling interest in a company;
- Help identify the type of information to be collected.

Having said this, it is also apparent the FATF's guidance has been deliberately crafted to allow flexibility, particularly in light on the regulatory regimes already in existence in particular countries.

Where feasible, it would be sensible to leverage off pre-existing domestic models and definitions, such as the definition of Beneficial Owner as contained in the Anti-Money Laundering and Counter Terrorism Financing Rules Instrument 2007 (No1) and the beneficial ownership of shares and member registers under the *Corporations Act (2001)*. AUSTRAC and ASIC regulatory guidance already exists, and could be road tested for suitability in achieving the specific policy objective. Other international models specifically designed to create a beneficial ownership register, such as the UK PSC Register, should also considered rather than trying to reinvent the wheel.

In our view, the beneficial ownership test is likely to have the following features:

- No testing is required if the company or shareholders satisfy certain exemptions or class orders;
- If testing is required, essentially it would be a process of the immediate shareholders reporting to the company, coupled with certain obligations imposed on the company and the shareholders to consider if significant influence/control occurs by other means;
- The testing is likely to include a percentage ownership rule (with a 25% threshold being a likely starting point) together with an associate-inclusive rule;

- An additional rule would seek to capture significant influence or control by other means;
- Even though the register is only dealing with companies, the test will still have to consider how the rules are to be applied when the shareholders are trusts, partnerships, etc;
- Special provisions will be required to deal with specific practical implementation problems, including imposing tracing obligations on foreign shareholders.

It is apparent that the above suggested features of a beneficial ownership test may not accommodate the 'wish list' of the regulator nor the regulated entities with customer due diligence obligations.

Where their statutory duties involving tracing beyond immediate shareholders to 'ultimate' beneficial ownership, the regulators and regulated entities may prefer for the register to report the ultimate beneficial owners at the company level (i.e., having one record per entity that lists all of their ultimate beneficial owners), rather than requiring the regulator and the regulated entity to do their own tracing exercise through each company in a corporate group.

In this regard, we note the following:-

- In theory, determining the ultimate beneficial owners of closely held companies should be easier than for publicly listed and other widely held companies. Thus, requiring ultimate beneficial ownership information for companies but with various class order concessions for widely-held companies seems conceptually attractive in the design of the register;
- However, once it is accepted that the regime needs a broadly drafted beneficial ownership test (including associate-inclusive rules) to minimise loopholes in the regime, the theory starts to fall away in practice;
- It is our experience that closely held private companies can often have one or more of the following ownership features:
    - multiple classes of shares (which can be registered with ASIC as beneficially or not beneficially held),
    - novel voting, dividend and capital rights,

- unique governance, control and shareholder agreements (e.g. deceased estates controlling 'from the grave'),
- constitutional clauses impacting on different rights or being triggered on the happening of different events,
- formal and informal arrangements,
- shareholders falling within an associate inclusive definition but actually behaving totally independently (and vice versa);

- It is also our experience in undertaking beneficial ownership testing under the tax laws and the *Corporations Act (2001)* (each of which have their own unique, broadly drafted beneficial ownership tests) that both widely held and closely held companies (plus the ATO and ASIC) can often face significant compliance tracing costs in following the letter of the law.

In summary, we suspect the compliance costs of requiring the collection of ultimate beneficial ownership information at the individual company level will be substantially higher, but if not required, the utility of the register will be diminished. A possible solution to this trade-off dilemma is whether the register might be capable of automating its own ultimate tracing exercise, albeit we suspect this will be easier said than done.

Like the UK PSC Register experience, cost/benefit option analysis needs to be performed together with robust compliance cost surveys.

2.6 **Recommendation 4**

(a) Defining beneficial ownership should be consistent with internationally agreed principles.

(b) Where feasible, the detailed rules, should seek to leverage off pre-existing domestic models and other international models.

(c) Designing the optimal detailed rules is likely to require trade-offs and option analysis.

2.7 **How should beneficial ownership information be collected and stored?** We consider that beneficial ownership information should be collected by the relevant company because:-

- It is consistent with existing member register processes;

- Broad rules governing the beneficial ownership test may well require different control tests to be considered at both the shareholder and company level;
- Separate reporting by shareholders and the company direct to a regulator seems cumbersome and more prone to errors;
- This could be supplemented with the regulator being able to make its own tracing inquiries to the company or direct to shareholders; and
- Where they seek to access a designated service (such as a bank account) in Australia, they are required to provide information regarding their ultimate beneficial owners to the Reporting Entity (i.e. the Bank that provides their bank account) during their account opening process.

We also consider that a model whereby the beneficial information collected by the company is reported to a central regulator is preferable because:-

- It will act as the 'one source of truth' for information, rather than having many other conflicting information sources;
- It should be easier to apply consistency rules with regards the recording of and updating of beneficial ownership information:
- A lack of any reporting obligation on a company or shareholder until a request is made by a regulator significantly diminishes any proposed transparency benefits;
- There is less chance of beneficial ownership information collection systems falling into disrepair or information collected being out of date if there was a reporting obligation;
- There are already *Corporations Act (2001)* processes in place for reporting member information by the company to a central regulator and ASIC already has a type of central register with, inter alia, company member information.
- A central register of beneficial ownership information has its attractions as it should improve access to the information and enhance compliance monitoring for the regulators and regulated entities involved in anti-money laundering and tax transparency laws. The regulator's role should include ensuring the information on the register is accurate, up to date and reliable (under a sensible risk based lens), otherwise there appears to be little point in establishing the register.

However, it needs to be recognised there will inevitably be expectations gaps in what regulators and regulated entities would like and what is achievable. Section 2.5 above already highlights practical concerns as to what the register is capable of reporting. There are likely to other expectation gaps if the register must be updated more regularly than on an annual cycle in order to satisfy statutory obligations.

2.8 **Recommendation 5**

(a) Beneficial ownership information should be collected at the company level and consistent with Recommendation 2, obligations to report information should be imposed at both the company and shareholder levels.

(b) It would be preferable if the information collected was reported to a central regulator.

(c) It would also be preferable if a centralised beneficial ownership register was established, however consistent with Recommendation 1 and 4, this requires further cost/benefit analysis as against less ambitious options.

2.9 **Access to the information.** We consider that beneficial ownership information should be capable of being shared between relevant domestic and international authorities, subject to appropriate safeguards and protocols.

In addition, if regulated financial institutions and other service providers required to undertake customer due diligence could access this information, this could significantly reduce their compliance costs. Indeed, if these regulated entities did not get access to this information then we would question why the register is being considered at all. Of course, getting access to the register does not guarantee compliance savings are achieved if the final design of the register (e.g. what is reported and when it is updated) cannot satisfy their statutory obligations. Thus there are a number of inter-dependencies in maximising the compliance savings in accessing the beneficial ownership information.

However, overarching all these access matters is the issue of privacy. This issue will only intensify if attempts are made to establish a beneficial ownership register that includes trusts and other legal arrangements.

Whilst we acknowledge some information to be collected from companies and shareholders will already be in the public domain or non-sensitive, we would favour

confidential access rights (and in some cases consent may be prudent in the case of regulated entities) rather than open public access.

We consider that confidential access can overcome the privacy concerns and provides more flexibility longer term in developing a centralised register of information from multiple data sources that is more capable of satisfying multiple regulatory obligations. All this can be achieved without sacrificing the transparency benefits of formal reporting to regulators.

3.0 **Recommendation 6**

(a) Beneficial ownership information should be capable of being shared between relevant domestic and international authorities.

(b) Regulated financial institutions and other service providers required to undertake customer due diligence could also benefit from access this information, albeit there are a number of inter-dependencies.

(c) Longer term, we consider confidential access rights and protocols to a centralised register of information has a better chance of delivering the optimal outcomes.

Law Council
OF AUSTRALIA

Increasing Transparency of Beneficial Ownership of Companies

The Treasury

27 March 2017

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful for the assistance of the Corporations Committee of the Business Law Section, its Anti-Money Laundering Working Group and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to comment on the Treasury's *Increasing Transparency of Beneficial Ownership of Companies Consultation Paper,* released in February 2017 (**the Consultation Paper**).

2. The Hon Kelly O'Dwyer MP has indicated that 'Improving transparency around who owns, controls and benefits from companies will assist with preventing the misuse of companies for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing.'[1]

3. The Law Council opposes financial crime and accepts the Minister's claim that improving transparency will assist in preventing misuse of companies. However, it is unaware of the empirical bases for the Minister's assertion. Accordingly, the Law Council welcomes necessary and proportionate measures to this end provided such measures are subject to stringent review to assess the extent to which the register is effective in achieving its aims in addressing financial criminality.

4. As part of Australia's first Open Government National Action Plan the Government committed to improve transparency of information on beneficial ownership and control of companies available to relevant authorities. A key milestone for this commitment was the release of a public consultation paper seeking views on the details, scope and implementation of a beneficial ownership register for companies.[2]

5. In this context, the Law Council welcomes the release of the Consultation Paper and proposals to increase the transparency of beneficial ownership of companies. This increase in transparency is consistent with international practice. As noted in the Consultation Paper, organisations such as the G20, the Financial Action Task Force (**FATF**), the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes and the World Bank have a strong interest in increasing beneficial ownership transparency.[3] Moreover, the United Kingdom has recently introduced a beneficial ownership register.[4] Article 30(3) of the *Directive (EU) 2015/849*,[5] in the context of AML/CTF, also requires member states to ensure that beneficial ownership information is held in a central register; it is left to member states whether this is a company register or a public register.

6. Action on a register of beneficial ownership is one element of a series of internationally agreed measures[6] directed toward global problems of illicit money laundering, corruption, bribery, terrorism financing and tax evasion, as well as addressing legally (if not morally) legitimate aggressive tax planning arrangements

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[1] The Treasury, *Increasing Transparency of Beneficial Ownership of Companies Consultation Paper* (February 2017), v.
[2] Department of the Prime Minister and Cabinet, *Australia's First Open Government National Action Plan* (December 2016), 16.
[3] The Treasury, *Increasing Transparency of Beneficial Ownership of Companies Consultation Paper* (February 2017), 1.
[4] Part 21A of the *Companies Act 2006* (UK) and the *Register of People With Significant Control Regulations 2016* (UK).
[5] Directive (EC) No 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L 141/73.
[6] Other measures include the AML/CTF regime, including international exchange of information and cooperation, and proposals for action on Base Erosion and Profit Shifting.

that leverage gaps and mismatches between national taxation laws and systems. A core theme of the responses is to place a series of client due diligence, 'risk management' and reporting obligations on financial institutions, service providers and professional advisers (collectively referred to as the 'regulated community'), as means of providing additional streams of information to assist revenue and law enforcement agencies to deal with these problems.

7. Federal, state and territory governments already require businesses and the regulated community to collect and report to multiple government agencies a substantial amount of identity, financial and business information under, for example, revenue, land and property conveyancing, business and entity registration, and licensing schemes; and the existing Corporations Law.

8. The Consultation Paper suggests that improving the collection and utilisation of beneficial ownership information will significantly contribute to authorities' efforts to combat illicit activities, and will, in turn, promote greater integrity and transparency with the domestic and global financial system.

9. While the Law Council acknowledges the problem identified, and that the introduction of a central register of beneficial ownership might assist in addressing the revenue and law enforcement objectives, we urge the Government not to implement the measure in a way that simply adds an additional layer of due diligence and reporting obligations on business and regulated communities, or which simply creates an additional, 'stand alone' data set.

10. The Law Council considers Australian governments need to holistically examine what information is called for across all levels of government; what verification, due diligence and reporting burdens are being placed on business and the regulated community in assembling and supplying that information; whether the compliance burdens and disclosure obligations are reasonable and proportionate; whether the privacy of individuals is being respected and protected; whether government agencies are maximising efficiency in the way they store, analyse and share that information; and whether the revenue and law enforcement objectives are being achieved. By way of example, the design of a register of beneficial ownership should actively contribute to simplifying and reducing the client due diligence and reporting obligations of financial institutions, service providers and other reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF**) regime in a manner which imposes the minimum incremental cost burden on companies, as is consistent with the G20 objectives.

11. The Law Council makes the following key recommendations in relation to the Consultation Paper proposals:

    - The register of beneficial ownership should comprise a company's own register and the additional information provided on the Australian Securities and Investments Commission's (**ASIC**) current company register system, so as to provide a necessary response to the legitimate objectives of increased transparency, accountability and information access for the purpose of preventing companies being used as a vehicle to disguise the identity of those involved in illicit activities, while also leveraging off existing requirements and systems to the maximum extent possible. The Law Council considers that the following model achieves these dual aims:

- for listed companies: listed companies should be exempt from the beneficial holder register due to the considerable reporting obligations already in place that provide for beneficial ownership information to be collected for listed companies, such as existing substantial holder notices, the share register which a listed company is required to maintain, and the tracing notices register kept under section 672DA of the *Corporations Act 2001* (Cth) (**Corporations Act**).

- for unlisted companies: unlisted companies should collect beneficial ownership data which relates to a natural person having a 'relevant interest' in more than 20% of shares in the company, to align unlisted companies' obligations with the current 'relevant interest' provisions that apply to listed companies. This information should be collected at various stages: at incorporation, when a company becomes aware of a change of beneficial ownership and in response to ASIC's annual statement.

- privacy measures should be taken to ensure the model's compliance with privacy standards, including review and consultation with the Office of the Australian Information Commissioner (**OAIC**) and the Australian Government Solicitor to ensure that publicly available information on the register does not include confidential information of private citizens.

- The Law Council submits that the legal concept of 'relevant interest' as under the Corporations Act already subjects Australian listed companies to a state of the art, anti-avoidance disclosure regime which appears to meet the G20 objectives in relation to a 'beneficial ownership register.' Utilising the concept of 'relevant interest' ensures consistency across domestic regimes and compliance with the standards that the Consultation Paper seeks to implement in relation to beneficial ownership. Further the definition of beneficial ownership adopted in our domestic laws should be aligned to internationally agreed standards, such as recommended by the FATF and adopted in AML/CTF legislation;

- ASIC should be appointed as the regulator with responsibility for holding and maintaining the register of beneficial interests information which companies will be required to lodge, alongside a company's existing register, which should also include the beneficial ownership information collected as we describe;

- The level of obligation should dovetail into existing reporting obligations of companies and not be unduly onerous. If ASIC was to introduce an obligation on the company beyond reporting beneficial ownership information to verify or interrogate the information provided, that would risk being unduly onerous and imposing disproportionate cost on the company concerned. If any more onerous regime was proposed, it would be necessary to consider exemptions to the categories of companies which had to provide the information (e.g. small proprietary companies) to avoid undue administrative and cost burden; and

- AML/CTF reporting entities should be relieved of the obligation to undertake beneficial ownership due diligence where the company (i.e. customer) has an entry on the register.

12. This submission begins by providing some general comments on key aspects of the Consultation Paper before addressing specific Consultation Paper questions. As the questions in the Consultation Paper relate exclusively to companies and do not relate to the use of trusts, the Law Council's answers to the specific questions, provided below, do not canvass any issues that may arise from the use of trusts.

General comments

13. As a general proposition, Australian business is affected by the increasing cost of compliance with regulation, at state, territory, federal and, increasingly, international levels. The more consistent the requirements can be across each of those jurisdictions, and across agencies, the better.

14. It is worth noting that, in Australian law, the expression 'beneficial ownership' is often used interchangeably with the legal concept of 'equitable ownership.' The G20 principles seem to go to control and influence, which is closer to the 'relevant interest' Australian law concept than to equitable ownership. This submission uses the term 'beneficial owner' or 'beneficial holder' in the same way that the Consultation Paper does, rather than in the Australian legal sense of that term.

15. To avoid confusion, and since the policy objectives of a 'beneficial ownership register' would be best achieved by using the 'relevant interest' concept, we would recommend against using the term 'beneficial ownership' in any legislation which may be introduced to address the G20 principles on this topic, albeit it could be made clear that the purpose of the legislation was to meet the G20 principles in relation to beneficial ownership. We would be happy to assist with thoughts on how this approach could be drafted into legislation.

16. ASIC, as the national regulatory authority for corporations, should be responsible for collecting and maintaining the beneficial ownership information to the extent it is to be stored on a central register. The public accessibility of that register of beneficial ownership of companies should also be explored as a way of leveraging reductions in compliance burdens for regulated entities under, for example, the AML/CTF regime. At present, financial institutions and service providers are required to obtain and verify beneficial ownership information as part of their client due diligence and 'know your customer' duties whenever an AML/CTF reportable transaction is in contemplation. This process may have to be repeated by different institutions and service providers at various stages of a transaction's pathway.

17. Arguably, a lot of this information is of no business relevance to the financial institution or service provider, but is being collected and reported, firstly, to provide a deterrence/unwitting risk management tool against illicit transactions by a customer/client and, secondly, to provide a stream of financial transaction 'intelligence' to AUSTRAC. It has been established from empirical and other studies – particularly in the United Kingdom – that there is a very high compliance cost for private sector reporting entities associated with client due diligence obligations under AML/CTF legislation. A publicly available register of beneficial ownership information, maintained by a trusted national agency (along with the company's own register), could provide a basis for relieving financial institutions and other service providers from having to duplicate beneficial ownership information gathering and verification obligations under the AML/CTF regime.

A workable regime

18. A workable regime which leverages off existing measures could be as set out below.

19. For listed companies, leverage from the:

    - existing substantial holder notice regime;
    - share register which the listed company is required to maintain; and
    - register kept under section 672DA of the Corporations Act, which contains the responses to tracing notices. The frequency with which companies have this analysis (often colloquially described as 'beneficial holder analysis') done through the issue of tracing notices varies, but the results of any tracing notices which are issued are made available on the register. Generally, this has application with respect to holdings of less than 5% (below the substantial holder notice disclosure requirement), so well below the area of focus of the FATF. While some improvements to this regime may be desirable – and are addressed below – they are not necessary for Australia to meet the G20 obligations. Australia already significantly exceeds those requirements through the substantial holder notice regime.

20. For unlisted companies:

    - provided the obligations are not too onerous, it should be practical and cost-effective for the company to add collecting beneficial ownership data to its existing data, dovetailing into its current data review/disclosure points. Specifically:
        - at incorporation, require the company to disclose the beneficial owners, not just whether shares are beneficially held;
        - if the company becomes aware of a change of beneficial ownership which relates to a natural person having a relevant interest in more than 20% of shares in the company, impose an obligation on the company to notify ASIC, in the same way that a proprietary company is currently required to notify a change of shareholding. These changes were previously notified through a paper form 484. It is now done through the online equivalent where the company can submit the information directly to ASIC; and
        - impose an obligation on the company to enquire of its shareholders after receiving ASIC's annual statement whether there has been any change of relevant interest of a natural person, and to notify ASIC of any change which is notified to the company. This could include an obligation to include in the updated details to ASIC the identity of any shareholder which did not respond to the request.

21. The Law Council submits that, to ensure that this model meets privacy standards, the following privacy measures should be taken:

    - OAIC should be involved in and consulted on how the register addresses the safeguarding of personal information and auditing of the register; and

- the Australian Government Solicitor should conduct a privacy impact assessment.

Specific responses to the questions in the Consultation Paper

Beneficial Ownership

Which companies are in scope?

Question 1—Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exemption apply to companies listed on all exchanged or only to specific exchanges?

22. Companies listed on any exchange, including the Australian Securities Exchange (**ASX**) should be exempt from the new requirements. There is sufficient information available via the tracing notice provisions and other mechanisms referred to below. Requiring listed companies with diverse and dynamic share registries to comply with these obligations would impose an unfair and unnecessary compliance burden on them.

23. The Law Council notes that Australian listed companies are already subject to a state of the art anti-avoidance disclosure regime which appears to meet the G20 objectives, through:

    - 'substantial holder notices' – under this regime the holders and associates of holders of a 'relevant interest' in voting shares must report that interest to the company. The company then discloses it to ASX. These notices relate to voting power of 5% or more in a company, held individually or when aggregated with an associates' voting power. This regime generates disclosure significantly below the 25% FATF threshold;

    - 'share registry' – under this regime the company keeps a share register (which discloses legal but not necessarily beneficial interests); and

    - 'beneficial shareholdings analysis' under this regime where the company does a beneficial holder analysis by issuing tracing notices, the company keeps the responses to those notices. Beneficial holder analysis can be quite costly. Companies typically do it when they are preparing for a capital raising, since some capital raising structures involve offers being made direct to the beneficial holders. Also, companies do a beneficial holder analysis if they are monitoring shareholders for early signs of intended changes to shareholdings. Since the substantial holder regime already identifies beneficial interests of 5% or more, beneficial holder analysis typically makes inquiries about shareholdings at a lesser threshold – i.e. below 5% interests.

24. Between them, the above requirements are considerable, since they apply to interests of 5%, or even less in the case of the beneficial interest register. The penalties for non-compliance with the above requirements are also significant:

- a person who does not disclose their substantial holding or does not respond to tracing notices is liable for any loss or damage suffered as a result of their contravention (sections 671C and 672F of the Corporations Act) and may be subject to the broad range of orders, including remedial orders, that a Court is entitled to make pursuant to section 1325A of the Corporations Act; and

- a company which does not correctly maintain a share register may be liable to pay a penalty of up to $9,000, and individuals (such as directors) may be liable for both payment of $1,800 and imprisonment for 3 months (section 168, Schedule 3, section 1312 of the Corporations Act).

25. In relation to interests of over 20%, there is already a high degree of scrutiny in place for listed companies, as a result of the strict regulation of any acquisitions over this percentage under chapter 6 of the Corporations Act.

26. There is therefore no need to impose additional requirements on listed companies to meet the G20 requirements. They could be met either by exempting listed companies from the beneficial ownership register requirements and relying on the substantial holder regime, or by otherwise taking their actions under the Corporations Act to constitute compliance with the beneficial ownership register requirements.

27. The substantial holder notice requirements in the Corporations Act apply to listed companies (section 671B). It would be appropriate to use the existing Corporations Act definition of 'listed company' (section 9), which is as follows:

> A company is listed … if it is included in the official list of a prescribed financial market operated in this jurisdiction.

28. 'Prescribed financial markets' are as specified by regulation from time to time. The current list, set in Corporations Regulation 1.0.02A comprises the following list:

- Asia Pacific Exchange Limited;

- ASX Limited;

- Chi-X Australia Pty Ltd;

- National Stock Exchange of Australia Limited; and

- SIM Venture Securities Exchange Ltd.

Question 2—Does the existing ownership information collected for listed companies allow for timely access to adequate and accurate information by relevant authorities?

29. The Law Council considers that the current regime for listed companies does allow for timely access to adequate and accurate information by relevant authorities. Substantial holder notices are publicly available. They can be accessed at no charge by regulators and anyone else who is interested in the information.

30. Share registers and beneficial holder registers can be accessed, and copies available for a cost which reflects the incremental cost to the company of providing them to the party requesting the copy. Regulators typically have powers (for example ASIC's

power under section 30 of the *Australian Securities and Investments Commission Act 2001* (Cth)) to require production of such information at no cost to the regulator.

What beneficial ownership information should be captured?

Question 3—How should a beneficial owner who has a controlling ownership in a company be defined?

31. The Law Council notes that there is a definition of 'control' in section 50AA of the Corporations Act that might be used. Under the takeovers rule in Chapter 6 of the Corporations Act, which applies to listed companies, 20% is seen as a significant level in that:

    - a person cannot acquire that percentage or more of a listed company without a takeover bid or other permitted gateway; and
    - a person who has 'voting power' of at least 20% in another company (A) is deemed to have the same 'relevant interest' as company A has in company B.

32. Similarly, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) deems a person who has a 20% interest in an entity as having a 'substantial interest'.[7]

33. The UK has a 25% threshold. It might be more practical in Australian law to use a 20% threshold given its existing significance in the context of both the takeover rules and the FATA regime. Otherwise the same rules could apply as under chapter 6 of the Corporations Act but with 25% substituted for 20% in this context.

Question 4—In light of these examples given by the FATF, the tests adopted by the UK and the tests applied under the AML/CTF framework and the Corporations Act, what tests or threshold do you think Australia should adopt to determine which beneficial owners have controlling ownership in a company such that information needs to be collected to meet the Government's objective?

(a) Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?
(b) Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exercised via other means other than owning or having interests in shares, or by a position held in a company? If so, how would those types of control be defined?

34. A 'relevant interests' test is the most appropriate test to adopt in Australia. As noted above, in the context of the existing requirements in Chapter 6 of the Corporations Act, a 20% threshold may be the most logical threshold.

35. The 'relevant interest' concept already has anti-avoidance measures built in to ensure that they are not evaded by legal constructs. As noted at page 5 of the

[7] *Foreign Acquisitions and Takeovers Act 1975* (Cth), s 4.

Consultation Paper, they extend to situations where the relevant power or control is 'indirect, or can be exercised as a result of a trust, agreement or practice'.

36. In the absence of unusual circumstances, a person would not be taken to have a relevant interest or voting power by virtue of having a particular position in the company (e.g. director or management role). This is because, under the usual governance regime applicable to Australian companies, people in those positions owe duties to exercise them for the benefit of others. For example, subsections 50AA(4) and 608(7) of the Corporations Act each provide that, where a person who would otherwise be taken to control a company or to have a relevant interest, the person will not be taken to have that control or relevant interest if the person is under a legal obligation to exercise their capacity for the benefit of someone other than either themselves or (if the person is a company) someone other than its own members.

37. Instead, subsection 608(4) of the Corporations Act takes a practical approach; that section provides that a person will be taken to control a company where that person has the capacity to determine the outcome of decisions about the company's financial and operating policies. Further, under subsection 608(5), in determining whether a person has that capacity, the practical influence a person can exert (rather than the rights they can enforce) is the issue to be addressed, and any practice or pattern of behavior is taken into account.

38. We would suggest the same approach in this case.

Question 5—How should the natural persons exercising indirect control or ownership (that is, through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?

39. The Corporations Act currently imposes a legal obligation on a person with a substantial holding, of more than 5%, to disclose this to the company and to the ASX. That is important because it is not practical for a company to report such information in the absence of a legal obligation on that person to report the information to the company. The Corporations Act contains sanctions for a party which does not comply with the obligation to notify a substantial interest, namely, that the party will be liable for any loss or damage arising from non-compliance.[8]

40. Often in the takeovers context it is another shareholder or an actual or potential takeover bidder who brings the non-disclosure to the attention of ASIC or the Takeovers Panel, which results in some form of enforcement action. Similar sanctions could apply to non-disclosure under a beneficial ownership reporting regime.

Question 6—Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the ultimate beneficial owner?

41. The substantial holder notice regime in the Corporations Act already makes provision for this in respect of listed companies.

[8] *Corporations Act 2001* (Cth), s 671C.

42. For the new reporting obligation to be imposed on unlisted companies, the objective of the G20 principles, and the UK legislation, appear to be directed to natural persons with a large beneficial ownership level. To address that concern in a way which imposes the minimum incremental burden on companies required to achieve the G20 objectives, the Law Council suggests requiring disclosure of natural persons with a 20% or greater relevant interest, or any change in the ultimate holding company of the Australian company.

Question 7—Do there need to be special provisions regarding instances where the relevant information on a beneficial owner is held by an individual who is overseas or in the records of an overseas company and cannot be identified or obtained?

43. The obligation on a beneficial owner to report should have extraterritorial effect in the same manner as the substantial holder notice requirements. If that beneficial owner does not disclose and the beneficial interest is discovered, there are sanctions in the Corporations Act which could be applied to that beneficial owner.

44. If a national register were established, ASIC could develop relationships with its international counterparts to conduct tracing where the domestic Australian company was not able to provide the information.

Question 8—Should there be exemptions from beneficial ownership requirements in some circumstances? What should those circumstances be and why?

45. As noted above, there is already a high degree of scrutiny in place of the beneficial ownership of listed companies through the substantial holder regime, tracing notices regime and strict regulation of acquisitions over 20% under chapter 6 of the Corporations Act.

46. There is therefore no need to impose additional requirements on listed companies to meet the G20 requirements. They could be met either by exempting listed companies from the beneficial ownership register requirements and relying on the substantial holder regime, or by otherwise taking their actions under the Corporations Act to constitute compliance with the beneficial ownership register requirements.

47. For unlisted companies, provided that the obligations are not too onerous, it should be practical and cost-effective for the company to add collecting beneficial holder data to its existing information. This should dovetail into companies' current data review and disclosure points. Specifically:

- at incorporation, require the company to disclose the beneficial holder, not just whether the shares are beneficially held;
- if the company becomes are of a change of beneficial ownership which relates to a natural person having a relevant interest in more than 20% of shares in the company, impose an obligation on the company to notify ASIC, in the same way the company is currently required to notify a change of shareholding; and
- impose an obligation on the company to inquire of its shareholders upon receiving the annual statement from ASIC, whether there has been any change which is notified to the company. This could include an obligation to include

the updated details to ASIC, the identity of any shareholder which did not respond to the request.

48. If a regime of that level is imposed, given that companies have an annual review checking obligation with ASIC, and the obligation to notify certain updating details within 28 days of becoming aware of them in any event, this additional obligation should not be unduly onerous.

49. However, if ASIC was to introduce an obligation on the company to do more than that – for example to verify or interrogate the information provided – that would add cost and effort which is disproportionate and impractical for smaller companies. If that more onerous regime was proposed, it would be necessary to consider exemptions to the categories of companies which had to provide the information (e.g. small proprietary companies).

50. OAIC and Australian Solicitor General should be consulted to ensure that information cannot be accessed by those who are not relevant authorities, financial intelligence units and obliged entities where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise does not have legal capacity. Such a regime would allow persons with significant control over the corporate body who would be at risk of serious violence or intimidation due to the company's activities or their association with the company to protect all of their information through the suppression of that information. The corporate regulator should be the body responsible for considering applications for 'protection' and should take advice from law enforcement authorities in making a decision. This exemption should only be available on a case-by-case basis in exceptional circumstances.

51. Consultation with the OAIC should also be undertaken regarding whether the identity of any private citizen that would not already be publicly available should be publicly available on the register.

Details of beneficial owners to be collected

Question 9—What details should be collected and reported for each natural person identified as a beneficial owner who has a controlling ownership interest in a company?

52. For efficiency, these would be consistent with the usual data a company is required to collect from its shareholders and record on its register, being:

- the name and address of each shareholder, and the date on which the shareholders name is entered into the register;
- the number and class of shares and when the shares were acquired;
- the amount paid on the shares; and
- whether the shares are fully paid and (if any) the amount unpaid.[9]

53. Reform should also incorporate the following privacy measures:

[9] *Corporations Act 2001* (Cth), s 169.

- OAIC to be consulted as to how the register addresses the safeguarding of personal information and auditing of the register; and

- the Australian Government Solicitor to conduct a privacy impact assessment of any proposal for a register.

Question 10—What details should be collected and reported for each other legal persons identified as such beneficial owners?

54. See above answer to Question 9.

Question 11—In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?

55. See above answer to Question 9.

How should information be collected and stored?

Question 12—What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?

56. There should be an obligation on natural persons to disclose their beneficial ownership to the company (where it relates to more than 20%). The obligation on the company should be to ask and report that information. The obligation should not be to verify that information, at least if this obligation is proposed to be imposed on all companies regardless of size or the scope of their business activities, since it would not be cost-effective or practical to expect them to do that.

57. The obligation of the company to report should be applied:

    - at the point of applying for registration as a company;

    - within 28 days of the company being notified of a change by a beneficial owner, which relates to 20% or more of the company; and

    - each year after receiving its annual statement from ASIC.

58. There should be an obligation on the beneficial owner at all times to notify the company of any beneficial ownership. At any time when the beneficial holder notified the company, this would flow through into an obligation on the company to notify ASIC under the second bullet above.

Question 13—Should each company maintain their own register?

59. As long as the reporting is limited to the matters set out in the Law Council's response to question 12 above, it should be practical for each company to maintain its own register just as it maintains its share register. However, this information would also appear on the ASIC register as a result of the company notifying ASIC.

Question 14—How could individual registers being maintained by each company provide relevant authorities with timely access to adequate and accurate information? What would be an appropriate time period in which companies would have to comply with a request from a relevant authority to provide information?

60. For listed companies, because the information is public, it would be readily available to relevant authorities immediately. The majority of company registers are now maintained electronically and, as such, it should be relatively straightforward for the information to be taken from the register and provided to the relevant authorities.

61. The proposed timing in the answer to question 12 above is consistent with the obligation on companies to notify changes of shareholding, so provides reasonably timely information for relevant authorities.

Question 15—Should a central register of beneficial ownership also be established?

62. Under the model we support as set out above, the ASIC register would perform this function with respect to unlisted companies. It would not be necessary with respect to listed companies because the information is already publicly available.

63. Being able to rely on the existence of a public register of beneficial ownership should be a basis for reducing or relieving AML/CTF compliance burden on reporting entities.

64. The register maintained by ASIC should be publicly searchable (subject to appropriate limitations as developed in conjunction with OAIC and the Australian Government Solicitor). It is noted that the idea of a company keeping information in a format that can be shared between agencies is the basis for Standard Business Reporting that underpins the Australian Business Register.

Question 16—What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?

65. The Law Council suggests that:

- in the case of listed companies, the advantage of relying on the substantial holder notices is that they are already available publicly and do not need to be recorded on a central register. No additional cost or effort is required by the companies or any regulatory body; and

- In the case of unlisted companies, it would likely be the most practical to add to the ASIC existing register details and documents for each company relating to beneficial ownership. If this model is adopted which dovetails as closely as possible into the companies' existing reporting requirements and systems, the register could be maintained at what should not be significant incremental cost or effort.

66. The Law Council is not in favour of a new central register, separate from the existing ASIC register system, being created. It appears to be no simple matter to set up a new register. For example, the establishment of the PPSR register, at substantial

cost, demonstrated numerous teething and practical difficulties in establishing new registers of information. It continues to be non-user friendly and expensive to administer and use. The manageable changes proposed to the existing ASIC register and lodgment requirements would be more practical for companies and should minimise incremental cost for companies and the government.

Question 17—In particular, what do you see as the relative compliance impact costs of the two options?

67. If the data sets required to be collected by unlisted companies under the new regime are not unduly onerous and can be collected electronically, then there should be relatively low compliance cost under either option.

Operation of a central register

Question 18—Who would be best placed to operate and maintain a central register of beneficial ownership? Why?

68. ASIC is best placed to operate a central register; it already maintains a public searchable central register of shareholders of Australian companies and ought to be able to leverage off existing systems which apply to changes in shareholdings. It should require only minimal incremental details to be added, and should be able to leverage off the existing systems which apply to changes in shareholdings.

69. The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) would not be suitable as it is a regulatory authority that monitors the providers of certain designated services. AUSTRAC's function includes monitoring the threshold and suspicious transactions of individuals as well as corporate entities. This is a fundamentally different function to establishing and maintaining a central register of the beneficial ownership of corporate entities – whether or not they transact in the areas of commercial activity identified by FATF. Further, AUSTRAC is a dedicated financial intelligence unit that provides and shares information and reports with revenue and law enforcement agencies all over the world.

Question 19—What should the scope of the register operator's role be (collect, verify, ensure information is up to date)?

70. Both the company (to the extent that it collects the information) and ASIC, with respect to the information it would maintain on its register, should be responsible for collecting, but not verifying beneficial ownership information. In terms of ensuring information is up to date, the obligation would be on the natural person who has a relevant interest of more than 20% to report to the company on a timely basis, and on the company to report within 28 days of being notified of any change as well as on its annual statement response.

Question 20—Who should have an obligation to report information to the central register? Should it be the company only or also the persons who meet the test of being a relevant 'beneficial owner'?

71. A person who meets the test of being a beneficial owner should be required to report that information.

72. As is the case for the substantial holder regime under the takeover provisions of the Corporations Act, it is important to impose an obligation on the party which has the interests. This assists the company to collect the information by giving the company a reason for requesting and basis for demanding a response. The company would have an obligation to report within 28 days of being notified of any change and on its annual statement checking cycle. The extent of the obligation should be to accurately report the information the company receives and where no information is provided to report that fact.

Question 21—Should new companies provide this information to a central registry operator as part of their application to register their company?

73. Yes, new companies should provide beneficial ownership information to ASIC as part of their application to register a company. This is a simple step, which should be cost-effective, at the point of registration of a company. Part of the 'price' of being permitted to register a company in Australia would be to provide this information.

Question 22—Through what mechanism should existing companies, and/or relevant beneficial owners, report?

74. Provided that the obligations are not too onerous, for unlisted companies it should be cost-effective for the company to add collecting beneficial ownership data to its existing data, dovetailing into its current data review / disclosure points by way of the following mechanisms:

- at incorporation, requiring the company to disclose the beneficial owners;
- imposing an obligation on companies to notify ASIC within 28 days of becoming aware of a change of beneficial ownership which relates to a natural person having a relevant interest; and
- imposing an obligation on the company to enquire of its shareholders after receiving ASIC's annual statement whether there has been any change of relevant interest of a natural person, and to notify ASIC of any change which is notified to the company. This could include an obligation to include in the updated details to ASIC the identity of any shareholder which did not respond to the request.

75. In each case, providing this information electronically should reduce the compliance and data entry burden.

Ensuring information is accurate and current

Question 23—Within what time period (how many days) should any changes to previously submitted beneficial ownership information have to be reported to a company (where registers are maintained by each company) or the registry operator (where there is a central register)?

76. Under the substantial holder notice regime, the holder is required to notify the company within two business days after the change of interest by at least one percentage point. This may be too onerous in the case of an unlisted company. A

period of 28 days may be reasonable for the beneficial owner to notify the company. The company would then have 28 days to update ASIC on the change. In response to each annual statement checking process, a company could be required to ask its shareholders within 28 days of the annual confirmation for any changes, and to notify any to ASIC within 28 days of being informed by its shareholders of any change.

Question 24—If reporting to a central register is required, should this information be included in the annual statement which ASIC sends to companies for confirmation with an obligation to review and update it annually?

77. The information should be included in ASIC's annual statement; however, this should not displace companies' obligation to notify ASIC of relevant changes in beneficial ownership of which they become aware at any time, and the law should impose a corresponding obligation on the holders of relevant interests to disclose the information.

Question 25—What steps should be undertaken to verify the information provided to a central register by companies or their relevant beneficial owners? Who should have responsibility for undertaking such steps?

78. There should be a legal obligation on the beneficial owner to provide the correct information on a timely basis.

79. As is the case with the substantial holder regime, there should be no obligation on the company to verify the information, as opposed to collecting and providing it to ASIC. The beneficial owners should have this obligation imposed on them. To impose a 'policing' obligation on the company would not be practical or cost-effective for many companies. So if this obligation is to be imposed broadly, it should be an obligation to report, and to request information from shareholders annually, not an obligation to verify. The response could be required to include details of shareholders of 20% or more who had not provided confirmation as to beneficial ownership.

Exchange of information between authorities

Question 26—Should beneficial ownership information be provided to one relevant domestic authority and then shared with any other relevant domestic authorities? Please explain why you agree or disagree.

80. This information would be publicly available (subject to any information the OAIC and the Australian Government Solicitor indicate should not be made publicly available) so there is no reason for it not to be shared between agencies. Any removal of requirements to provide the same information to different relevant domestic authorities is welcome.

Question 27—Should beneficial ownership information be automatically exchanged with relevant authorities in other jurisdictions? Please explain why you agree or disagree.

81. Since the information would be publicly available (subject to any information the OAIC or the Australian Government Solicitor indicate should not be made publicly available), there should be no particular sensitivity in the information being shared

with relevant authorities in other jurisdictions. Further, such an approach would be consistent with the approach taken by the OECD members on tax compliance under the Base Erosion Profit Shifting proposals, such as country-by-country reporting.

Sanctions

Question 28—What sanctions should apply to companies or beneficial owners which fail to comply with any new requirements to disclose and keep up to date beneficial ownership information?

82. The sanctions should be comparable with those imposed on:

- in the case of companies, companies which fail to maintain up-to-date registers may be liable to pay a penalty of up to $9,000, and individuals (such as directors of these companies) may be liable for $1,800 and/or imprisonment for 3 months (section 168, Schedule 3, section 1312 of the Corporations Act); and

- in the case of beneficial owners, substantial shareholders who fail to disclose their interests as required by law will be liable to compensate for any loss or damage suffered as a result of their failure to disclosure this interest (section 671 of the Corporations Act) and may be subject to the broad range of orders, including remedial orders, that a Court is entitled to make pursuant to section 1325 of the Corporations Act.

Transitional arrangements

Question 29—How long should existing companies have from when the legislation commences to report on their beneficial owners? What would be an appropriate transition period?

83. This is a design question which should be determined through consultation between ASIC and the business community. One option may be after existing companies receive their next annual statement from ASIC – subject to at least a year's lead time for education of companies and beneficial holders as to the new requirements.

Impact on affected companies and stakeholders

Question 30—Do you foresee any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?

84. The Law Council suggests that a public education program on the new requirements should be undertaken so that beneficial owners and companies are aware of their obligations. The concept of 'relevant interest' is complex and may be difficult for companies to understand. However, we surmise that companies with sufficient sophistication to have division between legal and beneficial ownership are likely to be able to understand this concept sufficiently to comply with obligations of the limited nature we have suggested above.

Question 31—What types of compliance costs would your business incur in meeting any new requirements for record-keeping and reporting of beneficial ownership information?

85. Provided the obligations were limited as set out above, the incremental cost would be additional reporting to ASIC (of changes in beneficial ownership of natural persons of more than 20% and in seeking information annually from shareholders). That should not be substantial. It is noted that any more onerous reporting obligations would lead to additional costs.

Question 32—If you are already required to comply with AML/CTF obligations, how do you see any new requirements to collect beneficial ownership interacting with those existing obligations?

86. AML/CTF reporting entities should be able to rely on the beneficial ownership information in the register and not have to repeat the process under the AML/CTF client due diligence rules.

Question 33—If companies had access to the additional beneficial ownership information collected, could this reduce companies' compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?

87. See answer to question 32.

Question 34—Could any changes be made to streamline or merge existing reporting requirements in order to reduce the compliance costs for businesses?

88. There are currently multiple entry points into government, whereby reporting requirements should be streamlined. The implementation of a beneficial ownership register should streamline existing reporting requirements as much as possible. In this context, the Law Council notes that the AML/CTF regime for example places an obligation on private sector reporting entities to verify beneficial ownership and to report or make available that information to AUSTRAC, which can in turn make it available to law enforcement and revenue agencies. The AML/CTF regime comes at a heavy compliance cost to the private sector when, paradoxically, ASIC and other government agencies either already have the ability to collect this information, or could with changes to their governing legislation. A register of beneficial ownership may be a vehicle that relieves financial institutions and service providers from repeating some of the AML/CTF client due diligence processes.

Other beneficial ownership transparency issues

Identifying those who can control listed companies

Question 35—Are the current substantial holding disclosure provisions sufficient to identify associates which may have the ability to influence or control the affairs of a company? What changes could be made to improve their operation?

89. The Law Council is of the view that the substantial holding disclosure provisions, which are drafted on a broad, anti-avoidance basis, are sufficient. There are rare cases where they do not appear to be complied with, in which case a party can seek

the involvement of ASIC or the Takeovers Panel to deal with apparent non-compliance.

Question 36—Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies?

90. As noted above, the substantial holder notice regime is generally sufficient to achieve that purpose with respect to interests of 5% and above. The tracing notice regime has greater relevance to holdings of less than 5% in a company, though it may assist in identifying breaches of the substantial holder notice requirements.

Question 37—In your experience, are there issues or obstacles (specific to obtaining ownership information) which currently arise when using tracing notices? If so, what are those issues or obstacles?

91. The tracing notices regime generally only has application with respect to interests of less than 5% since the substantial holder regime operates where an interest is above 5%. Beneficial holder analysis performs a function which appears to go well beyond what is required for Australia to meet its obligation to establish a beneficial ownership register.

92. In the case of interests of more than 5%, the ultimate beneficial owner has a direct legal obligation to notify that interest in a substantial holder notice, so any limits on what can be achieved through tracing notices do not affect disclosure of the form of beneficial interest to which the G20 beneficial ownership principles are addressed.

93. Practical difficulties that may arise when using tracing notices include:

- the nominee who owns shares may not know who has an interest, other than the nominee's immediate instructing party. There can effectively be multiple nominees in a chain, requiring sequential tracing notices to be issued in order to identify the ultimate beneficial owner. Generally this delays, rather than prevents, discovery of the ultimate beneficial owner; and
- responses can be slow or not forthcoming, particularly from offshore parties who may not be familiar with tracing notices or not concerned with complying with Australian legal requirements.

Question 38—In order to improve and incentivize compliance with the tracing notice regime should ASIC have the ability to make an order imposing restrictions on shares the subject of a notice until the notice has been complied with?

94. The Law Council supports ASIC having the ability to make an order imposing restrictions on shares which are the subject of a notice until that notice has been complied with, and considers that such an order could address the, at times, inadequate compliance with the regime. The order should only be made once the time for compliance with the tracing notice has passed. The making of this order by ASIC should be subject to review by the Takeovers Panel where the company is a listed entity and in other cases by an application for an internal review by ASIC with

entitlements to further reviews in the Australian Administrative Tribunal or the Federal Court.

Question 39—What other changes could be made to improve the operation of these provisions?

95. The Law Council suggests that the Court should have the same powers and remedies as are available under section 1325A of the Corporations Act with regard to the existing notice regime. Consideration could also be given to providing a specific power of inquiry for an administrator or liquidator of a company to obtain this information from not only the company's officers but also any other person who may hold this information on behalf of the company.

Nominee shareholders and bearer share warrants

Question 40—Who uses nominee shareholding arrangements, and for what purpose?

96. A number of entities make use of nominee shareholding arrangements, including superannuation funds, custodians or other collective investment funds that hold shareholdings in companies for investment or fiduciary purposes. Private estate planning structures may also use nominee shareholding to increase the flexibility of such structures.

97. The purposes for which nominee shareholding arrangements are used include:

- having a local recipient of communications from the company to liaise with the beneficial owner on matters regarding the company as needed, rather than relying on mail or the beneficial owner having to monitor arrangements locally;
- administrative ease — the shares remain in the name of a broker nominee to facilitate trading;
- institutions which have a reputation for success not wanting to signal their interest in a company before they reach the 5% reporting threshold, for fear that other investors will follow them in investing in the company and thus resulting in a higher share price; and
- potential takeover bidders which seek to acquire a stake in a company before announcing a takeover bid, which they are entitled to do provided they lodge a substantial holder notice within 2 business days after reaching 5%.

Question 41—How often are nominee shareholding arrangements used?

98. Nominee shareholding arrangements for listed company shares are quite common in Australia for investment purposes through custodians. For many listed companies, their major registered shareholders are professional nominees, often holding for multiple investors which have no association with one another. The information available is, however, supplemented by the substantial holder notices which report beneficial ownership.

Question 42—What do you see as the benefits of nominee shareholding arrangements? Are there any negative aspects of their use?

99. The benefits include facilitating the objectives mentioned in answer to Question 40, above. Nominee shareholding arrangements also provide a basis for disparate and diverse groups of investors (such as retail or unsophisticated investors) to invest in diverse assets. They also provide protection to the nominee shareholder by limiting the nominee shareholder's liability.

100. Potential drawbacks include delayed responses by the beneficial owner. However, a temporary lack of transparency is mitigated by the substantial holder regime and the tracing notice regime. Sometimes nominee shareholding arrangements make it difficult for a company to engage with its shareholders on particular issues (for example, remuneration votes) if the company has not recently done a beneficial holder analysis.

Question 43—Should further obligations be introduced in order to increase the transparency of the beneficial owners of shares held by nominee shareholders?

101. Given the current substantial holder regime and the tracing notices regime, further obligations would appear to be unnecessary. Australia has among the greatest transparency of beneficial ownership of listed companies in the world.

Question 44—Are you aware of any practical obstacles which would make increasing reporting in respect of shares held by nominee shareholders problematic?

102. As most nominee shareholders shown on share registers are custodians, the custody records can produce reports of the beneficial owners for which they hold, although this would incur costs.

103. Increased reporting could undermine takeover bidders' ability to acquire a pre-bid stake in a listed company in a manner which is permissible by law, that is, acquiring a stake over time without disclosure provided the stake is disclosed in a substantial holder notice within 2 business days after the bidder reaches a 5% stake. Similarly, institutions which do not wish to signal their presence on the share register before they reach the 5% threshold could be 'outed' earlier.

Question 45—Who uses bearers share warrant, and for what purpose?

104. The Law Council has no information on who holds bearer share warrants which were issued in other jurisdictions or issued in Australia before their further issue was prohibited. The Law Council has no information on the purposes for which issued bearer share warrants are held. It is not permitted for bearer share warrants to be issued by companies under Australian law. If any bearer shares (that predate the prohibition) still exist and are surrendered, the company is under strict liability to cancel the share and enter the bearer's name into the register.

105. The *Companies Act 1981* (Cth) provided that 'a company shall not issue any share warrant.' This prohibition was carried forward in the same terms in section 189 of the Corporations Law. This provision, in turn, was eventually replaced by section

254F of the Corporations Act, which provides that 'a company does not have the power to issue bearer shares.' This change was made in 1998 as part of the Simplification Program with the report leading to the change saying:

Share warrants

26. Companies will be prohibited from issuing share warrants, as at present.

106. Bearer share warrants are the certificates which prove the entitlement of the person who holds that certificate to the relevant bearer shares. Since Australian companies do not have the power to issue bearer shares, it follows that bearer share warrants (as certificates of entitlement to bearer shares) cannot be issues by Australian companies.

Question 46—How often are bearer share warrants used?

107. They are not issued in Australia since, as noted in the response to question 45, Australian companies have no power to issue bearer shares by virtue of section 245F of the Corporations Act.

Question 47—What do you see as the benefits of bearer share warrants? Are there any negative aspects of their use?

108. The Law Council sees no reason why bearer share warrants ought to be made lawful in Australia.

Question 48—Should a ban be introduced on bearer share warrants?

109. This is already in place to prevent bearer share warrant being issued by Australian Companies, see section 254F of the Corporations Act. Making the possession in Australia of bearer share warrants with respect to foreign companies illegal would, possibly, be an appropriation of private property.

Consultation paper: Increasing transparency of the beneficial ownership of companies in Australia

10 March 2017

To: The Australian Government, The Treasury

This submission is made on behalf of the Natural Resource Governance Institute (NRGI), a non-profit policy institute based in New York that promotes the responsible management of oil, gas and mineral resources for the public good. Working in over twenty resource-rich countries, NRGI pursues this goal through research, advocacy, capacity development programs, and technical advice to governments and civil society actors. For more information, please see: www.resourcegovernance.org

The paper provides some background to the submission (section 1) and responses to the focus questions asked by the Treasury (section 2).

1. BACKGROUND TO RESPONSE

NRGI's comments are offered from the perspective of an independent non-governmental organization that is seeking evidence of good practices in the detection and prevention of corruption in the extractive industries. As an organization, NRGI believes that corruption in oil, gas and mining can be detected and prevented if oversight actors have the right information at their disposal, including on the beneficial ownership of companies. For the last 18 months, NRGI has built a record in this area and is providing technical assistance on beneficial ownership disclosure implementation in eight countries. As part of the Extractive Industries Transparency Initiative (EITI), countries now have to disclose beneficial owners of companies involved in the oil, gas and mining companies. NRGI has been supporting countries with their EITI beneficial ownership roadmaps, advising on codifying beneficial ownership disclosure in laws and regulations, and producing guidance and analytical materials on the topic.

Furthermore, as part of our research into corruption in the extractive industries over roughly the past two years, we have examined over 100 real-world cases of license or contract awards in the oil, gas and mining sectors where accusations of corruption arose. The cases came from 49 resource-producing countries.

Among the cases we examined, 55—or around half—showed signs that one or more companies had been used to channel benefits to a hidden beneficial owner. Most of these hidden owners, in turn, were Politically Exposed Persons (PEPs). Companies with PEPs as hidden beneficial owners are not uncommon in the extractive industries. Often the participation of a PEP is hidden by a company's ownership structure.

Many of the corporate vehicles that can hide beneficial ownership are not illegal per se, but all should command close review. Some can serve legitimate legal, accounting or operational goals—or purposes such as tax avoidance that, while questionable, do not mean anything illegal or strictly corrupt has occurred. But companies with the kinds of secretive attributes that might help hide the participation of a PEP should receive heightened scrutiny nonetheless, especially whenever including them in the award does not obviously promote any legitimate business or public policy interests.

From our sample of 55 cases, we developed the following list of "warning signs" that a company involved in the extractive industries has a hidden beneficial owner:

- *The company's shareholder structure includes a chain or network of shell companies, or a complex holding company structure, that obscures who ultimately owns or controls the company.*
- *The company has one or more nominee shareholders. Corporate records may explicitly identify the individual as a nominee, or he/she may exhibit common characteristics of nominees—for instance, being a shareholder or director in many other entities; working for a law firm, corporate services firm or other business that specializes in creating shell companies or managing private wealth.*
- *Some of the company's shares are bearer shares.*
- *The company's shareholder structure includes a name that appears to be altered or fabricated. This could be the name of a person or company for which no public records exist; a name that appears to have been deliberately misspelled; a name that no one with relevant knowledge recognizes; a name that otherwise closely resembles some other, identifiable name; or a known or suspected alias, particularly of a PEP.*
- *The company's shareholder structure includes a significant block of authorized but unissued shares. In some—though certainly not all—cases, this could raise suspicions that the company is holding the block of shares in reserve for a PEP.*
- *A list of shareholders for the company—whether contained in a corporate filing or some other official document—does not fully account for all of the company's issued shares.*
- *An individual with familial, personal, political, business or other close financial ties to a PEP is a shareholder, director or officer in the company. Particularly when other red flags are present, this could raise concerns that the individual is a proxy or "front" for the PEP.*
- *A shareholder with a significant interest in the company has a modest, working-class occupation that is unrelated to extractives, and that would not generate sufficient income to buy his/her stake or otherwise contribute financially to the company.*
- *When contacted, a shareholder is unaware that he or she is an owner of the company, suggesting that his or her identity may have been used without his or her knowledge or permission.*

- *An entity in the company's shareholder structure is incorporated in a jurisdiction that does not publicly report on shareholders, or does not collect or records shareholder information.*[1]
- *The company's shareholder structure contains a trust with unknown or unclear beneficiaries.*
- *The company shares a registered or actual physical address, registered agent, office space, phone number, or other business infrastructure with another firm that is owned or controlled by a PEP, or with an individual linked to a PEP.*

This list, along with summaries of some of the real-world cases we analyzed, will be part of a forthcoming NRGI publication on "red flags" of corruption due out in the next month or so.

Our responses to certain of the questions from the consultation paper, included below, are based on NRGI's record of research, analysis and technical assistance just described, and will refer to them throughout.

2. RESPONSES TO SPECIFIC QUESTIONS

3. How should a beneficial owner who has a controlling ownership interest in a company be defined?

Based on our analysis of read-world extractives corruption cases, we are recommending the following definition:

> *"A beneficial owner is a natural person who, directly or indirectly, exercises substantial control over a company or has a substantial economic interest in, or receives substantial economic benefit from, such company."*

This definition, we believe, is best placed to reach cases where a PEP or other individual involved in corruption, not through a formal equity interest but rather by virtue of indirect relationships or other lines of influence, receives a significant part of the company's economic benefit.

The findings of our research further council that language, whether in the definition of "beneficial owner" or elsewhere, about requiring companies to disclose only their "ultimate" BOs should be used carefully—or perhaps preferably, not at all. A company's "ultimate" owner, however defined, is not always clear, either to outsiders or to personnel. Instead, companies should have to disclose all owners that meet the chosen criteria for disclosure. On this point, our cases included a range of instance in which a company provided "substantial economic benefit" to multiple PEPs. For example, we saw cases in which:

- A company acted as a clearinghouse or conduit for payments to many PEPs.

[1] For an assessment of the relative transparency of different jurisdictions with regard to corporate beneficial ownership, see: Global Witness. *Company Ownership: which places are the most and least transparent?* November 2013, p. 1-12: https://www.globalwitness.org/sites/default/files/library/GW_CA_Company%20Ownership%20Paper_download.pdf.

- A PEP acted as a proxy or nominee for a higher-level PEP.
- The company's ownership structure included one or more professional nominee shareholders who represented many officials or other persons in the same or different companies.

These sorts of cases also have led us to conclude that companies participating in beneficial ownership disclosure programs should be required to identify all nominees (both natural and legal persons) and state whom they represent as part of their submissions. This should be the case even if governing law does not require disclosure of nominees in corporate filings or other official documents.

Some of our other responses, below, will take this recommended definition as a starting point.

4. In light of these examples given by the FATF, the tests adopted by the UK (see Part 3.2 above) and the tests applied under the AML/CTF framework and the Corporations Act, what tests or threshold do you think Australia should adopt to determine which beneficial owners have controlling ownership interest in a company such that information needs to be collected to meet the Government's objective?

- ***a. Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?***
- ***b. Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exerted via means other than owning or having interests in shares, or by a position held in the company? If so, how would those types of control be defined?***

Our research into extractives sector corruption suggests that tying thresholds for ownership and control to particular shareholding percentages (or other quantifiable measures such as percentage of voting rights exercised, number of board seats held) in the disclosing company risks exempting a wide range of cases from the disclosure rules. In particular, guidance on what constitutes "control" ideally would be detailed and take into account less formal scenarios. In a number of the corruption cases we analyzed, a PEP exercised control over a company via informal means, not through commonly understood rules, vehicles and processes of corporate governance. For example, we saw cases in which:

- No clear, single natural person acted as a nominee, proxy or other "front" for the PEP in the disclosing company's ownership structure.
- The PEP did not exercise any voting rights, powers of attorney, or other standard forms of corporate control in the disclosing company.
- The PEP exercised control over the disclosing company in more informal, extralegal ways—e.g., political seniority, blackmail, extortion, other threats, past favors.

If Australia adopted "substantial economic benefit" language for its definition of beneficial owner similar to the language in the definition we recommend above (under Question 3), the guidance accompanying

the disclosure rules should make clear that the rules still apply to beneficial owners who will only receive economic benefit from the company in future. During our research of extractives sector corruption cases, we saw instances in which a PEP arguably had not yet personally received any "substantial economic interest in" or "substantial economic benefit from" a disclosing company but would do so in future. For example, we saw instances in which:

- The disclosing company earned revenues to pay dividends to a PEP, or used its funds to buy assets on behalf of a PEP, but then held these for the PEP, did not distribute to him/her (e.g., held assets in a blind trust).
- The disclosing company held a block of authorized but unissued shares for a PEP.
- The disclosing company provided a PEP with something that only has value in the future (e.g., an unredeemed note, unexercised stock options).
- The disclosing company gave a PEP something that is illiquid, hard to value, for which no market exists, or which has no clear, immediate monetary value.
- The disclosing company paid someone else on orders from a PEP, such that the PEP receives no personal financial benefit.
- The disclosing company made only very small payments on behalf of a PEP (e.g., for travel, housing or entertainment expenses).

Thus far, our research has not reached any "one-size-fits-all" rule or standard for defining when economic benefit should be deemed "substantial" for purposes of detecting and preventing corrupt practices. We have considered a number of different threshold markers, including the value of the benefit conferred to government (e.g., as a percentage of revenues/earnings/profits), the value to recipient (as a percentage of income, salary, assets, etc.), value in local economic terms, number and/or frequency of payments made. Unfortunately, natural resource-related corruption is highly context specific, and it is unlikely that guidance on this point can be drafted in a way to avoid being over- or under-inclusive in some contexts. We will continue to consider the issue as our research goes on.

6. Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the ultimate beneficial owner?

A beneficial ownership disclosure program that will be a useful tool in the detection and prevention of natural resource-related corruption must reach beyond the more obvious, simple cases in which a PEP holds a hidden stake directly in a company via a nominee shareholder, bearer shares or other legal proxy. The corruption case studies from our library included many examples of PEPs holding beneficial interests in more indirect ways and via other legal entities—e.g., through:

- trusts

- complex chains of subsidiary or parent-child/sister company relationships
- different types of holding company structures
- other types of foreign or offshore investment vehicles

As such, disclosure rules ideally would make clear that companies must also report their beneficial owners who hold interests in more indirect ways, and potentially include a (non-exhaustive) list or description of the types of indirect ownership relationships that are covered. Moreover, it may also be advisable to have disclosing companies submit written statements that concretely describing how the beneficial owner holds his/her interest, and/or perhaps a diagram or corporate organogram that shows the relationship visually. Without this additional information, users of the data may often find it difficult to ascertain how the individual holds and exercises his/her ownership or control.

9. What details should be collected and reported for each natural person identified as a beneficial owner who has a controlling ownership interest in a company?

Based on our experience researching and investigating cases of oil, gas and mining sector corruption, we believe that parties attempting to use the information to identify potential corrupt practices would need the following info for each beneficial owner:

- Full name(s) including any former names, alternative names or aliases used.
- Identifying details including date(s) of birth, nationality, national identity number.
- A brief description of the means of ownership or control.
- Addresses of record.
- A description of any nominee, bearer share or other proxy relationship(s) with any legal shareholder.
- If the beneficial owner is/was also a PEP during his/her time as a beneficial owner of the company, a description of why the owner qualifies as a PEP, including information on any public office held and relevant dates in office. This information should be provided irrespective of the size of the PEP's interest in the company.

11. In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?

Same answer as for the previous question.

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission on increasing the transparency of the beneficial ownership of companies

31 March 2017

Ms Jodi Keall

Senior Adviser

Financial System Division

100 Market Street

Sydney NSW 200

Email beneficialownership@treasury.gov.au

Contact: **Emily Ryan**
President, NSW Young Lawyers

Svetlana Collantes
Chair, NSW Young Lawyers Business Law Committee

Contributors: Nicola Bailey, Veronica Clark, Priti Joshi (Editor), Ravi Nayyar, Felicia Pserras, Jermir Punthakey, Leah Serafim and Savitha Swami

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

The NSW Young Lawyers Business Law Committee makes the following submission in response to the Consultation Paper regarding increasing the transparency of the beneficial ownership of companies (**Consultation Paper**).

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The New South Wales Young Lawyers Business Law Committee (**Committee**) is a forum of like-minded individuals who have joined together to improve their own knowledge of business law and foster increased understanding of this area in the profession. The Committee reviews and comments on legal developments across corporate and commercial law, banking and finance, superannuation, taxation, insolvency, competition and trade practices.

Summary of Recommendations

A key objective of the Government's proposed changes to reporting measures around the beneficial ownership of companies is that the 'natural person(s)' who have ultimate ownership and control of a company be identified, in order to pinpoint, and correctly allocate responsibility for, illegal conduct.[1] The Consultation Paper outlines the purpose of such measures as the combating of money laundering, tax evasion, terrorism financing and other criminal activities undertaken by natural individuals under the guise of interposed legal entities, such as company or trust structures.[2]

The Committee has not addressed all of the questions in its response, but has responded to those questions within its knowledge and expertise.

In light of the Government's objectives, the Committee submits that:

1. Listed companies should be exempt from any new requirements to report on their beneficial owners because their existing disclosure obligations under the *Corporations Act 2001* (Cth) (**Corporations Act**) are sufficient to identify the beneficial owners of listed companies. Such an exemption should only apply to companies listed on exchanges with disclosure obligations that at the minimum are equivalent to those imposed by the Australian Stock Exchange (**ASX**).

2. Any reporting requirements imposed on non-listed companies should, to the greatest extent practicable, mirror the existing disclosure requirements imposed on listed entities.

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[1] Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <http://www.treasury.gov.au/>. p 11
[2] Ibid.

3. The existing ownership information collected for listed companies allows for timely access to adequate and accurate information by relevant authorities, but that penalties should be imposed on beneficial owners for non-compliance.

4. 'Beneficial owner' should be defined in accordance with the definition adopted under the Anti Money Laundering and Counter-Terrorism Financing (**AML/CTF**) Rules.

5. Whatever definition of 'beneficial owner' is adopted, where appropriate the definition of 'beneficial owner' should be consistent across all Australian legislation.

6. A distinction needs to be made between shares that are 'beneficially held' versus an asset that is 'beneficially owned' so that companies can better understand their reporting obligations.

7. The obligation to report on changes to beneficial ownership of a company should be shared among the beneficial owner themselves, the registered member and the company which is directly affected by the change to beneficial ownership. Internal data sharing and matching within ASIC could be used to identify what other entities could be affected by such a change.

8. The test to determine ownership of a company (whether direct or indirect) should be 25% of the shares in a company, consistent with the AML/CTF Rules and the UK's approach to its register of people with significant control (**PSC**).

9. The percentage of ownership required for a deemed 'relevant interest' under the Corporations Act should be raised from 20% to 25% to ensure consistency across domestic legislation.

10. In addition to the percentage ownership test, there should be a test based on control that is exerted via means other than owning or having interests in shares which is based on the definition of 'control' under the AML/CTF Rules.

11. Data sharing between domestic Government agencies and regulatory bodies may assist with identifying persons exercising indirect control (such as by reviewing the Australian Transaction Reports and Analysis Centre's (**AUSTRAC**) records to determine who may be financing a company).

12. If an individual is required to prepare an Australian tax return, they should be responsible for disclosing their beneficial ownership information in their tax return. Where a beneficial owner cannot be identified, the relevant company should be required to make a declaration that it is not aware of any threats for tax avoidance, money laundering, terrorism financing or any other illicit purpose.

13. Other than an exemption for public listed companies, there should be no other exemptions to reporting on the beneficial ownership of a company.

14. The information relating to beneficial ownership should not be made available to a member of the general public without a proper purpose, but such information should be available to government authorities only to avoid any breaches of an individual's privacy. If such information is required by a member of the general public, they should be required to make an application to ASIC and demonstrate why such information is required.

15. Unless and until generic cross-border identifiers are developed, foreign bodies that are beneficial owners should also provide details of their country of registration and any local/foreign associates, the nature of their Australian holdings and details of any disciplinary action taken.

16. Companies should be obliged to record beneficial ownership information including upon incorporation, when shares are being issued, and when shares are being transferred and should be required to review beneficial ownership information annually.

17. Registered members and beneficial owners should also have obligations to report on its beneficial owners on application for shares, when shares are being transferred to it, when changes to its beneficial ownership occur and if it is aware that the company's records are incorrect.

18. Each company should be required to keep a record of beneficial owners with their existing registers.

19. A central register should be established and maintained by ASIC. Benefits to a central register include ease of information sharing with domestic and international authorities. Other domestic authorities should be required to put in a request for information with ASIC if they require access to beneficial ownership information.

20. ASIC should update its Form 201 and 484 to facilitate the disclosure of information relating to beneficial owners.

21. ASIC should communicate reporting requirements in plain English so that beneficial owners, registered members and companies alike are aware of, and able to comply with, their reporting obligations.

22. Only the relevant company (and not the beneficial owner or registered member) should be required to supply information of the beneficial ownership to the operator of the central register (which we have suggested to be ASIC).

23. Where a registered member's beneficial interest changes, that member should be required to provide details of any change to the company within seven days of the change occurring. Once that information has been supplied to the company, the company should have 28 days within which to notify ASIC of the change.

24. An annual review and confirmation should be included in ASIC's annual statement to prompt companies to review their existing records and may increase the rate of compliance.

25. A Holder Identification Number (**HIN**) should be issued to each legal owner and each beneficial owner when their interest in a company is first notified to ASIC to record their beneficial ownership details. The use of a HIN will prevent duplication of data and reduce the burden of compliance under any reporting regime.

26. One domestic authority should be selected as the central organisation that companies are required to disclose information to. ASIC should be that domestic authority and other domestic authorities should be required to put in a request for information with ASIC if they require beneficial ownership information.

27. Beneficial ownership information should be automatically exchanged with international authorities.

28. Civil penalties should apply to companies for failure to comply with reporting obligations. Criminal penalties should apply to registered members and beneficial owners for failure to comply where it can be proven that the person in question deliberately concealed the beneficial ownership information.

29. Companies should be given one year from commencement of the legislation to report on their beneficial owners and confirm compliance.

30. Access to beneficial ownership information in a centralised location is likely to significantly reduce compliance costs for entities required to report under the AML/CTF legislation.

31. The current substantial holding disclosure provisions are sufficient to identify associates who might have the influence or control over the affairs of a company.

32. The current tracing notice obligations are sufficient to achieve the aim of providing timely access to adequate and accurate information.

33. ASIC should not have the ability to make an order imposing restrictions on shares subject to a tracing notice.

Increasing the transparency of beneficial ownership of Australian companies

Which companies are in scope?

1. Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies?

Yes. The Committee submits that listed companies should be exempt from any new requirements imposed on companies to report on their beneficial ownership, because:

1. listed companies are already subject to disclosure obligations; and
2. imposing further obligations may create an administrative burden on listed companies given their size and high volume of transactions.

Under the Corporations Act, listed companies are already subject to disclosure obligations.

ASIC, a listed company or a responsible entity of listed managed investment scheme may issue a notice (**Tracing Notice**) requiring a member to disclose details of their own relevant interest in the shares, as well as each other person's interest within two business days.[3] The obligation to report on a 'relevant interest' is broad and includes legal title as well as the ability to exercise direct and indirect control.[4] It does not matter whether the above power is express, implied, formal, informal, exercisable alone or jointly, or that it cannot be related to a particular security.[5] The purpose of this section is to look to substance, rather than the form of the power/control to ensure that the regulatory scheme is not circumvented.[6] It is evident that 'relevant interest' is defined broadly under the Corporations Act, and that a person might be required to disclose extensive ownership information where it receives a Tracing Notice.

In addition to the requirement to respond to a Tracing Notice, a person must also offer up certain information to a listed company and the relevant market operator within two business days if there is a prescribed movement in their substantial shareholding or they make a takeover bid.[7]

Companies listed on the ASX are also required to include in their annual report information about the substantial holdings of the company as disclosed to the company by its shareholders[8] and must immediately

[3] *Corporations Act 2001* (Cth). s672B(2)
[4] Ibid. s608
[5] *Corporations Act 2001* (Cth).
[6] ASIC, *Regulatory Guide 5 Relevant interests and substantial holding notices* (November 2013). RG 5.27
[7] *Corporations Act 2001* (Cth). s 671B

provide to the ASX a document it receives about a substantial holding of securities under Part 6C.2 of the Corporations Act that reveals materially different information than any current information it has received about that substantial shareholding.[9]

Given that certain shareholders of listed companies and the listed companies themselves have disclosure obligations under Chapter 6C of the Corporations Act, the Committee is of the view that there is no need for any additional obligations to be imposed on them under any new laws to report on beneficial ownership.

The Corporations Act has imposes varying obligations on public listed companies, public companies and proprietary companies, and accordingly treating public listed companies differently by exempting them from the new reporting requirement would not be novel. A public listed company which receives information subject to a Tracing Notice must establish a register of information about relevant interests which have been disclosed.[10] This obligation can be contrasted with the obligation on all companies (other than listed companies) who must record in their register of members whether the shares on issue are held beneficially or not.[11] Imposing a similar obligation on listed companies may cause an administrative burden given the volume of share purchase and sale transactions for a listed company on any given day. Proprietary companies on the other hand must also notify ASIC when there are any subsequent changes to the top 20 members of the company (including any changes to whether the shares are beneficially held).[12] This obligation is more feasible for a proprietary company because it must have no more than 50 members at any given time[13] and their shares are not freely and frequently traded on an exchange.

The Committee's view that public companies should be exempted from any new reporting requirements is consistent with the approach taken in the United Kingdom (**UK**). In the UK, companies are required to keep a register of people with significant control (**PSC**) over the company.[14] There is an exemption for listed companies trading on 'regulated markets' from reporting on their beneficial owners because they are already subject to disclosure requirements[15]. The Committee is of the view that the same approach should be adopted in Australia.

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[8] Australian Securities Exchange, *Listing Rules* (as at March 2017). Rule 4.10.4
[9] Ibid. Rule 3.17.2
[10] *Corporations Act 2001* (Cth). s 672DA
[11] Ibid. s169(54)
[12] Ibid. ss 178A and 178B
[13] Ibid. s 113
[14] *Small Business, Enterprise and Employment Act 2015* (UK). s 81
[15] *Companies Act 2006* (UK). s790B

Given that one of the primary aims of the proposed reforms is to provide consistency and transparency across Australia's corporate holdings,[16] the Committee submits that any reporting requirements imposed on non-listed companies should, to the greatest extent practicable, mirror the existing disclosure requirements imposed on listed entities. These issues are discussed in further detail below.

If so, should an exemption apply to companies listed on all exchanges or only to specific exchanges?

If an exemption to report on beneficial ownership is introduced for listed companies in Australia, the Committee submits that listed companies should only be exempt where the exchange on which the company is listed has disclosure obligations which at the minimum are equivalent to those imposed by the ASX, being Australia's primary securities exchange. As evident from the discussion above, listed companies are required to provide the ASX with information in a timely manner pursuant to the ASX Listing Rules.

2. Does the existing ownership information collected for listed companies allow for timely access to adequate and accurate information by relevant authorities?

Whilst there is room for improvement, the existing ownership information collected for listed companies allows for timely access to adequate and accurate information by relevant authorities.

The nature of information required to be provided under the Corporations Act, for instance, in response to Tracing Notices or changes to substantial holdings as discussed at Question 1 is satisfactory to disclose relevant details of direct and indirect ownership and control of a person in a company, including the interest of any 'associate' as defined in the Corporations Act.

The requirement for a person to respond to a Tracing Notice and for the substantial holder to disclose its interest to the company within two business days[17] ensures currency of information, provided sufficient administrative systems are in place to record and update the information.

However, authorities are dependent on either the cooperation and record-keeping of the person with the relevant interest, the listed company itself, or the tracing powers of ASIC to obtain some information. This may create a barrier to the timely access to information by relevant authorities. In particular, where an individual is using a company structure to avoid tax or for some other illicit purpose, they are unlikely to self-report their beneficial ownership (or any changes to it) to the company in question, or to any regulator such

[16] Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <http://www.treasury.gov.au/>.
[17] *Corporations Act 2001* (Cth). s 671B

as ASIC. Accordingly, the Committee submits that criminal penalties should be imposed on a beneficial owner for deliberate non-compliance, which will be discussed in further detail below.

What beneficial ownership information should be captured?

Identifying the natural persons who have a controlling ownership interest in a company

3. How should a beneficial owner who has a controlling interest in a company be defined?

The Committee submits that 'beneficial owner' should be defined in accordance with the definition adopted under Rule 1.2.1 of the Anti Money Laundering and Counter-Terrorism Financing Rules[18] (**AML/CTF Rules**). Under the AML/CTF Rules, reporting entities are obligated to collect and verify information about those who beneficially own (meaning own 25% or more of a person directly or indirectly) or control (whether directly or indirectly including by trusts, agreements, arrangements, understandings and practices) its customers.[19] 'The definition of 'beneficial owner' adopted under the AML/CTF Rules is consistent with the definition proposed by the Financial Action Task Force (**FATF**),[20] as it includes control exercised pursuant to agreements and arrangements.

The definition of 'beneficial owner' under the AML/CTF Rules also correlates with the current definition of 'relevant interest' under the Corporations Act, as it includes:[21]

1. the concept of indirect and direct share ownership; and
2. in its definition of control, control through the capacity to determine decisions about financial and operating policies.

Accordingly, the definition under the AML/CTF Rules should be adopted to ensure consistency in the definition of 'beneficial owner' domestically.

Whatever definition of 'beneficial ownership' is adopted, the Committee submits that where appropriate the definition of 'beneficial ownership' be made consistent across Australian legislation. For example, under income tax legislation, the concept of 'beneficial ownership' is relevant when deciding whether the 'primary'

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[18] *Anti Money Laundering and Counter-Terrorism Financing Rules 2007 No. 1*. made under s 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
[19] Ibid. Part 4.12 and Rule 1.2.1
[20] Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <http://www.treasury.gov.au/>. p 2
[21] *Corporations Act 2001* (Cth). s608(3)

or 'alternative' test should apply when determining whether there has been a continuity of ownership permitting a company to carry forward its tax losses.[22] Beneficial ownership is not defined under the tax law, and is given its common law meaning.[23] Under the common law, 'beneficial ownership' means 'ownership for one's own benefit, not for the benefit of others',[24] and is to be distinguished from legal ownership, like the legal ownership of shares according to the register of its members.[25] If the definition of 'beneficial owner' as defined under the AML/CTF Rules is adopted in relation to a company's obligations to report on its underlying owners, then there will be varying definitions of 'beneficial owner' under the law, which may create confusion about an individual or company's reporting obligations.

The legislature should also clarify whether a distinction needs to be made between shares that are 'beneficially held' versus an asset that is 'beneficially owned'. There is commentary to suggest that the latter has a wider meaning that the former. [26] It is important for this issue to be clarified because as discussed earlier, the Corporations Act also prescribes reporting obligations in relation to shares that are 'beneficially held'. For example, a company (other than a listed company) must record in their share registers whether the shares are held beneficially or not.[27] In addition, a proprietary company needs to notify ASIC when there is a change to whether a top 20 member's shares are held beneficially.[28] A company must be made aware of its obligations under the Corporations Act, and the nuances between the definitions of 'beneficially held' and 'beneficially owned' so that it is able to comply with its reporting obligations.

4. In light of these examples given by the FATF, the tests adopted by the UK and the tests applied under the AML/CTF framework and the Corporations Act, what tests or threshold do you think Australia should adopt to determine which beneficial owners have controlling ownership interest in a company such that information needs to be collected to meet the Government's objective?

a. Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?

As discussed at Question 3, the Committee submits that Australia should adopt the definition of 'beneficial owner' under the AML/CTF Rules. Accordingly, the relevant threshold of ownership should be 25% (whether held directly or indirectly) held by a person together with their associates as defined under the Corporations Act. This percentage is consistent with the threshold of ownership applied in the UK with respect to their

[22] *Income Tax Assessment Act 1997* (Cth). s 165-150; CCH, *Australian Federal Income Tax Reporter (ITAA 1997)*. (at 181-520)
[23] Ibid.
[24] Ibid. Citing *Ayerst (HMIT) v C&K (Construction) Ltd* (1976) AC 167.
[25] Ibid. Citing *Avon Downs Pty Ltd v FCT* and *Patcorp Investments Pty Ltd v FCT*.
[26] Ibid.
[27] *Corporations Act 2001* (Cth). s 169(5A)
[28] Ibid. s178A(1)(b)(viii)

definition of PSC.[29] Given the ability for cross-border investment to occur, the Committee's view is that a globally consistent definition would make it easier for beneficial owners to report their interests in companies to authorities across a variety of jurisdictions if the reporting requirements are the same. In addition, if the information is shared by central authorities across jurisdictions (which is further discussed below), then each central authority will be able to rely on the information supplied by other authorities as the standard of information supplied will be the same.

As discussed at Question 1, the Corporations Act already has a concept of 'relevant interest' which defines the scope of a person's disclosure obligations, in particular pertaining to takeovers and substantial holding disclosures.[30] A person may be deemed to have the same relevant interest in any securities that certain companies or managed investment schemes hold, where that person has 20% of the voting power in that company or managed investment scheme. The Committee recommends that the threshold under the Corporations Act for a deemed 'relevant interest' should be amended to 25% to ensure consistency across domestic legislation, which will better assist with compliance under any reporting regime implemented for beneficial owners.

Care should be taken in balancing policy objectives of fighting money laundering, terrorism financing, tax fraud and other illicit activities against the piercing of the corporate veil and undermining of a fundamental tenant of corporations law which is the separation of the identity of the owners and the company's legal identity.[31]

b. Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exerted via means other than owning or having interests in shares, or by a position held in the company? If so, how would those types of control be defined?

As noted at Question 3, the Committee submits that the definition of 'beneficial owner' under any new reporting requirements should be the same as the definition adopted in the AML/CTF Rules. This definition does not just encompass direct and indirect share ownership, but also includes an individual who has a 'controlling' interest. 'Control' has an expansive definition under the AML/CTF Rules and includes control as a result of trusts, agreements, arrangements, understandings and practices, including the ability to exercise control through decision-making about financial and operating policies.[32] This definition of control is similar to that which is adopted under the Corporations Act when determining whether an individual has 'control' for

[29] *Companies Act 2006* (UK). Schedule 1A Part 1
[30] ASIC, *Regulatory Guide 5 Relevant interests and substantial holding notices* (November 2013).
[31] *Salomon v A Salomon & Co Ltd* [1897] AC 22.
[32] *Anti Money Laundering and Counter-Terrorism Financing Rules 2007 No. 1*. Rule 1.2.1

the purpose of identifying whether it has a 'relevant interest' which is subject to a disclosure obligation. The Committee submits that the definition of 'control' under the AML/CTF Rules be applied to ensure consistency across domestic legislation.

5. How would the natural persons exercising indirect control or ownership (that is, not through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?

The Committee submits that some natural persons exercising indirect control could be identified by increasing data matching between Government agencies and regulatory bodies (such as the ATO, ASIC, ASX and AUSTRAC). For example, under the AML/CTF framework, reporting entities (being financial institutions and providers of designated financial services) must report certain cash transactions, any international funds transfers and suspicious transactions to AUSTRAC.[33] Such information collected by AUSTRAC could be shared with ASIC to determine who is responsible for financing an Australian company, and may thereby provide guidance over who may exert indirect control over that entity.

In addition, ASIC should have the investigative power to issue a Tracing Notice to a member or beneficial owner requiring it to provide to ASIC details and documents relating to its beneficial ownership.

6. Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the beneficial owner?

No. If each individual company in a group of companies was required to report on the change in beneficial ownership, this would result in unnecessary duplication of resources for companies within a group. Instead, the Committee submits that the obligation to report on changes to beneficial ownership of a company should rest with the registered member and the beneficial owner themselves and the company which is directly affected by the change to beneficial ownership. This is consistent with the approach taken in the UK, where the obligation to maintain a PSC register rests with both the company, (which must take reasonable steps to identify their PSCs, and conduct at least annual checks to ensure the company's PSC information is correct) and the actual PSCs (who have a separate obligation to inform the company of changes to their beneficial ownership).[34]

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[33] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). ss 41, 43 and 45

[34] Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <http://www.treasury.gov.au/>. p 9

Once such information has been reported to ASIC, ASIC could then use internal data sharing and matching processes, to determine in turn which other entities could be affected by such a change in beneficial ownership.

7. Do there need to be special provisions regarding instances where the relevant information on a beneficial owner is held by an individual who is overseas or in the records of an overseas company and cannot be identified or obtained?

There are existing measures under the Common Reporting Standard (**CRS**) for the automatic exchange of financial account information (including beneficial ownership information) on account holders who are foreign tax residents.[35] It is submitted that these measures are sufficient for present purposes. Especially because such a 'standard will minimise the compliance burdens for… financial institutions, maximise the effectiveness of the standard itself and result in increased voluntary compliance'.[36]

With respect to any individuals who cannot be identified, the Committee submits that the relevant company should be required to sign a declaration when lodging the company tax return stating that it has taken all reasonable steps to obtain and verify information relating to its ultimate natural person beneficial owners, and that they were not aware of any threats from a tax avoidance, money laundering or other illicit-activity perspective. This position is consistent with Australia's AML/CTF legal framework, which requires reporting entities as defined by section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) to collect and take reasonable measures to verify beneficial ownership information of customers in relation to normal and enhanced customer due diligence obligations, unless exemptions apply.[37]

8. Should there be exemptions from beneficial ownership requirements in some circumstances? What should those circumstances be and why?

Apart from the exemption discussed in relation to listed companies above, the Committee submits that there should be no other exemptions to reporting on the beneficial ownership of a company.

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[35] Ibid. p 6
[36] Organisation for Economic Cooperation and Development Global Forum on Transparency and Exchange of Information for Tax Purposes, *Transparency 2016: Report on Progress* (2016). p 9
[37] Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <http://www.treasury.gov.au/>. p 6

Details of beneficial owners to be collected

9. What details should be collected and reported for each natural person identified as a beneficial owner who has a controlling ownership interest in a company?

The following information should be collected by companies in respect of each 'beneficial owner':

1. legal name of the person, including any aliases or former names;
2. type of interest held (e.g. shareholder, director);
3. birth date (for accurate identification purposes only);
4. nationality;
5. address for service;
6. quantum of interest held;
7. capacity in which interest is held;
8. relationship with any other entities holding a beneficial or non-beneficial interest in the same company or group of companies;
9. a copy of the relevant trust deed / agreement giving rise to the beneficial interest;
10. tax identification number (if applicable);
11. details of any prior legal convictions or current legal proceedings,

(together, the **Prescribed Information**).

A balance must be reached between obtaining information sufficient to achieve the overarching purpose of transparency of share ownership to target illicit activities and respecting the privacy of natural persons, particularly if information reported is readily accessible by all members of the public. For some individuals, personal details will need to be kept confidential, such as high profile, high wealth individuals or individuals otherwise at risk of their safety.

Unlike the UK model with the PSC register,[38] the Committee submits that the Prescribed Information should not be made available to anyone with a proper purpose, but such information should be available to government authorities only to avoid any breaches of an individual's privacy.

The need to protect an individual's privacy can be demonstrated by the Government's recent amendments to the law requiring the ATO to disclose information about the owners and assets of Australian private

[38] Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <http://www.treasury.gov.au/>. p 9

companies with income of more than AU$200 million for the income tax year ending 30 June 2014 onwards.[39] Business community leaders were deeply concerned about risks of kidnap and ransom of high net worth individuals, and well as the serious impact to individuals' privacy for no apparent taxation revenue benefit.[40] In light of this example, individuals and companies may feel that the accessibility of their information to the general public is in breach of their privacy. If such information is required by a member of the public, they should be required to show cause to ASIC about why the information is needed.

A similar protective regime applies to silent voters in local, state and federal elections.[41]

10. What details should be collected and reported for each other legal person identified as such beneficial owners?

In addition to the Prescribed Information listed above, details held about legal persons identified as beneficial owners should include information sufficient to pierce the corporate veil and readily identify the constituency and control of the legal person. For instance, director and shareholding information should be disclosed, as should details presently held by ASIC, such as ACN, service address, date of registration and any reported actions (such as the commencement of winding up proceedings or the appointment of an external administrator) and documents filed (such as annual reports). Considering that ASIC already has available a significant amount of information relating to companies registered in Australia, internal data matching could be used by ASIC to reduce the reporting requirements and duplication of reporting for complex company structures.

11. In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?

Difficulties arise in reconciling information across different jurisdictions. Unless and until cross-border generic information identifiers are developed, the type of information necessary for foreign individuals and bodies corporate includes, so far as possible, the Prescribed Information. This is to achieve as much consistency in data collection and retention as possible.

In addition, information should be disclosed regarding the country in which the foreign individual/body corporate is registered and operates, the identity of any local or foreign associates (as defined in the Corporations Act) and the nature and extent of any other Australian holdings.

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[39] *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015* (Cth).
[40] Nassim Khadem,'Private Companies Restructure to Avoid Being Named on ATO's Tax Disclosure List', *The Sydney Morning Herald*, 21 March 2016.
[41] See for example: *Commonwealth Electoral Act 1918* (Cth). s 104

Knowledge regarding any foreign or local disciplinary action against the body corporate or its members may also be of relevance to certain regulatory authorities and Australian stakeholders, particularly in respect to foreign entities involved in finance or trade.

How and where to record beneficial ownership information?

How should this information be collected and stored?

12. What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?

A company should have the following obligations to make enquiries to ascertain and collect information regarding its beneficial owners:

1. on incorporation, the person making the application to register the Australian company should identify 'current and accurate' information about its beneficial owners; [42]

2. when the company seeks to issue shares and raise capital, the company should be required to obtain the Prescribed Information about the company's beneficial owners prior to issuing any shares in the company;

3. where shares on issue in a company are bought and sold in the secondary market, the company should have the power to refuse to record the transfer of shares and refuse to record the incoming member in the register of members unless and until it has received the Prescribed Information; and

4. companies should have an obligation to maintain the accuracy and currency of the Prescribed Information relating to beneficial owners regularly. The Committee submits that companies should be required to make enquiries with members to verify the accuracy of the Prescribed Information annually.

The obligations placed on the company as suggested above is consistent with the current AML/CTF framework which requires reporting entities to include in their compliance programs appropriate systems and

[42] Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership* (October 2014).

controls' for ascertaining each customer's beneficial owner, collecting certain beneficial ownership information and taking reasonable measures to verify this.[43]

It is evident that companies will not be able to comply with their obligations to record information about the beneficial owners of its shares without the co-operation of the registered holders of the shares, and the underlying beneficial owners. Accordingly, the Committee submits that both the registered holders of the shares (those persons with the legal title) as well as the underlying beneficial owners should have the obligations to provide the company with information regarding the beneficial ownership of its shares to the company when:

1. an application is made to subscribe for shares in a company. The application should contain the Prescribed Information about the beneficial owners of the shares;

2. an existing shareholder seeks to sell its shares on the secondary market. The incoming member should be required to the Prescribed Information to the company before it may be registered as a member;

3. a registered member's beneficial interest changes, that member must provide details of any change to the company within seven days of the change occurring. The Committee does not take the view that this disclosure needs to be made within two business days, as is required under the Corporations Act for changes to the 'substantial holding' of listed companies because proprietary companies and non listed public companies generally have a longer timeframe within which to provide ASIC information under the Corporations Act, as discussed above; and

4. The person becomes aware that the information held by the company is incorrect, they must notify the company immediately so that the company may update its records. [44]

The obligation on beneficial owners to notify the company of changes to its beneficial interest is consistent with the approach taken in the UK where PSCs have an obligation to notify the company of any changes. [45]

The Committee takes the view that the obligation to offer up the Prescribed Information should rest with both the legal owner and the underlying beneficial owner. The reason for this is that the legal owner will be recorded on the register of members and readily identifiable. Accordingly, any obligations imposed will be

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[43] *Anti Money Laundering and Counter-Terrorism Financing Rules 2007 No. 1*. part 4.12
[44] Department for Business Innovation & Skills United Kingdom Government, *Register of People with Significant Control: Guidance for People with Significant Control Over Companies, Societates Europaeae and Limited Liability Partnerships*. p 15.
[45] Ibid. p 13.

readily enforceable as against the legal owner. With respect to the beneficial owner, however, failure to 'offer up' the Prescribed Information to the company (or any government authority) may mean that the beneficial owner is unidentifiable and accordingly enforcement against such an individual will be difficult.

13. Should each company be required to maintain their own register?

Yes. The Committee submits that each company should be required to keep a record of the Prescribed Information with the share register it is required to maintain under s 169 of the Corporations Act. Given that companies are already required to maintain a register of members, the Committee takes the view that requiring companies to also record the details of the beneficial owners will not be too onerous or costly.

14. How could individual registers being maintained by each company provide relevant authorities with timely access to adequate and accurate information? What would be an appropriate time period in which companies would have to comply with a request from a relevant authority to provide information?

Once the registered holders of the shares and the underlying beneficial owners have complied with their obligations to report the Prescribed Information to the company (as discussed at Question 12 above), companies should have the obligation to supply this information to ASIC within 28 days of receiving the Prescribed Information from the beneficial owner/registered member. ASIC would then have such information readily available, and it could be made available to relevant government authorities in a timely manner when required. The Committee submits that companies should be required to report on changes to beneficial ownership to ASIC regularly rather than upon receiving a request from a government authority, as the latter approach may alert the company that the beneficial owners are being investigated.

15. Should a central register of beneficial ownership information also be established?

Yes. The Committee submits that a central register of beneficial ownership should be established in addition to the requirement for companies to record the Prescribed Information in its register of members. This would be similar to the way in which proprietary and non-listed public companies are required to maintain their own shares registers, but proprietary companies are also required to report to ASIC about the changes in its top 20 holdings by lodging an ASIC Form 484. The Committee submits that all companies (other than listed companies) should be required to report its beneficial owners and any changes to beneficial ownership to ASIC so that ASIC may collate such information to form a 'central' register.

This approach is similar taken in the UK in relation to its register of PSCs.

16. What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?

Advantages of a central register (as opposed to an individual register) include:

1. the operator of the central register can provide other domestic authorities with access to information about beneficial ownership without notifying the company, the registered member or the underlying beneficial owner that the beneficial owner is being investigated and thereby effectively target illicit activities. The strengths of such an approach are demonstrated in a case study by AUSTRAC in its approach to the collection and dissemination of financial intelligence to partner agencies. In the 2015-16 financial year, AUSTRAC received more than 78,000 suspicious matter reports and suspect transaction reports from reporting entities, financial intelligence contributing to Serious Financial Crime Taskforce activities raising $130 million in liabilities.[46] In the previous reporting period, financial intelligence distributed by AUSTRAC contributed to 16,038 ATO cases, raising $466 million in income tax assessments and debt collections.[47]

2. a central register would better facilitate cooperation between international government agencies in sharing beneficial ownership information. Criminals exploit contemporary financial interconnectedness and conduct regulatory arbitrage across borders.[48] In the process, they exploit corporations for money laundering purposes,[49] especially a serious risk in Australia.[50] Hence, international coordination is crucial, not least because paragraph 3(1)(a) of the AML/CTF Act calls for it through Australia fulfilling its international AML obligations. However, international coordination, in the Committee's view, requires countries to have central registries of beneficial owners operated by respective corporate regulators, and accessible to financial intelligence units (**FIUs**) and law enforcement agencies. This is due to resultant efficiency of intelligence sharing. That, in turn, facilitates swift anti money laundering enforcement activities, exemplified by the 857 exchanges of financial intelligence AUSTRAC conducted with international FIUs,[51] aided in no small part arguably by its having a functional, centralised database of such intelligence. The FATF

[46] Australian Transaction Reports and Analysis Centre, *AUSTRAC Annual Report: 2015-16* (2016). p 9
[47] Australian Transaction Reports and Analysis Centre, *AUSTRAC Annual Report 2014-15* (2015). p 9
[48] Alexander Kern, 'The International Anti-Money Laundering Regime: The Role of the Financial Task Force' (2001) 4(3) *Journal of Money Laundering Control* 231. p 232
[49] Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership* (October 2014). p 3
[50] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia Mutual Evaluation Report* (2015). p 112
[51] Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (2015). p 12, citing AUSTRAC, 'AUSTRAC Annual Report 2014-15' (Report, Australian Transaction Reports and Analysis Centre, 2015).

considers the 'exchange of information with a foreign counterpart …a critical component of measures to obtain information on a corporate vehicle.'[52]

Disadvantages of a central register include:

1. where a company is also required to maintain its own register, this will result in duplication of information; and

2. set-up and compliance costs. Such a register would need to be updated regularly, and this would require additional resources on the part of the operator (who we have suggested to be ASIC).

17. In particular, what do you see as the relative compliance impact costs of the two options?

ASIC already maintains records about companies on its register, and in particular maintains information about the top 20 shareholders of proprietary companies. The Committee submits that as ASIC has the infrastructure available to record the Prescribed Information electronically on its register, the Committee does not foresee a considerable cost to ASIC, particularly where the obligation is being placed on the company to record the information in ASIC's database electronically. Where Prescribed Information must be provided to ASIC on incorporation or within 28 days of the company receiving such information from the member or beneficial owner, the respective ASIC forms (being the Form 201 and 484) could be amended to reflect that this information must be provided. As the ASIC paper Form 484 is no longer available,[53] the Committee does not envisage there being a considerable cost to ASIC in updating its online form.

However, for the companies which are required to disclose the Prescribed Information to ASIC, there may be additional internal costs as the company would require an employee or third party service provider to manually input the Prescribed Information into ASIC's system.

Operation of a central register

18. Who would be best placed to operate and maintain a central register of beneficial ownership? Why?

As Australia's current corporate, markets and financial services regulator, ASIC should operate and maintain the central register of beneficial ownership. The argument for such a conclusion is two-fold.

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[52] Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership* (October 2014).
[53] ASIC, *Changes to your company* <http://asic.gov.au/for-business/changes-to-your-company/>.

First, practices seeking to strengthen reporting requirements of companies should be implemented within the appropriate infrastructure. Existing regulatory bodies such as ASIC will maximise efficiency of existing resources while minimising the potential for duplication of information and for existing resources to become obsolete. The benefit of such an approach is that it will ensure that ASIC remains flexible to future changes in the law and similarly, will ensure that new practices are consistent and operable with the current framework. Continuity within the legal landscape will improve the information recorded on the existing ASIC company register[54] and in turn increase the transparency of the beneficial ownership of companies, allowing relevant competent authorities to combat illicit activities.

Second, building upon the company records maintained by ASIC will provide a holistic understanding of each company. As noted above, currently ASIC requires private companies to provide details of their top 20 members in each class of share, including any change as to their beneficial ownership, company members and any subsequent changes to member details to ASIC. For a fee, the public may obtain a company extract setting out current and historical information on membership, and each separate document notifying of changes.[55] By requiring companies and owners to disclose beneficial ownership of shares, ASIC's records and company extracts provide a more complete picture of the company. This would ensure that beneficial ownership information is available to competent authorities, which would in turn allow authorities to investigate companies and owners in a timely and effective manner without alerting the subject of the investigation.[56]

19. What should the scope of the register operator's role be (collect, verify, ensure information is up to date)?

The objectives of the operator should be to maintain adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons.[57] To facilitate these objectives, the scope of the operator's role should be to:

1. communicate the meaning of beneficial ownership in plain language. Companies, registered members and beneficial owners may not understand what information is required of them, and this will make it difficult for them to comply with any reporting obligation placed on them;

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[54] Namely, the register of companies incorporated within Australia and normally maintained by or for ASIC. This does not refer to information held by or for the company itself.
[55] Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <http://www.treasury.gov.au/>. p 4
[56] Such an approach has been adopted and useful in the United Kingdom see Department for Business Innovation and Skills, 'Beneficial Ownership Transparency – Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK', March2016 ('UK Department for Business Innovation and Skills Report') 27.
[57] 'Financial Action Task Force, *International Standards on combating money laundering and the financing of terrorism and proliferation - the FATF Recommendations* (2012). p 84.

2. specify the basic information required from companies to identify the beneficial owner(s);
3. implement mechanisms so that beneficial ownership of a company can be determined in a timely manner, for example by giving the relevant regulator (such as ASIC) investigative powers;
4. create automated alerts to notify related agencies (AUSTRAC, ATO, etc.) and ASIC departments of activity or information that requires further investigation; and
5. assess the money laundering and terrorist financing risks associated with different types of legal persons created within Australia.

These are described in further detail below.

Basic Information

To determine who the beneficial owners of a company may be, competent authorities would require information about the legal ownership and control structure of the company. The operator should ensure that it collects information about the voting rights of the company, its officeholders, shareholders and members.[58]

Mechanisms

The operator should ensure that:

1. companies maintain the Prescribed Information on the beneficial ownership of a company at a specified location within Australia;
2. this information be provided promptly upon request by a competent authority (as further discussed below); and
3. companies maintain their information and records for at least seven years, including in situations where companies cease to be operable due to liquidation and/or winding up of a company (as further discussed below).

Assessment of risks

It is essential to eradicate obstacles to transparency to allow competent authorities to make an accurate assessment of risk. This could be performed through:

1. Requiring disclosure of beneficial interests be provided by both the company, the registered member, beneficial owner and any other entity which may be currently required to store such

[58] Ibid.

information under existing laws (such as reporting entities under the AML/CTF Act);

2. Requiring shareholders with a controlling interest to notify the company, and the company to record their identity; and
3. Requiring nominee shareholders and directors to disclose the identity of their nominator to the company and to the relevant registry, and for this information to be included in the relevant register.[59]

20. Who should have an obligation to report information to the central register? Should it be the company only or also the persons who meet the test of being a relevant 'beneficial owner'?

The Committee submits that the obligation to notify the central register maintained by ASIC should lie only with the company. This is analogous to the manner in which a proprietary company must notify ASIC to the changes in its membership, and the way in which public listed companies must notify the ASX of changes to its substantial interest under the existing legal framework.

Similar to the way in which shareholders with a substantial interest are required to notify the company of any change to their shareholding, a beneficial owner should have an initial obligation to inform the company of any changes to its beneficial ownership. It would then be the company's responsibility to update its register of members and to notify the operator of the central register regarding the changes in beneficial interest in a timely manner.

While companies would be reliant on the legal or the beneficial owner of the shares to notify it of the details of the beneficial owner, the Corporations Act could be amended to provide that where the information relating to the beneficial owners has not been provided to the company, the company may refuse to record the relevant member in the register of members. While companies may be able to modify their existing Constitutions to permit them to refuse to register the shares in such a scenario, this would result in an immediate short term cost to companies.

21. Should new companies provide this information to a central registry operator as part of their application to register their company?

Yes. As discussed at Question 12, the Committee submits that new companies should be required to provide the Prescribed Information to ASIC as part of their application to register a company. To facilitate the transparency of beneficial ownership of a company, the Prescribed Information should be obtained and

[59] Ibid. p 24

recorded by a company as part of their application. The Committee recommends that the ASIC Form 201 required for company incorporation be amended to include the Prescribed Information pertaining to the beneficial owners of the shares.

22. Through what mechanism should existing companies, and/or relevant beneficial owners, report?

The operator should implement a combination of mechanisms[60] to ensure that companies are providing up-to-date information on the company's beneficial ownership structure. The Committee recommends that the following reporting mechanisms be implemented:

1. on the commencement date of legislation imposing reporting obligations regarding beneficial owners, existing companies should be given a transitional period (of one year) to bring their records in line with the requirement to record beneficial ownership. This will ensure that they are given sufficient time to comply with any new obligations imposed on them;
2. for companies incorporated on or after the commencement date of the legislation, such companies should be required to provide details of their beneficial owners on incorporation as discussed at Question 12;
3. all companies should be required to maintain up-to-date information on its beneficial ownership structure on its respective company register and should be required to notify the operator of any changes to the beneficial ownership of their shareholders within 28 days of receiving notice from the beneficial owner or registered member. The Committee recommends that the ASIC Form 484 be amended to include prompts requesting the Prescribed Information, which can be lodged electronically;
4. requiring companies to take reasonable measures[61] to ensure that it can obtain and hold up-to-date information on its beneficial ownership;
5. requiring companies to review its beneficial ownership annually in its annual statement and confirm that the details are up to date;[62] and
6. ensure that companies cooperate with competent authorities to the fullest extent possible in determining the beneficial owner.

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[60] A combination of mechanisms will increase transparency in beneficial ownership of companies so long as it seeks to ensure that information obtained by a company is available within a specified location in Australia and will provide for effective mechanisms to be in place to ensure that authorities are able to determine matters in a timely manner – see Financial Action Task Force, '*FATF Guidance – Transparency and Beneficial Ownership*', October 2014 18.

[61] Measures taken should be proportionate to the level of risk or complexity induced by the ownership structure of the company or the nature of the controlling shareholders.

[62] A similar procedure has been recommended in the United Kingdom, see Department for Business Innovation and Skills, '*Beneficial Ownership Transparency – Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK*', March2016 ('UK Department for Business Innovation and Skills Report') 11.

Ensuring information is accurate and current

23. Within what time period (how many days) should any changes to previously submitted beneficial ownership information have to be reported to a company (where registers are maintained by each company) or the registry operator (where there is a central register)?

As discussed at Questions 13 to 15, the Committee takes the view that there should be both a company maintained register as well as a central register.

Where a registered member's beneficial interest changes, that member should be required to provide details of any change to the company within seven days of the change occurring.

Once that information has been supplied to the company, the company should have 28 days within which to notify ASIC of the change.

24. If reporting to a central register is required, should this information be included in the annual statement which ASIC sends to companies for confirmation with an obligation to review and update it annually?

Yes. As the reporting of changes to beneficial ownership requires on voluntary compliance, an annual review and confirmation included in ASIC's annual statement will prompt companies to review their existing records and may increase the rate of compliance.

25. What steps should be undertaken to verify the information provided to a central register by companies or their relevant beneficial owners? Who should have responsibility for undertaking such steps?

First, a Holder Identification Number (**HIN**) should be issued to each legal owner and each beneficial owner when their interest in a company is first notified to ASIC. The details provided should match the register's record under the existing HINs. In the event of inconsistency, the person that submitted the information to the register should be asked electronically to check and clarify whether:

1. the HIN is correct (and if not, to provide the correct HIN);
2. the corresponding details are correct (and if not, to provide the correct details); or
3. the registry should update the old details with the new details.

The use of a HIN will prevent duplication of data. Where a person acquires another beneficial interest in a company at a later date, it may provide its HIN to the company provided that the associated information recorded under the HIN is not out of date. Such a system will reduce the burden of compliance under any

reporting regime.

Second, random audits of companies should be undertaken (without advance notice) to verify the accuracy of the information.

Third, as further discussed at Question 26 below, cooperation and exchange of information ought to occur between agencies. Where an agency (such as AUSTRAC or the ATO) or a department of ASIC is alerted to a lack of compliance, this may prompt measures to verify the information in the register.

Exchange of information between authorities

26. Should beneficial ownership information be provided to one relevant domestic authority and then shared with any other relevant domestic authorities? Please explain why you agree or disagree.

One domestic authority should be selected as the central organisation that companies are required to disclose information to. This is because the Government's commitment to achieving transparency runs the risk of being heavily undermined if there is no practical method by which domestic authorities can access the relevant information quickly, easily and accurately.

As ASIC already maintains a register of companies, it appears to be an appropriate choice for such a process. Other domestic authorities (such as the ATO or AUSTRAC) can therefore put in a single request for information with ASIC rather than issuing requests to several other authorities which would require excessive time and resources.

It would be less of an administrative burden on companies if they were required to disclose information to one authority rather than to provide the same information to multiple authorities. This would also make it easier for companies to comply with disclosure obligations and to respond to Tracing Notices as the disclosure process would become more streamlined.

The PSC appears to be a step forward in the UK's implementation of the FATF standards and the move towards transparency. The Australian Senate Committee began considering such an approach in 2015 Report, *Insolvency in the Australian Construction Industry,*[63] suggesting that such a register ought to correspond with a register of directors' names. The Senate Committee also recommended that ASIC take on the task of setting up these registers.

[63] *Insolvency in the Australian Construction Industry*, Senate, December 2015

However, the potential impact of designating one domestic authority that companies would be required to disclose information to should also be considered. That is:

1. a significant degree of time and resources would need to be dedicated to setting up a branch of the organisation that can receive and manage all the information received;
2. programs would need to be developed for the other domestic authorities such as the ATO or the AFP to be able to request information from ASIC and receive the requested information expeditiously; and
3. measures would need to be implemented to allow ASIC to record why information is being requested by other domestic authorities to ensure that sensitive information obtained regarding the beneficial ownership of companies is used appropriately.

27. Should beneficial ownership information be automatically exchanged with relevant authorities in other jurisdictions? Please explain why you agree or disagree.

The Committee submits that beneficial ownership information should be automatically exchanged with international authorities so that the authorities have a more complete picture of beneficial ownership, especially with respect to companies that have shareholders that are incorporated or resident overseas.

Sharing beneficial ownership information with international authorities may mean that Australia is able to receive reciprocal information. This will allow the ATO to identify Australian tax residents who have not declared foreign income, or have made and failed to disclose a capital gain on the disposal of a foreign asset. The sharing of beneficial information globally will ensure better tax compliance domestically.

An automatic exchange of information would require that the:

1. information platforms be developed that contain relevant information which can be quickly accessed by participating states;
2. necessary manpower is dedicated to set up platforms that can amalgamate such information across several systems; and
3. information that companies are required to disclose to the relevant international authorities are consistent.

It is important that process of disclosing information to international authorities be as simple and as streamlined as possible. This would assist in preventing the risk of large foreign investors seeking to either

reduce holdings in particular nations or stop purchasing financial products in particular nations all together in order to avoid burdensome reporting requirements.[64]

The effectiveness of setting up an international exchange of information might also be affected by the countries that might not choose to participate in the exchange of information. It is noted that there are many countries that may not wish to make public the relevant information as their governments might depend on offshore assets as a source of revenue.[65] There are also many nations that are known to be well-established tax havens which are not currently part of FATF. A few examples of these countries include Monaco, the Cayman Islands, Mauritius, the Isle of Man and Bermuda.[66]

However, with more governments implementing measures to improve access to beneficial ownership information, it is likely that public pressure will cause regulatory change in countries which have historically been less transparent. Notably, the British Virgin Islands, which is perhaps one of the most renowned international tax havens, has recently amended legislation to comply with FATF conditions.[67] While the amendments still do not require the keeping of a public register which would be highly desirable, this example displays the great possibility of increased international access to information in the future.

Other implementation and administration issues

Sanctions

28. What sanctions should apply to companies or beneficial owners which fail to comply with any new requirements to disclose and keep up to date beneficial ownership information?

Civil penalties should apply to companies for failure to comply, as these companies will be reliant on the underlying beneficial owners and the registered members to offer up the Prescribed Information.

Criminal penalties should apply to registered members and beneficial owners for failure to comply where it can be proven that the person in question deliberately concealed the Prescribed Information from the

[64] The Australian Financial Markets Association, Submissions to Australian Treasury, *Improving Australia's Framework for Disclosure of Equity Derivative Products*, 31 July 2009
[65] Alexia Fernandez Campbell, 'The Cost of Corporate Tax Avoidance', *The Atlantic* (online), 14 April 2016 https://www.theatlantic.com/business/archive/2016/04/corporate-tax-avoidance/478293/
[66] Andrew DePietro, '12 Best Tax Havens in the World', *GoBanking Rates*, 21 February 2017 https://www.gobankingrates.com/personal-finance/10-best-tax-havens-world/8/
[67] Niki Olympitis, Sara-Jane Knock, Lynette Ramoutar and Lucy Hannett, 'British Virgin Islands: Recent Changes To BVI Legislation - Limited Disclosure Of Control And Ownership', 24 March 2016 http://www.mondaq.com/x/476654/Shareholders/Recent+Changes+To+BVI+Legislation+Limited+Disclosure+Of+Control+And+Ownership

company. The Corporations Act already contains criminal penalties for certain breaches of that Act.[68] The Committee submits that any criminal penalties imposed should be 'proportionate and dissuasive',[69] as per FATF guidance. The Committee submits that the requisite intent should be required in prosecuting criminal offences as a person may have failed to report in accordance with their obligations because they genuinely did not understand their obligations under the reporting regime.

Transitional arrangements

29. How long should existing companies have from when the legislation commences to report on their beneficial owners? What would be an appropriate transition period?

The Committee submits that companies should be given one year from commencement of the legislation to report and confirm compliance.

Whether or not currently recorded on a register, those responsible for managing ownership registers or the owners themselves are likely to have sufficient knowledge of their beneficial interests such that reporting of beneficial ownership information is unlikely to be burdensome. Depending on the degree of detail of Prescribed Information required to be reported, it is likely that only limited inquiries will need to be made by the company to obtain such Prescribed Information.

Furthermore, the difficulty in accessing such beneficial information currently is unlikely to be that this information is not available, but rather those in the position of beneficial ownership have limited obligations to disclose such information. If legislation is enacted to require the Information to be reported, particularly where there are criminal penalties imposed on beneficial owners for failing to offer up the Information, this barrier will be overcome.

The operator of the central register could also require reporting entities under the AML/CTF framework to offer up the information which they have already collected to assist with setting up the central register, although such information could be outdated by the time the central register is established.

[68] *Corporations Act 2001* (Cth). Schedule 3
[69] Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership* (October 2014). p 22.

Impact on affected companies and stakeholders

30. Do you foresee any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?

The Committee's submission has touched on several recurring issues relating to the practical implementation of reporting requirements for beneficial ownership. In summary, these are:

1. **education:** Companies, registered members and beneficial owners may not understand the new reporting requirements. ASIC would need to implement an educational program to educate people of their obligations under the new requirements. In addition, ASIC would need to distinguish between those that innocently misunderstand the requirements and those that deliberately avoid compliance;

2. **compliance costs:** As further discussed in Question 31 below; and

3. **privacy**: Please refer to our discussion in Question 9 above.

31. What types of compliance costs would your business incur in meeting any new requirements for record-keeping and reporting of beneficial ownership information?

As this submission is on behalf of the New South Wales Young Lawyers, the Committee's response is of a general nature and not specific to any business.

There are two factors to consider when assessing any cost implications of record-keeping or reporting beneficial ownership information:

1. how easily the information can be obtained; and
2. how easily the information can be regularly recorded and updated.

Cost of obtaining beneficial ownership information

As discussed earlier, privately held companies are already required to notify ASIC of changes to its top 20 members, including any changes to beneficial ownership. The beneficial ownership information that is anticipated to be reported as part of beneficial reporting obligations is likely to already be known by the beneficial owners. If reporting obligations were extended to require details of beneficial ownership, it would be a matter of documenting the beneficial owners or existing registered members providing those details to the company.

In relation to a company's obligations to obtain the information about its beneficial owners, this will not be problematic for proprietary companies where the sole shareholder is also the sole director. However, where a company is more widely held, this might require some investigative effort on the part of the company to identify its existing beneficial owners and may cause the Company to incur a time and financial cost. Alternatively, companies may refuse to register any transfer or allotment of shares in the company until it has first received details of the beneficial owners from the incoming member. This will assist to reduce the administrative burden and cost for the company to comply with its obligations. However, this may also require an immediate short term cost on the company, as the company may need to amend its existing constitution to allow it to have this power.

Recording/reporting the beneficial ownership information

It is acknowledged that there are real and sometimes significant costs incurred by companies in maintaining its registers (whether recorded centrally or otherwise). However, given privately held companies are already required to report details of its top 20 members and any changes to those members' beneficial ownership, reporting additional details about the beneficial ownership is unlikely to be a significant additional burden to such companies.

The additional burden is going to arise when changes to the details of the beneficial owner are required to be recorded or reported in circumstances when the details of the legal owner does not. The frequency of this, and therefore additional cost, will be dependent on the nature of the beneficial ownership and ownership arrangements. Whilst this is likely to be a real cost, it is unlikely to be significant.

Considering the above factors, it is unlikely that businesses are going to incur significant additional compliance costs to report details relating to the beneficial ownership information.

33. If companies had access to the additional beneficial ownership information collected, could this reduce companies' compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?

For companies, such as those deemed reporting entities pursuant to AML/CTF legislation, access to beneficial ownership information in a centralised location is likely to significantly reduce compliance costs. Any opportunity for a reporting entity (or any other entity) to obtain details directly from a public (or access-approved) register will reduce the need for that entity to approach its customer/the company and therefore avoid lengthy exchanges to obtain the beneficial ownership information.

34. Could any changes be made to streamline or merge existing reporting requirements in order to reduce the compliance costs for businesses?

Current reporting requirements are often duplicated. This is especially so in the context of AML/CTF where reporting entities are required to collect (and take reasonable measures to verify) the beneficial ownership information in relation to their customers. The resource effort to comply with such obligations falls on the reporting entities but also on their customers.

If reporting entities could obtain access to a central register, with consent or approval of companies, to the required beneficial ownership information of their customers, there would be no need for internal compliance officers to report such information to the various reporting entities. This would drastically decrease the compliance costs of businesses particularly in relation to their dealings with banking institutions.

Other beneficial ownership transparency issues

Identifying those who can control listed companies

35. Are the current substantial holding disclosure provisions sufficient to identify associates which may have the ability to influence or control the affairs of a company? What changes could be made to improve their operation?

Yes, the current substantial holding disclosure provisions are sufficient to identify associates who might have the influence or control over the affairs of a company. Where a person and their associates obtain voting power in 5% or more of an ASX listed company they must make disclosure of this publicly within two business days.[70]

However, there is scope for broadening the information required to obtain a more complete picture of the beneficial owners. For example, s 608(3) of the Corporations Act sets out what constitutes a 'relevant interest' in a security held by a body corporate. Where the test applied in relation to a 'relevant interest' is in relation to voting power, a person having a relevant interest if he/she, together with any associates has voting power of more than 20% or controls the operation of the securities. However, this provision does not necessarily capture trusts that do not have a corporate trustee or that do not qualify as a managed investment scheme.

This is problematic because while many larger trusts put in place corporate trustees as a means to better protect their assets, it is also likely that there are trusts without corporate trustees which would fall outside

[70] *Corporations Act 2001* (Cth). s 671B

the scope of this provision. It is therefore recommended that the definition of a relevant security interest be broadened to include more assets that may be controlled by associates in Australia.

The Corporations Act also prescribes the thresholds of share ownership in a company which trigger disclosure requirements; these being 5% to qualify as a "substantial holder" and 20% in circumstances of takeovers. There is, however, no obligation to identify the holders of smaller percentages of shares in a company. It is therefore worth considering whether the 1-4% of shareholders should be required to disclose ownership so that the use of derivatives and share custodians, which might cause difficulties in identifying true ownership information, can be minimised.

36. Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies?

The current Tracing Notice obligations are sufficient to achieve the aim of providing timely access to adequate and accurate information.

Under the current Tracing Notice obligations, ASIC, a listed company or the responsible entity for a managed investment scheme may require a member or a person previously named as having a 'relevant interest' to make disclosure about the details of their own relevant interest and the details of each other person who has a relevant interest in the shares. [71] The person is required to make a disclosure within two business days of being given the direction, or receiving an exemption to disclose,[72] ensuring a timely disclosure to the market.

The reality of the Australian and the international economic market is that people can devise company structures through perfectly legal means in which the beneficial ownership is not necessarily clear cut or even known to the legal owner. For example, in circumstances where a share custodian has been instituted in a company, the legal owner often does not have access to information concerning the true beneficial owners.

As such, it might be the case that a person given a Tracing Notice to disclose information might only be able to provide information to the "extent which it is known" without being in a position to provide further details. It might be the case here that ASIC would need to issue another notice to the newly identified entity to obtain a more complete picture regarding the beneficial ownership situation.

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[71] Ibid. s 672A
[72] *Corporations Act 2001* (Cth). s 672B(2)

Similar consequences arise in circumstances where the government requires information about beneficial ownership which is accurate at the time it is disclosed. The beneficial owner of shares might constantly shift as a result of the relevant company structure. For example, derivatives that have a limited temporal lifespan may be issued by a company. The derivative which might give rise to the relevant interest that the beneficial owner has might not be permanent. Therefore the information given by the person to the authority might not be considered to be accurate at a later time, after the lifespan of the derivative has lapsed. However, it might be useful for the person to disclose the existence of temporal ownership to better assist the authority in understanding the nature of the beneficial ownership.

38. In order to improve and incentivise compliance with the tracing notice regime should ASIC have the ability to make an order imposing restrictions on shares the subject of a notice until the notice has been complied with?

The Committee submits that ASIC should not have the ability to make an order imposing restrictions on shares subject to a Tracing Notice. This is because such an order may have the effect of suspending the decision making of a company where the person that is subject of the Tracing Notice is a majority shareholder.

The Committee submits that the existing legal framework already provides sufficient mechanisms to incentivise compliance. It is expected that substantial holders give full disclosure about the nature of their holdings rather than a minimal or technical disclosure.[73] Failure to do so is a civil liability offence.[74] With effective enforcement mechanisms therefore already in place, if there are delays in notices being complied with or the information requested in the notice is not accurately set out, the terms of the notice and the relevant disclosure provisions should be reviewed rather than for restrictions to be imposed on the relevant shares. Imposing restrictions on shares is a severe measure to take, especially in circumstances where it is acknowledged that companies are challenged by requirements to comply with competing and often overlapping disclosure obligations. Imposing regulations which are difficult to comply with along with severe penalties for noncompliance is likely to frustrate companies in their ability to meet disclosure obligations rather than create a more cohesive and transparent exchange of information.

The Committee understands that giving ASIC such powers would assist with ensuring compliance, as ASIC and the relevant company rely on the registered member or the beneficial owner of a company to offer up information relating to the beneficial owners. Allowing ASIC to place restrictions on shares (such as restrictions on voting or the transfer of shares) may incentivise the registered members and the underlying

[73] ASIC, *Substantial holding disclosure: Securities lending and prime broking*, Regulatory Guide 222, April 2011
[74] *Corporations Act 2001* (Cth). s 671C

beneficial owners to offer up this information. The Committee submits that if such a power is introduced, that ASIC be required to:

1. use such a tool sparingly, and as a last resort after a Tracing Notice has been issued and the member has been given a reasonable opportunity to reply.
2. apply to the Court for such an order, rather than have the power to restrict the shares independently. The requirement for an independent review of the circumstances by a Court will ensure that ASIC has reasonable grounds for taking such action.

39. What other changes could be made to improve the operation of these provisions?

The Government should seek a general review of the regulatory requirements on companies to reduce overlapping, inconsistent, redundant or unnecessary requirements, and to ensure terminology is consistent between international and domestic standards. Such improvements would reduce the regulatory burden on both companies and the government, and increase compliance.

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Chair

NSW Young Lawyers Business Law Committee

Email: buslaw.chair@younglawyers.com.au

13 March 2017

Manager
Corporations and Schemes Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: beneficialownership@treasury.gov.au

Consultation: **'Increasing Transparency of the Beneficial Ownership of Companies'**

Submission: **Provided by Mel Flanagan of Nook Studios**

We welcome the opportunity to provide a submission on this Open Government Partnership Commitment.

Our response contains a supporting statement of the Publish What You Pay submission and the Nook Studios individual responses to questions posed.

Publish What You Pay Submission

We strongly support the statement provided on the need for, and the benefits of, a publicly available register. We also would like to reinforce the importance of raising this in all discussions on the introduction of a beneficial ownership registry in Australia in order to deliver on the Australian Government's commitment to-openness and transparency.

We also support the implementation of mandatory disclosure legislation requiring mining and oil and gas companies to publish what they pay to governments where they operate.

We would also like to raise the issue of ensuring there is an interconnectedness in Open Government Partnership commitments, policies and initiatives. We recommend that the Government establish a way to refine the National Action Plan commitments to ensure it delivers on existing agreements, and our objective of genuine and meaningful openness.

Nook Studios Context

Nook Studios is a small business based in Sydney, Australia. We are a collective of open government advocates, producers and designers of government content and information services. Much of the work we do is interpreting data, visualising it, and designing services to make it easily accessible for non-technical audiences and users.

Director, Mel Flanagan participated in developing the National Action Plan and contributed to Open Data policy development. She has been a member in the Open Government Partnership International Natural Resources Working Group since December 2016.

Our interest in beneficial ownership is based on our experiences producing the NSW Government's first open government web service Common Ground, between 2012-2014 with NSW Department of Trade and Investment.

Common Ground is a community engagement tool to help people easily access maps and other useful data about exploration, mining and production activities and extractive industries operating in NSW.

http://commonground.nsw.gov.au/#!/

Since 2015, we have worked with other NSW Government Departments, where the issue of open access to beneficial ownership information is increasingly required to ensure fair dealings and transparency on government decisions.

Aside from extractives industry, open access to information about beneficial owners to combat corruption relates specifically to: procurement, planning, environment, agriculture, and infrastructure.

Relevant Experience and Insights Related to Extractive Industries

Open access to Beneficial Ownership is inextricably linked to commitments 1.3 Extractive Industries Transparency, 2.2 International Open Data Charter, and 4.3 Open Contracting.

The Common Ground web service provides easy to understand explanations of policy, legislation, the process companies must go through to establish operations, and the role of community in the decision making process for any potential activity in NSW.

Data includes: resource type, title types, locations of activities, stage of the project, title holder (company) details, application approval letters and licences, environment assessments, mine safety and well reports.

Titleholders are; individuals, sole traders, proprietary limited companies, corporations, joint ventures, subsidiaries or organisations. Identifying exactly who these entities are, the level of involvement, responsibility, accountability and influence is extremely important for community and government.

Common Ground is unique in that people can search for titles and maps via company name. However, the title data presented only shows the main titleholder name, not other parties and titleholders involved in the project and operations.

http://commonground.nsw.gov.au/#!/companies

The NSW Department and Investment collects the information about all titleholders of an application or licence and royalty payments but it was not in a format that could be linked and published at the time of the beta version launch in 2015.

Another major data sharing issue in NSW is that as information passes between government departments from Resources and Energy to Mine Safety to Planning and Environment and the Environment Protection Authority, there is no consistent naming convention to link the title/operations data or project names.

Project names change constantly and at different stages of projects and with different departments. This is a global problem and obstacle to transparency.

There are design challenges in displaying the multitude of companies and their roles on projects but this is a problem that is worth solving. Technology now exists that could overcome this problem. However, open access to company information and beneficial ownership is a powerful way to help solve this data design problem and provide compelling social and economic benefits as well as build trust in Government.

Company Data Research Insights

We conducted extensive stakeholder research and engagement whilst designing and developing Common Ground. The issue of lack of access to company ownership information and opacity of the complex web of company structures, was raised as a problem universally by community, industry and government:

Industry

Industry was especially concerned about reputation and the industry “cowboys” who were making it difficult for others.

Industry was willing to provide additional information to ensure communities and government (state and local) had accurate contact details and links to details of engagement community consultations etc.

A frequent response from industry was a Government service would be valuable and provide a legitimate channel for companies who do the right thing to publish timely, accessible, and accurate information. Those who didn't provide information would be seen to be not complying.

The consensus was that openly publishing the information would help distinguish companies that were behaving responsibility and help build better reputations with communities and investors, than those who don't.

Government

The political context for Common Ground was corruption. The Department was under pressure and intense scrutiny. In 2012 two former NSW Resource Ministers Eddie Obeid and Ian MacDonald were under investigation for corruption.

This situation is a compelling reason for open access to beneficial ownership. In this context Government staff, community members, and investors would have been alerted to the misuse of access to information, and links to decision makers (Ministers), companies and property owners.

General Public & Communities

Areas of concern for community were; understanding who is operating in their communities, how reputable and responsible companies were, and what level of political influence they had.

A big issue was, the people behind the companies and how they were connected to local communities. During research, people provided many examples of where local councillors were found to have used their influence and financially benefitted through a complex web of companies and associations.

Phoenix companies were also a real concern. People wanted to know who was in fact accountable and responsible for operations, safety, environmental impacts and rehabilitation. For communities where jobs were promised, accessing information about the company's financial stability was an issue and in assessing when downturns happened, whether communities were at greater risk from job losses due to bankruptcy.

Quality and accuracy of the data was highlighted as problem. When data became open to the public via Common Ground, errors were spotted and fixed.

We also conducted research and have had ongoing feedback from the investment sector and legal fraternity. This stakeholder group welcomed access to company information and identified the need for more detailed company information.

Summary

We raise this background experience and use of data to highlight what is possible and how, by providing open access to company and beneficial ownership data. This could have a positive impact for industry, communities, and all levels of Government information management, help build trust and be a driver of innovation.

Responses to Specific Questions

1. Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exemption apply to companies listed on all exchanges or only to specific exchanges?

A. No

5. How would the natural persons exercising indirect control or ownership (that is, not through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?

A. The company and natural person should report individually and that information should be checked to determine it is correct and any discrepancies will be obvious.

6. Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the ultimate beneficial owner?

A. Yes.

7. Do there need to be special provisions regarding instances where the relevant information on a beneficial owner is held by an individual who is overseas or in the records of an overseas company and cannot be identified or obtained?

A. No. All information must be provided no matter where beneficial owners reside or are located. If the information cannot be provided, there is a serious cause for concern.

8. Should there be exemptions from beneficial ownership requirements in some circumstances? What should those circumstances be and why?

A. No.

9. What details should be collected and reported for each natural person identified

as a beneficial owner who has a controlling ownership interest in a company?

A. Consider international best practices and types of data captured and what is relevant in our local context. The UK reference is a good place to start. The point is to identify people, be able to locate them, understand the length of association with the company, and if required determine their networks of influence and associates.

10. What details should be collected and reported for each other legal persons identified as such beneficial owners?

A. Same as above.

11. In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?

A. Same as above.

Operation of a central register

If a central register was to be established, there would be different options as to which entity would be the operator of such a register. Such a register could be operated by ASIC in addition to or as part of the register of company information which it already operates and maintains. It could also be operated by a different government entity which is already involved in maintaining registers of information, such as the Australian Business Register. Alternatively, such a register could be privately operated.

Response: this register should be Australian based, and not privately operated. For it to be secure and the data easily shareable and reusable across Government and published to the general public, it should remain within the Government.

12. What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?

A. Both should be compelled to provide information when requested.

13. Should each company maintain their own register?

A. Yes. However, if the Australian Beneficial Ownership Register were open and using open data, they would not have to have a duplicate version. This is a compelling reason to make this publically available and open as in the UK.

14. How could individual registers being maintained by each company provide

relevant authorities with timely access to adequate and accurate information? What would be an appropriate time period in which companies would have to comply with a request from a relevant authority to provide information?

A. 30 days unless extenuating circumstances. See UK best practices.

15. Should a central register of beneficial ownership information also be established?

A. Yes.

16. What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?

A. A trusted, secure, and accurate source of information and resource for everyone to publically access. Providing an open and transparent register means you can crowd-source corrections to errors and omissions.

17. In particular, what do you see as the relative compliance impact costs of the two options?

A. It should be business-as-usual and best practice for companies to understand who owns them. It's extraordinary that they do not.

18. Who would be best placed to operate and maintain a central register of beneficial ownership? Why?

A. The Australian Government.

19. What should the scope of the register operator's role be (collect, verify, ensure information is up to date)?

A. Collect, verify, ensure current and accurate data, co-ordinate enforcement, publish data to an open public platform so all stakeholders, including companies, and the general public can access it freely.

20. Who should have an obligation to report information to the central register? Should it be the company only or also the persons who meet the test of being a relevant 'beneficial owner'?

A. Both. The UK model ensures people (individuals) are responsible for providing information, and if they don't they are penalised. Unless this is in place, people won't be compelled to provide accurate information.

21. Should new companies provide this information to a central registry operator as part of their application to register their company?

A. Yes. And existing companies requested to add information.

22. Through what mechanism should existing companies, and/or relevant beneficial owners, report?

A. Through existing channels such as ASE and a central Government platform/web service. How this data can be linked so information isn't duplicated, is a design challenge worth exploring further.

23. Within what time period (how many days) should any changes to previously submitted beneficial ownership information have to be reported to a company (where registers are maintained by each company) or the registry operator (where there is a central register)?

A. 14 days (which I understand is the UK model).

24. If reporting to a central register is required, should this information be included in the annual statement which ASIC sends to companies for confirmation with an obligation to review and update it annually?

A. Yes. It makes sense to ensure this information is current and accurate.

25. What steps should be undertaken to verify the information provided to a central register by companies or their relevant beneficial owners? Who should have responsibility for undertaking such steps?

A. What is the UK precedent? Are there other international examples of best practice and experience?

Exchange of information between authorities

The Government is committed to taking action to fulfil its international commitments around access for domestic and international 'relevant authorities' to beneficial ownership information: law enforcement bodies, regulators and other government agencies. Increasing the beneficial ownership information available to relevant authorities will enhance their ability to combat and prevent illicit activities such as tax evasion, money laundering and terrorism financing.

Response. The UK and many other countries have taken an open approach. Australia should too.

26. Should beneficial ownership information be provided to one relevant domestic authority and then shared with any other relevant domestic authorities? Please explain why you agree or disagree.

A. Beneficial Ownership information should be publically available as in the UK

27. Should beneficial ownership information be automatically exchanged with relevant authorities in other jurisdictions? Please explain why you agree or disagree.

A. Beneficial Ownership information should be publically available as in the UK

28. What sanctions should apply to companies or beneficial owners which fail to comply with any new requirements to disclose and keep up to date beneficial ownership information?

A. UK system is straightforward and strongly enforces compliance. This should be considered within the Australian context.

29. How long should existing companies have from when the legislation commences to report on their beneficial owners? What would be an appropriate transition period?

A. 60 days. All companies and individuals should have their information at hand, easily accessible and shareable.

30. Do you foresee any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?

A. Companies and individuals should have information easily available to be shared with authorities. If they do no, there should be cause for concern.

31. What types of compliance costs would your business incur in meeting any new requirements for record-keeping and reporting of beneficial ownership information?

A. Small businesses should not be affected. It's the larger businesses with complex ownership networks and joint ventures that will have a lot more work to do.

32. If you are already required to comply with AML/CTF obligations, how do you see any new requirements to collect beneficial ownership interacting with those existing obligations?

A. N/A

33. If companies had access to the additional beneficial ownership information collected, could this reduce companies' compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?

A. It is logical that a well-designed system with good data capture and sharing capabilities will make everyone's jobs easier and more efficient.

34. Could any changes be made to streamline or merge existing reporting requirements in order to reduce the compliance costs for businesses? L SEP

A. My business is small and this currently does not impact me.

38. In order to improve and incentivise compliance with the tracing notice regime should ASIC have the ability to make an order imposing restrictions on shares the subject of a notice until the notice has been complied with?

A. Yes.

43. Should further obligations be introduced in order to increase the transparency of the beneficial owners of shares held by nominee shareholders? L SEP

A. Yes.

Mel Flanagan
Nook Studios
Mel.flanagan@nookstudios.com

The Treasury

Submitted electronically: beneficialownership@treasury.gov.au

14 March 2017

Submission to 'Increasing Transparency of the Beneficial Ownership of Companies'

Publish What You Pay (PWYP) Australia welcomes the opportunity to provide this submission to The Treasury on its consultation paper 'Increasing Transparency of the Beneficial Ownership of Companies' as part of its commitment in Australia's National Action Plan for the Open Government Partnership.

PWYP Australia is a coalition of humanitarian, faith-based, environmental, anti-corruption, research and union organisations campaigning for greater transparency and accountability in the extractive industries. PWYP Australia works with the global Publish What You Pay coalition, a network of over 800 member organisations in more than 60 countries around the world, united in their call for an open and accountable extractive sector, so that oil, gas and mining revenues improve the lives of women, men and youth in resource-rich countries. Globally, PWYP is asking for national governments, including Australia, to implement mandatory disclosure legislation requiring mining and oil and gas companies to publish what they pay to governments where they operate.

This submission focuses on providing information on the benefits of a publicly available register, which are not covered in the consultation paper. PWYP Australia would like to emphasise the importance of this factor in any discussion on the introduction of a beneficial ownership registry in Australia.

Australia's global commitments to a publicly available Beneficial Ownership Register:

PWYP Australia is encouraged by the Government initiative to address the opacity of beneficial ownership in Australia. Beneficial ownership information is crucial to fighting corruption and ending money laundering and tax evasion. Hidden ownership of companies negatively affects governments and business, and has a substantial fiscal impact globally and in Australia. The OECD estimates that corruption adds 10% to the cost of doing business globally and is equivalent to a 20% tax on foreign business[1], while in Australia, The Australian Crime Commission report 'The Costs of Serious and Organised Crime in Australia 2013-14' found that 70% of Australia's Serious and Organised Crime threats were based offshore, or had 'strong offshore connections', and had cost Australia $36 Billion AUD[2]. This has been occurring as Australia has continued to slide down the International Corruption Perception Index, dropping 6 positions since 2012 to its current ranking of 13[3].

Access to beneficial ownership is increasingly seen as good business practice. 90% of respondents to the 2016 EY Global Fraud Survey believed it was important to know the ultimate beneficial ownership of the entities with which they do business[4]. As Director General of the UK Institute of Directors, Simon Walker, said "So-called 'anonymous companies', in which the corporate veil is used to conceal illegal activities, have no place in a modern economy and bring the entire business sector into disrepute."[5] We are also aware that countries where there is a lack of transparency around beneficial ownership are being used more frequently to house shell companies. In Canada they have named this 'snowwashing - the use of Canada's good reputation and economic stability as a cover to make suspicious transactions seem legitimate.'[6] It is therefore welcomed to see the Australian Government take action on this important global issue.

However, PWYP Australia is disappointed that the Government has continued to avoid committing to a beneficial ownership registry that is open to the Australian public. Australia is signatory to, or has made commitments within, numerous global mechanisms that are broadly aimed at increasing

[1] OECD in http://bteam.org/plan-b/ending-anonymous-companies-report-published/
[2] https://www.acic.gov.au/publications/intelligence-products/costs-serious-and-organised-crime-australia
[3] http://www.abc.net.au/news/2016-01-27/australia-perceived-as-more-corrupt/7118632

[4] http://www.ey.com/gl/en/services/assurance/fraud-investigation---dispute-services/ey-global-fraud-survey-2016

[5] http://bteam.org/plan-b/ending-anonymous-companies-report-published/
[6] PWYP Canada - Submission to the Standing Committee on Industry, Science and Technology February 22nd, 2017 Re: Bill C-25 and Beneficial Ownership Transparency

transparency, access to data, and ending corruption[7][8][9]. Acknowledgment of the interconnectedness of these initiatives is often missing from Government policy and initiatives and PWYP Australia feels that this is reflected in this consultation paper. This consultation paper is being released as part of the commitments the Australian Government has produced for our National Action Plan (NAP) to the Open Government Partnership (OGP). Commitments made in the NAP are not independent of each other, but rely on coordinated implementation for success. Not mentioned within this consultation paper is that commitment 2.2 in Australia's NAP 'Build and maintain public trust to address concerns about data sharing and release' includes a milestone that Australia will adopt the International Open Data Charter[10]. The International Open Data Charter has six principles, and while all are relevant, we make note here that the first principle is that data is 'open by default'[11]. This is a position that the Australian Government has also taken in its public data policy statement[12]. The OGP also encourages this position, and has incorporated the message into its published materials as 'Open by default, policy for the people, and accountability for results'[13]. PWYP Australia strongly believes that a beneficial ownership registry that is not publicly accessible would go against the spirit of the OGP and would not meet the principles of the Open Data Charter. Further, commitment 1.3 in Australia's NAP is implementing the Extractives Industries Transparency Initiative (EITI) for which Australia is currently in the process of preparing a candidacy application. The EITI contains a requirement for beneficial ownership information to be included within a country's EITI reports, which are publicly available, by 2020.

Numerous countries are in the process of implementing or exploring beneficial ownership registries, with the UK currently being the first to have done so, and to have also made publicly available. Rather than re-invent the wheel, PWYP Australia believes the Government should look to the UK as the standard on how a publicly available register could be modelled. This would also contribute to global interoperability as beneficial ownership disclosure becomes the global standard of reporting.

The Government can also look to the UK as a guide to challenging any arguments that arise against a publicly available registry, as these arguments have already been debated and answered abroad.

[7] https://www.ministerjustice.gov.au/Mediareleases/Pages/2016/SecondQuarter/UK-Anti-Corruption-Summit.aspx
[8] http://www.oecd.org/australia/australia-oecdanti-briberyconvention.htm
[9] http://dfat.gov.au/international-relations/themes/corruption/international-anti-corruption-efforts/Pages/united-nations-convention-against-corruption.aspx
[10] http://ogpau.pmc.gov.au/australias-first-open-government-national-action-plan-2016-18/commitments/ii-open-data-and-digital-1
[11] http://opendatacharter.net/principles/
[12] https://www.dpmc.gov.au/sites/default/files/publications/aust_govt_public_data_policy_statement_1.pdf
[13] http://www.opengovpartnership.org/sites/default/files/091116_OGP_Booklet_digital.pdf

During the consultation process for the UK registry, government submissions highlighted the numerous benefits of an open registry, a selection of which are noted bellows as being applicable within the Australian context:

Transparency International United Kingdom[14]

- Enable civic scrutiny.
- If a register of beneficial ownership were not made public, then - without substantial investigative capacity being provided to Companies House to ensure compliance and accuracy in reporting - the utility of the register will be dramatically reduced.
- By making the register public, scrutiny will be enabled from across civic society, the media, businesses due diligence, and financial institutions conducting KYC and AML procedures.
- As a crime where there is no immediate 'victim report', corruption is notoriously difficult for police to investigation and civic scrutiny of illicit finance and stolen assets through of transparent information can be essential to start investigations.
- A public register would reduce the cost of businesses' and financial institutions' due diligence,
- An open registry would enable cross-border investigations – often required for money laundering investigations - to progress, and progress at a much faster speed.

Global Witness[15]:

- Provide businesses with important information on their partners, investors, suppliers and customers.
- Ensure that law enforcement and tax authorities, including those from outside the UK, have quick and guaranteed access to beneficial ownership information.
- Allow citizens, journalists and others to hold companies to account.
- Give financial institutions a good starting point when it comes to identifying their customers for anti-money laundering purposes.

Save the Children UK[16]:

[14] TRANSPARENCY & TRUST: ENHANCING THE TRANSPARENCY OF UK COMPANY OWNERSHIP AND INCREASING TRUST IN UK BUSINESS UK Department for Business Discussion Paper Submission by Transparency International UK (TI-UK) Sept 2013
[15] What an effective beneficial ownership registry looks like November 2013
[16] Response to the consultation on enhancing transparency of UK company ownership Save the Children UK 16 September 2013

- Public data enables civil society, journalists and others to hold companies and governments to account. The principle of public accountability for corporate actions is enshrined in the UN Guiding Principles on Business and Human Rights. Public transparency of this information is also important as governments, particularly in developing countries, may not have the capacity or the incentives to investigate cases of tax evasion or corruption. The 'many eyes' principle should increase the likelihood of journalists and civil society identifying malfeasance.
- Public data provides tax authorities in developing countries access to beneficial ownership information. The G8, G20, and OECD have taken welcome steps towards automatic information exchange - the gold standard in information exchange between this is a long term process. However, in the interim, most developing countries do not have access to quick and easily accessible information on companies operating internationally which may be evading taxes.
- Quality control of the data. If the information is open to the public, there will be 'many eyes' looking at the information, increasing the chance that errors are spotted and fixed. If provided in an open data format, this information can be cross referenced with other data sets increasing the likelihood of errors being spotted.

Criticisms levelled at a public registry reported in the media primarily revolve around the issue of privacy, or potential risks to individuals[17], arguments that were also debated in the UK. However the Court of Justice of the European Union found that 'the right to protect personal data is not absolute. Rather, this right must be considered in relation to its function in society and be balanced with other fundamental rights, in accordance with the principle of proportionality. In other words, the right of people to keep their financial affairs secret must be balanced against the need of society to prevent financial crimes.'[18] Germany is currently having the same discussion at a national level. Civil Society there also stresses the point that we cannot let 'personal security' be the bait and switch for public accountability'[19] while also highlighting that the UK data has shown that in 90% of the cases, the data being made public was already publicly available in another form.

The UK allowed for exemptions in cases of extreme security concerns. Initial research has indicated that even with an enormous number of beneficial owners being identified through the registry in the UK (in excess of 1 million); only 30 have been successfully granted the right to have their names

[17] http://www.afr.com/news/public-register-of-shell-companies-gross-overreaction-20160422-gocwa7#ixzz4ZHveFtD3
[18] Open Society Foundations https://financialtransparency.org/reports/terrorism-inc-how-shell-companies-aid-terrorism-crime-and-corruption/ October 28th, 2013
[19] https://blog.opencorporates.com/2017/02/28/germany-do-not-let-personal-security-be-the-bait-and-switch-for-public-accountability/

concealed due to security concerns[20] demonstrating that the realistic security issues stemming from a public registry would not be as numerous as they have been argued in the media. PWYP Australia believes that by following the UK example of how they have addressed these issues, Australia could negate any concerns and pursue a register that was open.

While it is still early days in the UK for reporting, Global Witness has already demonstrated the power and usefulness of a public beneficial ownership registry. A concern raised during the UK process was that companies would struggle to identify their beneficial owners; however Global Witness research showed that this was not the reality, and only 2% of companies struggled to identify all owners or find the information required for reporting[21]. Further, and more importantly, their initial findings suggested that 19 senior politicians (known as politically exposed persons), 76 people from the U.S. sanctions list and 267 disqualified directors were listed as beneficial owners.[22] They also found that almost 3,000 companies listed their beneficial owner as a company with a tax haven address, which is disallowed under the UK rules[23]. This was all discovered from data that had only been published in the period June to November 2016.

EITI

Australia is in the process of preparing an application to be accepted as candidate country in the EITI. Briefly, the EITI is a domestic and voluntary reporting mechanism for the extractives industries. Once a country is accepted as a candidate, it must fulfil the various requirements of the EITI standard[24] to be found 'compliant'. There are currently 51 implementing countries in the EITI.

In 2016, the EITI released a new standard that included a requirement on beneficial ownership reporting. [25] This requirement means that by 2020, all implementing countries must ensure that all oil, gas and mining companies that bid for, operate or invest in extractive projects in their countries publish the names of their real owners.

[20] Global witness Blog / Nov. 22, 2016 WHAT DOES THE UK BENEFICIAL OWNERSHIP DATA SHOW US? https://www.globalwitness.org/en/blog/what-does-uk-beneficial-ownership-data-show-us/
[21] ibid
[22] ibid
[23] ibid
[24] https://eiti.org/document/standard
[25] https://eiti.org/document/standard#r2-5

The EITI requires that this 'is publicly accessible, be it through national registers or through other means.'[26] The rationale for this being that 'public accessibility to BO information is crucial not only to build public trust, but also to enable stakeholders beyond government authorities to use and monitor the information, which will help increase reliability of the data and support efforts to crack down on any dodgy activities… Anything less than public access to the most basic BO data could lead to missed opportunities for fighting illicit behaviour and undermine other global efforts for public access to beneficial ownership data.'[27] As of February 2017, 45 Countries have published their roadmap of how they will fulfil the beneficial ownership requirement. [28] Of the 45, analysis by Open Ownership[29] has shown that 20 countries have committed to making these a publicly open registry.

It is expected that Australia will be admitted as a candidate country to the EITI in late 2017. The EITI Multi Stakeholder Group will then have to develop as part of its work plan a roadmap for how Australia will report on beneficial ownership and how it will be made available. Australia will then be required to have publicly available beneficial ownership information for extractive industry companies, be that in a register or published in the annual EITI reports.

For Australia to be publishing beneficial ownership information for one industry, when there is no intention to make a national register publicly available sends a confusing message to the business sector, the Australian community, and on the global stage. It indicates a misalignment in Government objectives and also has resource implications with a requirement to make available beneficial ownership information while concurrently exploring and implementing a private registry. PWYP Australia also strongly agrees with the extractives industries position that global reporting standards are crucial to reducing burden on companies and to increase global operability. BHP Billiton has long expressed its support for a 'globally consistent disclosure framework that includes formal equivalency agreements between jurisdictions' [30] on reporting payments to government. As beneficial ownership reporting increases globally, it is reasonable to assume that companies will want the same for their beneficial ownership reporting requirements. For only one sector in in Australia to have to publicly report their beneficial ownership information not only risks decreasing

[26] https://eiti.org/blog/beneficial-ownership-transparency-what-eiti-requires-lessons-learnt-for-eu

[27] Ibid
[28] https://eiti.org/beneficial-ownership
[29] http://openownership.org/
[30] https://eiti.org/supporter/bhp-billiton

company participation in the Australian EITI, it creates an uneven reporting environment domestically between sectors.

There is already a global initiative to establish an open and global beneficial ownership registry, driven by leading anti-corruption and transparency civil society organisations – Open Ownership[31] - with the aim to provide a registry that also allows for clear and consistent global reporting mechanisms. The movement towards beneficial ownership registries is towards open and accessible information. A closed registry demonstrates a lack of leadership by Australia in the region, puts us out of step with the global community, and threatens the success and sustainability of the numerous global initiatives Australia has committed itself to.

PWYP Australia recommends that the Treasury implement a register that meets the commitments Australia has made globally, is aligned with the emerging global standard, and is open to the Australian people.

Yours sincerely

Jessie Cato

National Coordinator

Publish What You Pay Australia

Email: Jessie.Cato@victas.uca.org.au

[31] http://openownership.org/

Background to Publish What You Pay Australia

Publish What You Pay is a global campaign for transparency and accountability in the mining and oil and gas industries. In Australia, the campaign is supported by a coalition of organisations that are committed to promoting good governance in resource-rich countries to ensure that citizens benefit equitably from their natural wealth, including through advocacy for the mandatory disclosure of all payments made between extractive industry companies and governments on a country-by-country and project-by-project basis.

The current members of Publish What You Pay Australia are:

- Action Aid Australia
- Aid Watch
- Australian Conservation Foundation
- Australian Council for International Development
- A Billion Little Stones
- Burma Campaign Australia
- Caritas Australia
- Catholic Mission
- ChildFund Australia
- Columban Mission Institute
- Conservation Council of Western Australia
- CFMEU – Mining and Energy
- CAER – Corporate Analysis. Enhanced Responsibility
- Economists at Large
- Friends of the Earth Australia
- Global Poverty Project
- Greenpeace Australia Pacific
- Human Rights Law Centre
- Jubilee Australia
- Mineral Policy Institute
- Oaktree Foundation
- Oxfam Australia
- Search Foundation
- SJ Around The Bay
- Tear Australia
- Transparency International Australia
- Union Aid Abroad – APHEDA
- Uniting Church in Australia – Synod of Victoria and Tasmania
- World Vision Australia

A fundamental aspect of the government's proposed improvement in the transparency of information relating to Beneficial Ownership and Control of Companies is that it will only be made 'available to relevant authorities'.

This is unacceptable.

The government has stated that it is determined to be open and to make anonymised data available for exploitation by businesses and researchers. This must also mean that the government is ready and willing to assist the public by ensuring that data serving the public interest is made freely available for scrutiny by any interested party: be it a private individual, association, organisation or journalist. For example, it should not be possible for the owners of a company such as Indue Pty Ltd to disguise themselves via the establishment of shell companies, etc., but be able to be readily identified so the public can be confident that members of political parties are not the beneficiaries, receiving tax payer's money via government contracts, which contravenes S44.

If the government does not ensure that this information is readily available; in a searchable format, and is collated in one portal for anyone to access, then encouraging submissions from the public is simply an exercise is busy work with no possibility of a meaningful outcome.

Dr Madeleine R H Roberts
PhD, BA(Hons)

Manager
Corporations and Schemes Unit
Financial Systems Division
The Treasury
Langton Crescent
PARKES ACT 2600
E-mail: beneficialownership@treasury.gov.au

Submission on Increasing Transparency of the Beneficial Ownership of Companies
13 March 2017

The Tax Justice Network Australia (TJN-Aus) welcomes this opportunity to make submission on increasing transparency of the beneficial ownership of companies. TJN-Aus supports the creation of an accurate, accessible registry of ultimate beneficial ownership for all companies and trusts. Such a registry would be a great assistance to Australian businesses that have anti-money laundering and countering terrorism financing obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The registry would reduce the due diligence costs for reporting entities under the Act to determine ultimate beneficial owners of corporate entities they are dealing with and assess money laundering and terrorism financing risks. Costs are also saved by the fact that multiple reporting entities are not paying for the same due diligence as each other, if the beneficial ownership registry is public.

The World Bank and UN Office on Drugs and Crime have stated on the usefulness of public registries of beneficial ownership:[1]

> *…. finds that registries can usefully compliment anti-money laundering objectives by implementing minimum standards for the information maintained in the registry and by providing financial institutions and law enforcement authorities with access to adequate, accurate, and timely information on relevant persons connected to corporate vehicles – corporations, trusts, partnerships and limited liability characteristics, foundations and the like.*

The UK Government had previously revealed that 6,150 people acted as directors of more than 20 UK registered companies, with some people being directors in over 1,000 companies, clearly indicating some directors were acting as front people for the ultimate beneficial owners.

A research report by World-Check had previously shown that almost 4,000 people who are appear on various international watch lists are registered as directors of UK companies.[2] This included 154 people allegedly involved in financial crime, 13 individuals wanted by Interpol for alleged terrorist activities and 37 accused of involvement in the drugs trade.

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[1] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 34.
[2] Sean O'Neill, '4,000 company directors listed as global terror suspects and fraudsters', http://www.world-check.com/media/d/content_pressarticle_reference/Times_CompaniesHouse_0802.pdf; and 'World-Check Exposes Terrorists, Financial Criminals and Disqualified Directors in UK Companies House Register', PR Newswire, 21 February

The Panama Papers have provided a small window on the world in which unethical high net worth individuals and multinational corporations use shell companies with concealed ownership to facilitate tax avoidance and tax evasion. Shell companies with concealed ownership are also used as vehicles to facilitate a range of serious criminal activity, from human trafficking, money laundering, financing terrorism, commercial online child sexual abuse, illicit arms trading, fraud, embezzlement and bribery.

The OECD had previously provided data on the use of special purpose entities (SPEs or shell companies) through jurisdictions that have assisted in profit shifting by multinational companies. In general terms, SPEs are entities with no or few employees, little or no physical presence in the host economy, whose assets and liabilities represent investments in or from other countries, and whose core business consists of group financing or holding activities.[3]

Research by Findley, Nielson and Sharman also found Australian corporate service providers were near the top of corporate service providers in terms of being willing to set up an untraceable shell company even when there was significant risk the company in question would be used for illicit purposes.[4]

The ATO had publicly stated some time ago "Over a hundred Australians have already been identified involving tens of millions of dollars in suspected tax evasion through the use of 'shell companies' and 'trusts' around the world." In October 2013, the Australian Federal Police charged three men with tax and money laundering offences involving $30 million. It is alleged they used a complicated network of offshore companies to conduct business in Australia while hiding the profits offshore, untaxed. The profits were then transferred back to Australian companies controlled by the offenders and disguised as loans so the interest could be claimed as a tax deduction. The level of alleged criminal benefit was estimated at $4.9 million.

The World Bank and UN Office on Drugs and Crime (UNODC) have previously conducted research showing how shell companies with concealed ownership are used to facilitate a range of criminal activity. They published a report reviewing some 150 cases of corruption where the money from laundered. In the majority of cases:[5]

- A corporate vehicle (usually a shell company) was misused to hide the money trail;
- The corporate vehicle in question was a company or corporation;
- The proceeds and instruments of corruption consisted of funds in a bank account; and
- In cases where the ownership information was available, the corporate vehicle in question was established or managed by a professional intermediary to conceal the real ownership.

In two-thirds of the cases some form of surrogate, in ownership or management, was used to increase the opacity of the arrangement.[6] In half the cases where a company was used to

[3] OECD, 'Addressing Base Erosion and Profit Shifting', OECD Publishing, http://dx.doi.org/10.1787/9789264192744-en, 2013, p. 18.
[4] Michael Findley, Daniel Nielson and Jason Sharman, 'Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies', Centre for Governance and Public Policy, Griffith University, 2012, p. 21.
[5] Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 2.
[6] Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 58.

hide the proceeds of corruption, the company was a shell company.[7] One in seven of the companies misused were operational companies, that is 'front companies'.[8]

As an example of a case where shell companies with concealed ownership were allegedly used to facilitate money laundering through Australia, US authorities sought to seize the assets in three Westpac accounts held by Technocash Ltd holding up to $36.9 million.[9] Technocash Limited was an Australian registered company. The funds are alleged to be connected to shell companies owned by the defendants in the case.[10] It is unclear if Westpac had detected the connection between Technocash and key figures in Liberty Reserve and their alleged criminal activities, particularly money laundering. According to the case filled by the US Attorney for the Southern District of New York, Liberty Reserve SA operated one of the world's most widely used digital currencies. Through its website, the Costa Rican company provided its with what it described as "instant, real-time currency for international commerce", which could be used to "send and receive payments from anyone, anywhere on the globe". The US authorities allege that people behind Liberty Reserve:[11]
…intentionally created, structured, and operated Liberty Reserve as a criminal business venture, one designed to help criminals conduct illegal transactions and launder the proceeds of their crimes. Liberty Reserve was designed to attract and maintain a customer base of criminals by, among other things, enabling users to conduct anonymous and untraceable financial transactions.

Liberty Reserve emerged as one of the principal means by which cyber-criminals around the world distributed, stored and laundered the proceeds of their illegal activity. Indeed, Liberty Reserve became a financial hub of the cyber-crime world, facilitating a broad range of online criminal activity, including credit card fraud, identity theft, investment fraud, computer hacking, child pornography, and narcotics trafficking. Virtually all of Liberty Reserve's business derived from suspected criminal activity.

The scope of Liberty Reserve's criminal operations was staggering. Estimated to have had more than one million users worldwide, with more than 200,000 users in the United States, Liberty Reserve processed more than 12 million financial transactions annually, with a combined value of more than $1.4 billion. Overall, from 2006 to May 2013, Liberty Reserve processed an estimated 55 million separate financial transactions and is believed to have laundered more than $6 billion in criminal proceeds.

It was further alleged by US authorities that for an additional "privacy fee" of 75 cents per transaction, a user could hide their own Liberty Reserve account number when transferring funds, effectively making the transfer completely untraceable, even within Liberty Reserve's already opaque system.[12]

US authorities alleged defendant Arthur Budovsky used Technocash to receive funds from exchangers. Mr Budovsky, the alleged principal founder of Liberty Reserve,[13] allegedly used

[7] Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 34.
[8] Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 39.
[9] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 29, 43.
[10] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 21.
[11] US Attorney for the Southern District of New York, 13 Civ 3565, 28 May 2013, pp. 4-5.
[12] US Attorney for the Southern District of New York, 13 Civ 3565, 28 May 2013, p. 6.
[13] US Department of Justice, 'One of the World's Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged $6 Billion Money Laundering Scheme', 28 May 2013.

his bank to wire funds to Technocash bank accounts held by Westpac.[14] He is also alleged to be the registered agent for Webdata Inc which held an account with SunTrust. Technocash records allegedly showed deposits into the SunTrust account from Technocash accounts associated with Liberty Reserve between April 2010 and November 2012 of more than $300,000.[15]

Arthur Budovsky is allegedly listed as the president for Worldwide E-commerce Business Sociedad Anonima (WEBSA) and defendant Maxim Chukharev as the secretary. Maxim Chukharev is alleged to have helped design and maintain Liberty Reserve's technological infrastructure.[16] WEBSA allegedly served to provide information technology support services to Liberty Reserve and to serve as a vehicle for distributing Liberty Reserve profits to Liberty Reserve principals and employees.[17] It is alleged bank records showed that from July 2010 to January 2013, the WEBSA account in Costa Rica received more than $590,000 from accounts at Technocash associated with Liberty Reserve.[18]

It is alleged Arthur Budovsky was the president of Grupo Lulu Limitada which was allegedly used to transfer and disguise Liberty Reserve Funds.[19] Records from Technocash allegedly indicate that from August 2011 to November 2011 a Costa Rican bank account held by Grupo Lulu received more than $83,000 from accounts at Technocash associated with Liberty Reserve.[20]

Further, defendant Azzeddine El Amine, manager of Liberty Reserve's financial accounts,[21] was the Technocash account holder for Swiftexchanger. It is alleged e-mails showed that exchangers wishing to purchase Liberty Reserve currency wired funds to Swiftexchanger. When Swiftexchanger received funds in its Technocash account, an e-mail alert was sent to El Amine, notifying him of the transfer. Based on these alerts, it is alleged between 12 June 2012 and 1 May 2013, exchangers doing business with Liberty Reserve send approximately $36,919,884 to accounts held by Technocash at Westpac.[22]

The defendants are alleged to have used Technocash services to transfer funds to nine Liberty Reserve controlled accounts in Cyprus.[23]

Technocash Limited is reported to have been forced out of business in Australia following the action by US authorities, when it was denied the ability to establish accounts in Australia by financial institutions.[24] Technocash stated that it "complied with Australia's

[14] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 29.
[15] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.
[16] US Department of Justice, 'One of the World's Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged $6 Billion Money Laundering Scheme', 28 May 2013.
[17] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 37.
[18] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.
[18] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 38.
[19] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.
[19] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 40.
[20] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.
[20] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 41.
[21] US Department of Justice, 'One of the World's Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged $6 Billion Money Laundering Scheme', 28 May 2013.
[22] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 30.
[23] USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 31.
[24] Technocash, 'Opportunity: Own the Technocash Payment Platform', Media Release, 5 July 2013.

comprehensive AML regime, verified customers and has an AFSL licence since 2003. Technocash denies any wrong doing."[25]

1. **Should listed companies be exempted from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exemption apply to companies listed on all exchanges or only on specific exchanges?**

The requirement to disclose ultimate beneficial ownership should apply to all companies. Other businesses have a right to know who they are dealing with and who owns the companies they do business with. Customers have a right to know who are the ultimate beneficiaries in the companies they purchase products from.

TJN-Aus notes that Transparency International UK (TI UK) opposed publicly listed companies being exempted from the requirements of the UK people with significant control (PSC) register. TI UK pointed out that listing information is produced for the benefit of investors and unlike the PSC register, listing information is not combined into a single public register. This makes it difficult to search for information, as the information may be in various types of proprietary formats, limiting the ability of organisations and institutions to use the data in a meaningful way, such as conducting anti-money laundering due diligence checks.[26]

Publicly listed companies have not been above involvement with subsidiaries with hidden ownership to engage in serious criminal activity. For example, Alcoa, the world's third largest producer of aluminium, used anonymous companies formed in the British Virgin Islands to transfer million of dollars in bribe payments to Bahraini officials to secure a supply deal.[27]

Alcoa and a joint venture it controlled agreed to pay US$384 million to resolve charges of bribing officials of a Bahraini state-controlled aluminium smelter, marking one of the largest US anti-corruption settlements of its kind.[28] The payment was to settle criminal and civil allegations that two of the joint venture's subsidiaries bribed officials for years so they could supply raw materials to Aluminum Bahrain, or Alba.[29] Alcoa's mining operations in Australia were the source of the alumina that Alcoa supplied to Alba.[30]

Alcoa failed to maintain adequate internal controls to prevent or detect more than US$110 million in improper payments funnelled to Alba through a consultant between 1989 and 2009, according to the US Securities and Exchange Commission (SEC), which brought civil charges under the *Foreign Corrupt Practices Act*. In the words of the SEC:[31]

> *An SEC investigation found that more than $110 million in corrupt payments were made to Bahraini officials with influence over contract negotiations between Alcoa*

[25] http://www.technocash.com/pages/press-release.cfm
[26] Transparency International UK, 'Submission on the register of people with significant control – regulations', July 2015.
[27] Murray Worthy, 'The UK's Tax Havens: Top 10 Corruption Cases involving anonymous companies', Global Witness, 21 February 2017; and US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936
[28] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109
[29] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109
[30] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936
[31] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936

and a major government-operated aluminum plant. Alcoa's subsidiaries used a London-based consultant with connections to Bahrain's royal family as an intermediary to negotiate with government officials and funnel the illicit payments to retain Alcoa's business as a supplier to the plant. Alcoa lacked sufficient internal controls to prevent and detect the bribes, which were improperly recorded in Alcoa's books and records as legitimate commissions or sales to a distributor.

The Department of Justice brought criminal charges under the same law.[32]

The US SEC said Alcoa's subsidiaries used a London-based consultant to funnel the payments to officials. The subsidiaries cited by the US SEC were Alcoa World Alumina and Alcoa of Australia, both of which were parts of the joint venture.[33] The SEC stated:[34]

According to the SEC's order, Alcoa's Australian subsidiary retained a consultant to assist in negotiations for long-term alumina supply agreements with Alba and Bahraini government officials. A manager at the subsidiary described the consultant as "well versed in the normal ways of Middle East business" and one who "will keep the various stakeholders in the Alba smelter happy…" Despite the red flags inherent in this arrangement, Alcoa's subsidiary inserted the intermediary into the Alba sales supply chain, and the consultant generated the funds needed to pay bribes to Bahraini officials. Money used for the bribes came from the commissions that Alcoa's subsidiary paid to the consultant as well as price markups the consultant made between the purchase price of the product from Alcoa and the sale price to Alba.

The Department of Justice's settlement was with Alcoa World Alumina LLC, a joint venture with Australia's Alumina Ltd. The venture, 60 percent-owned by Alcoa, agreed to plead guilty to a single count of violating the *Foreign Corrupt Practices Act* and pay US$223 million in five installments over four years.[35]

Alcoa was listed on the ASX as of 15 June 2000 and removed itself from ASX listing in 2016.[36]

2. **Does the existing ownership information collected for listed companies allow for the timely access to adequate and accurate information by relevant authorities?**

3. **How should a beneficial owner who has a controlling ownership interest in a company be defined?**

4. **In light of these examples given by the FATF, the tests adopted by the UK (see Part 3.2 above) and the tests applied under the AML/CTF framework and the Corporations Act, what tests or threshold do you think Australia should adopt to determine which beneficial owners have controlling interest in a company such that information needs to be collected to meet the Government's objective?**

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[32] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109

[33] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109

[34] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936

[35] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109

[36] http://www.aspecthuntley.com.au/asxdata/20160913/pdf/01778365.pdf

a. **Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?**
b. **Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exerted via means other than owning or having interests in shares, or by a position held in the company? If so, how would those types of controls be defined?**

TJN-Aus favours beneficial ownership being defined by a number of tests, as is the case with the UK register, using a person who meet one or more of the following conditions:

- Directly or indirectly holding more than 5% of shares in the company;
- Directly or indirectly holding more than 5% of the voting rights in the company;
- Directly or indirectly holding the right to appoint or remove a majority of the directors of the company;
- Has the right to exercise, or actually exercises, significant influence or control over the company; and/or
- Where a trust or firm would satisfy one of the first four conditions if it were an individual, any individual holding the right to exercise, or actually exercising, significant influence or control over the activities of that trust or firm.

TJN-Aus favours a lower threshold than the UK 25% ownership of shares or voting rights. Though some international definitions stipulate a beneficial owner as a natural person who possesses more than 25% of company shares this is by no means the only definition (the banking industry often uses a definition of 10% as does the US FACTA Act which requires foreign financial institutions to provide information on US tax payers to the US authorities). TJN-Aus favours a 5% or lower threshold to be used. Corruption often flourishes through shareholdings of smaller stakes, as these entities draw less attention to themselves.

TJN-Aus notes that for listed companies 'substantial holding' provisions already require disclosures of persons or their associates who hold a relevant interest in 5% or more of the total number of votes attached to voting shares in the company.

There is a danger that by using a high threshold, the process will fail to reveal many beneficial owners, and will result in only cursory information that will be of limited benefit. Fewer actual owners will be identified, allowing the identities of those involved in potentially corrupt and criminal behaviour to remain hidden. A lower threshold will help prevent this.

In the case of the UK PSC register 8.7% of 1.3 million companies that had provided information for the register as of November 2016 stated they had no beneficial owners meeting the criteria for disclosure[37], which shows the problem of having a high threshold of ownership or control before disclosure needs to be made.

Global Witness has provided the following examples of where less than 25% ownership or control would have raised red flags:[38]

1. In Azerbaijan, a gold mine was awarded to a UK company which allegedly involved the daughters and wife of Azeri President Ilham Aliyev. They ultimately owned 11% of the company.
2. In Zimbabwe, a diamond mining concession was allocated to a company called Mbada. Just under 25% of Mbada was passed to a third party, Transfrontier, which has an opaque company structure based in secrecy jurisdictions and tax havens. The beneficial owners of Transfrontier are unknown.

[37] Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCACoalition, 22 November 2016.
[38] Global Witness, 'Assessment of EITI Beneficial Ownership pilots', March 2015, p. 7.

3. A US company, Cobalt International Energy formed joint ventures in Angola with two companies, Nazaki Oil and Gas and Alper. Nazaki originally held 30%, later dropping to 15%. Alper held 10%. Nazaki was found to be owned by Angolan Vice President Vicente, Director of the National Reconstruction Office General Kopelipa and his advisor General Dino. Alper's ownership is also suspected to include officials. Cobalt was under an US *Foreign Corrupt Practices Act* investigation as a result, but revealed that the US Department of Justice informed it that the investigation had been closed without any regulatory action in February 2017.[39]
4. Statoil's deals in Angola have also been under considerable scrutiny. In July 2005, Norsk Hydro (a company that later merged with Statoil) was awarded a 20% share in an oil licence in Angola. Two 15% slices were awarded to two Angolan private companies, Somoil and Angola Consultancy Resources. At the time, Norsk Hydro was "concerned about partnering with a company whose owners are unknown" but went ahead with the deal anyway.
5. In 2005, a subsidiary of Swiss corporation Weatherford entered into a joint venture in Angola with two local entities. The joint venture was split 45/45/10, with the 10% share held by "the relative of an Angolan Minister."

In the public disclosure of beneficial ownership under the Extractive Industries Transparency Initiative (EITI), Honduras, Liberia, Tajikistan and the Kyrgyzstan Republic have all adopted a 5% threshold of ownership for the disclosure of beneficial ownership.[40]

Liberia initially decided on a 10% threshold but this has since been lowered to 5% for companies involved in Agriculture, Mining and Oil (the threshold of 10% remains for other companies). An additional point of disclosure has also been added to the Liberian process – that if no single shareholder holds over the relevant threshold (5% or 10%, depending on the sector), then the top five shareholders by percentage must be revealed. This is a useful addition to the beneficial owner definition. It is perhaps worth considering whether it would be better for the EITI to have a standard definition of beneficial ownership with a fixed percentage for all countries to use. This would end possible confusion and allow for better data comparison and analysis.

Nigeria decided to remove the concept of thresholds, arguing that all people who benefit should be revealed.

5. How would the natural persons exercising indirect control or ownership (that is, not through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?

An offence should be introduced for acting as a nominee or front person for a natural person who is exercising direct or indirect control over a company and failing to disclose that fact. This would help act as a deterrent for people who knowingly or recklessly act as nominees or front people for those who have engaged in criminal activity.

There should also be an offence for exercising indirect control and failing to disclose the fact. However, for those who are engaged and criminal activity and wish their association to be concealed, the penalty for failing to disclose is likely to be minor compared to the penalty if they are caught in the criminal activity they are seeking to conceal. So this offence is not likely to be much of a deterrent.

The World Bank pointed out in 2011 that in one jurisdiction, that they did not name, customers of financial institutions are required to complete a written declaration of the

[39] http://www.cobaltintl.com/newsroom/cobalt-announces-closing-of-doj-investigation
[40] Global Witness, 'Assessment of EITI Beneficial Ownership pilots', March 2015, p. 8.

identity and details of the beneficial owner(s) – a requirement pursuant to an agreement between the jurisdiction's bankers association and signatory banks. The form is signed and dated by the contracting party and includes a statement that it is a criminal offence (document forgery) to provide false information on the form, with a penalty of up to five years imprisonment or a fine. The form approach has been adopted by banks in other jurisdictions, even when not required by law or regulation. In the jurisdiction where the form is used, the prosecuting authority has prosecuted cases of forgery (that is, falsely establishing in a written document a fact with legal application or what is referred to as an 'intellectual lie').[41]

The World Bank argues the written declaration of beneficial ownership is a valuable tool for a number of reasons. It assists in focusing on the process of identification of the beneficial owner at the outset, not only for the bank officials but also for the contracting party. It provides the background information that will assist the bank with verification, as well as in determining if the beneficial owner(s) is a Politically Exposed Person (PEP). It assists regulatory authorities in evaluating beneficial ownership practices and enables better oversight of how banks are handling beneficial ownership issues. Finally, the requirement to sign under penalty of a criminal offence and, where appropriate, the additional consequences of non-conviction based or criminal forfeiture, serves to alert the contracting party to the seriousness and importance of the information and therefore acts as a deterrent. It may not be a deterrent for the corrupt PEP, but for intermediaries and others (including family and close associates) who are acting as the contracting party.[42]

A similar approach could be adopted for those holding shares or acting as Directors of a company.

6. Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the ultimate beneficial owner?

For the register to be effective it is essential that reporting must occur on all entities to and including the ultimate beneficial owner. It must not be possible for a person engaged in serious criminal activity to be able to continue to be able to arrange for the concealment of their ultimate beneficial ownership.

7. Do there need to be special provisions regarding instances where the relevant information on a beneficial owner is held by an individual who is overseas or in the records of an overseas company and cannot be identified or obtained?

It is the view of the TJN-Aus that where it is not possible to identify the ultimate beneficial owner it should be a requirement that the ownership cannot be permitted. For example, a legal entity wishes to buy shares in a company but it is not possible to identify the ultimate beneficial owner of the entity seeking to purchase the shares. The purchase should not be permitted. Or if ASIC is unable to establish the ultimate beneficial ownership of a company that is seeking to be registered, then it should deny registration to that company.

For existing ownership where the ultimate beneficial ownership is currently not identified, there should be a reasonable period provided for entities and people to disclose ultimate beneficial ownership after which action is taken if the disclosure has not been made. For example, ASIC deregisters companies that fail to disclose their ultimate beneficial ownership (assuming it is possible to determine the non-disclosure).

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[41] Theodore Greenberg, Larissa Gray, Delphine Schantz, Michael Latham and Carolin Gardner, 'Stolen Asset Recovery. Politically Exposed Persons. A policy paper on strengthening preventative measures', The World Bank, 2009, p. 37.

[42] Theodore Greenberg, Larissa Gray, Delphine Schantz, Michael Latham and Carolin Gardner, 'Stolen Asset Recovery. Politically Exposed Persons. A policy paper on strengthening preventative measures', The World Bank, 2009, p. 37.

There might be a process for a person or entity to seek an exemption where there is a legitimate reason why the ultimate beneficial ownership is unknown, but TJN-Aus is unaware of circumstances where there is a legitimate need to conceal ultimate beneficial ownership from law enforcement authorities.

The experience with the UK PSC register is that only 2% of companies reported struggling to identify a beneficial owner or collect the right information.[43]

8. Should there be exemptions from beneficial ownership requirements in some circumstances? What should those circumstances be and why?
TJN-Aus does not believe there should be any circumstances in which beneficial ownership should not be disclosed on a register only accessible to law enforcement authorities.

If a public register of beneficial ownership was to be implemented then it would be legitimate for beneficial ownership details to not be placed on the public register where a person or company can prove a genuine, serious rick of violence or intimidation. We note that ASIC has a process that allows people to apply for 'relief' from regulatory requirements, including disclosure.[44] However, in such a case the beneficial ownership details should remain accessible to law enforcement authorities. In the case of the UK PSC register, approximately 30 beneficial owners have been successfully granted the right to keep their name off the public register due to concerns about their safety as of November 2016.[45]

Further, to highlight that safety risks are greatly exaggerated by those who benefit from the current system of concealed ownership, the Extractive Industries Transparency Initiative reported that in the Democratic Republic of Congo more than 100 mining companies have provided public access to the names, nationality, full addresses and identity numbers of their beneficial owners. The EITI has, as of the end of November 2016, received no reports of intimidation or other difficulties experienced by the beneficial owners of the companies that have publicly disclosed these details.[46]

9. What details should be collected and reported for each natural person identified as a beneficial owner who has a controlling ownership interest in a company?
The register needs to collect unique identifiers of beneficial owners in the database, so that an individual can be clearly identified and all their beneficial ownership holdings known. In the UK company database, company director records are connected up between multiple companies to easily see who if one individual is a director of more than one company. Unfortunately this is not the case in the ASIC company register. Member organisations of TJN-Aus have had experience of being unclear if the same person is the director of multiple companies due to slight variations in name and place of birth. It is also not yet the case for the UK PSC register. Also the lack of unique identifiers (in the absence of a full date of birth) in the PSC register, also makes it hard to compare the data against other data sets.

Ideally a person would be registered on the beneficial ownership register and assigned a unique identification number, so all their beneficial ownership holdings can be easily identified and linked. For such registration TJN-Aus supports a similar process to the 100 point check used by financial institutions when opening an account.

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[43] Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCACoalition, 22 November 2016.
[44] http://asic.gov.au/about-asic/dealing-with-asic/apply-for-relief/
[45] Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCACoalition, 22 November 2016.
[46] Dyveke Rogan, 'Beneficial ownership transparency: what the EITI requires and lessons learnt for the EU', EITI, 30 November 2016.

In the case of a public beneficial ownership register, it should include present given and family name, residential address, all former given and family names and the date and place of birth, as is the case for information to be provided by company directors to ASIC.

10. What details should be collected and reported for each other legal persons identified as such beneficial owners?
TJN-Aus believes that where a legal person is a beneficial owner then the beneficial owners of the legal person should also have to be disclosed. Ultimately ownership will rest with natural persons and there should be a requirement for these to be disclosed as the ultimate beneficial owners.

11. In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?
The requirements for disclosure of foreign beneficial owners should be the same as for Australian beneficial owners, be they natural persons or body corporate. Where a foreign beneficial owner seeks to conceal their identity then, wherever possible, ownership should be denied to them (for example, they cannot purchase shares in Australian companies above the beneficial ownership threshold, act as a director of a company or be able to register a company with ASIC).

12. What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on beneficial owners themselves?
Companies should be required to make all reasonable efforts to establish who are their beneficial owners and ultimate beneficial owners. In the case where the management of a company is unable to identify the beneficial owners and ultimate beneficial owners, or have strong reason to suspect beneficial owners are being concealed by an intermediary the company should be required to exclude the ownership of the undisclosed party. This is similar to requiring financial institutions not to proceed with highly suspicious transactions under anti-money laundering and counter terrorism financing obligations.

A lesser requirement might be to require companies to have to report to authorities, perhaps AUSTRAC, cases of suspicious ownership for possible investigation where the company is unable to establish the beneficial ownership or suspects the ultimate beneficial ownership is being concealed from it.

Beneficial owners should have an obligation to disclose their ownership, as per the answer to question 5.

There is a need to regulate companies that provide nominees as a service. For example, AUSeCorporate[47] that advertise to foreign investors and business people providing a nominee service to conceal their ownership from public scrutiny. As concealing beneficial ownership from the public is the business of such companies there should be a high requirement for them to have to do thorough due diligence and substantial penalties for the failure to do so. A public register of beneficial ownership would remove this high risk business activity.

13. Should each company maintain their own register?
TJN-Aus supports a publicly accessible central register. Registers maintained by companies themselves should only be as an addition to the central register. TJN-Aus notes that as of

[47] http://www.ausecorporate.com.au/corporate-services/australian-branch-subsidiary-company/

November 2016 nine countries have made beneficial ownership information public through EITI reports.[48]

14. How could individual registers being maintained by each company provide relevant authorities with timely access to adequate and accurate information? What would be an appropriate time period in which companies would have to comply with a request from a relevant authority to provide information?

Company based registers would be clumsy and deny law enforcement effective investigative capabilities. For example, a law enforcement agency detects that an individual is acting as a front for a terrorist organisation in one company. The law enforcement agency wishes to investigate if the same person has beneficial ownership in other companies. In the case of company based registers the law enforcement agency would be required to make that request to every company individually to check this information. In the case of a central searchable register the law enforcement agency could do a simple search on the person and immediately identity any additional beneficial ownership the person has.

15. Should a central register of beneficial ownership information also be established?

16. What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?

TJN-Aus supports the establishment of a public searchable central register of beneficial ownership. Even a searchable central register that is only accessible to law enforcement bodies and regulators provides a valuable law enforcement tool. For example, it would allow a regulator to search and determine the extent of beneficial ownership of anyone suspected of criminal activity. It would mean if a person is added to the Interpol wanted list[49], it will be possible for Australian law enforcement agencies to search and see if the person has any beneficial ownership in Australia. It would allow regulators to identify people who may be acting as professional nominees, by being directors in tens of companies.

17. In particular, what do you see as the relative compliance impact costs of the two options?

The compliance costs for a central register will be higher, but the benefits to law enforcement agencies and regulators will outweigh the costs. Making the beneficial ownership register public would also see a reduction in costs to businesses that are reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, as such businesses will need to spend less on conducting their own due diligence to determine beneficial ownership.

18. Who would be best placed to operate and maintain a central register of beneficial ownership?

The central register could be operated by ASIC given their role in maintaining the existing register of company information. In fact the existing register of company information could be expanded to include the information on beneficial ownership. They would need an increased budget to cover the costs of effectively managing the beneficial ownership register, as members of TJN-Aus have experience that due to limited resources it has been possible for companies to be registered on the ASIC register of company information at false addresses and with fake directors.

19. What should the scope of the register operator's role be (collect, verify, ensure information is up to date)?

[48] Dyveke Rogan, 'Beneficial ownership transparency: what the EITI requires and lessons learnt for the EU', EITI, 30 November 2016.
[49] https://www.interpol.int/notice/search/wanted

The operator of the central register should be required to collect the information, verify that it is accurate, ensure the information is up-to-date, issue warnings and infringement notices for failure to comply and initiate legal action against individuals and businesses where necessary to ensure compliance and deter the making of false or fraudulent declarations about beneficial ownership.

20. Who should have an obligation to report information to the central register? Should it be the company only or also the person who meet the test of being a relevant 'beneficial owner'?
The obligation to report information to a central register should apply to the company, the person who is a beneficial owner, any nominee representing a beneficial owner and any intermediary, such as AUSeCorporate, that arranges nominee arrangements.

21. Should new companies provide this information to a central registry operator as part of their application to register their company?
People establishing a new company should be required to disclose all required beneficial ownership information as part of their application to register the company. Failure to do so should result in refusal by the regulator to register the company. Making knowingly false declarations about beneficial ownership should incur significant penalties.

22. Through what mechanism should existing companies, and/or relevant beneficial owners, report?
There should be a separate process for existing companies and relevant beneficial owners to report upon the establishment of the central register.

23. Within what time period (how many days) should any changes to previously submitted beneficial ownership information have to be reported to a company (where registers are maintained by each company) or the registry operator (where there is a central register)?
TJN-Aus supports that any changes to beneficial ownership should have to be reported to the registry operator within 28 days by the beneficial owner, any nominee or intermediary they are using (from the time the nominee or intermediary becomes aware of the change) and by the company (from the time it becomes aware of the change in beneficial ownership). This period is largely consistent with existing reporting requirements to ASIC about changes to registered office, principal place of business, its member register, its share structure, directors or secretaries, including their personal details.

24. If reporting to a central register is required, should this information be included in the annual statement which ASIC sends to companies for confirmation with an obligation to review and update it annually?
The beneficial ownership information should be included in the annual statement which ASIC sends to companies for confirmation, but this should not replace or mitigate the obligation to report any changes within 28 days.

25. What steps should be undertaken to verify the information provided to a central register by companies or their relevant beneficial owners?
The regulator managing the central register should be responsible for verifying the information provided to the register, using a risk-based approach to give greater scrutiny to business areas that have a higher risk of using concealed beneficial ownership for criminal activity, such as the extractives sector and labour hire businesses. Having a system by which companies are required to make suspicious activity reports about beneficial ownership to the regulator managing the central register would assist the risk based approach.

Analysis of the UK PSC register by Global Witness has shown greater verification of the data entered is needed by the regulator. Almost 3,000 companies as of November 2016 listed

their beneficial owner as a company with a secrecy jurisdiction address – something that is not allowed under the rules.[50] Further, it was found that 76 beneficial owners shared the same name and birthday as someone on the US sanctions list and 267 disqualified directors were listed as beneficial owners. There were also 2,160 beneficial owners with a 2016 date of birth and people who listed the year 9988 as their date of birth.

As demonstrated by the findings of Global Witness, having a public register will allow third parties to assist the regulator in verification of data allowing for more cost effective detection of errors on the register as well as possible examples of false information being provided to the register.

26. Should beneficial ownership information be provided to one relevant domestic authority and then shared with any other relevant domestic authorities? Please explain why you agree or disagree.

It seems more efficient that beneficial ownership information would be provided to the one regulator and then shared with other relevant authorities, as a means to ensure that the information is all in one place and that businesses, intermediaries and beneficial owners are clear about where they need to report to.

27. Should beneficial ownership information be automatically exchanged with relevant authorities in other jurisdictions? Please explain why you agree or disagree.

Relevant beneficial ownership information should be automatically shared with relevant authorities in other jurisdictions, unless there are strong grounds to believe that the information would be misused to violate the human rights of the beneficial owner. Automatic exchange of information about beneficial ownership will assist in combating the use of companies with concealed ownership to carry out transnational crimes such as tax evasion, money laundering, human trafficking and terrorism. Automatic exchange of information between tax authorities has already seen significant global benefits in recovering funds obtained by tax evasion and in deterring individuals from engaging in cross-border tax evasion. Similar benefits can be expected from the automatic exchange of information on beneficial ownership.

28. What sanctions should apply to companies or beneficial owners which fail to comply with any new requirement to disclose and keep up to date beneficial ownership information?

The sanctions that should apply to companies, beneficial owners or businesses that arrange nominees to conceal beneficial ownership from public scrutiny should be the same as failure to notify ASIC about changes to company details: a fine of 60 penalty units and/or one year imprisonment. In relation to listed companies, failing to provide beneficial ownership information within the required time period should be a strict liability offence with a penalty of up to 25 penalty units and/or six months imprisonment. Where it can be established that a person failed to provide beneficial ownership information they were required to provide the regulator of the beneficial ownership register should be able to seek a court order placing restrictions on the relevant ownership.

Further, in line with the UK PSC register, where a person does not respond to a notice from a company requiring them to provide information, and also does not respond to a subsequent warning notice, the company should be able to apply restrictions on the relevant shares or interests which effectively 'freeze' them so that they cannot be sold or transferred and associated rights such as voting cannot be exercised. The ability to take such action should not require a court order.

[50] Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCACoalition, 22 November 2016.

29. How long should existing companies have from when the legislation commences to report on their beneficial owners? What would be an appropriate transition period?
TJN-Aus believes that six months should be the period existing companies and beneficial owners should have from when the legislation commences to report on their beneficial ownership.

33. If companies had access to the additional beneficial ownership information collected, could this reduce companies compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?
Having access to additional beneficial ownership would reduce due diligence compliance costs for businesses with AML/CTF Act obligations.

36. Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies?
The current tracing notice obligations are not sufficient to achieve the aim of providing timely, adequate and accurate information about beneficial ownership and ultimate beneficial ownership, with the consultation paper noting the strategies that can be employed to defeat or frustrate tracing notices.

Listed companies and their beneficial owners should not be exempted from having a positive obligation to provide the relevant beneficial ownership information to the regulator of the central registry.

42. What do you see as the benefits of nominee shareholding arrangements? Are there any negative aspects to their use?
Nominee shareholding can be used by criminals to hide their ownership and control in companies.

43. Should further obligations be introduced in order to increase transparency of the beneficial owners of shares held by nominee shareholders?
As stated earlier, it should be an offence for a nominee shareholder not to disclose the beneficial owner they are holding the shares for.

47. What do you see as the benefits of bearer share warrants? Are there any negative aspects of their use?
Bearer share warrants are a vehicle to facilitate money laundering. As an example, in the case of Syed Ziaddin Ali Akbar, who was the former head of the BCCI Central Treasury from 1982 to 1986 and was charged and convicted in October 1988 of laundering drug money at UK Trading House.[51] In an attempt to defeat asset recovery efforts by law enforcement, in January 1989 he used bearer shares in a Vanuatu company to transfer assets to his borther.

48. Should a ban be introduced on bearer share warrants?
TJN-Aus supports a ban on bearer share warrants due to the high risk they can be used for money laundering.

[51] John Gilkes, 'Open-Ended Intergovernmental Working Group on Asset Recovery. Asset Tracing and Recovery. A case study', 17 December 2010, http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2010-December-16-17/Presentations/John_Gilkes_StAR.pdf

Dr Mark Zirnsak
Secretariat
Tax Justice Network Australia
c/- 130 Little Collins Street
Melbourne, Victoria, 3000
Phone: (03) 9251 5265
E-mail: mark.zirnsak@victas.uca.org.au

Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:

(a) promote sustainable finance for development;
(b) promote international co-operation on tax regulation and tax related crimes;
(c) oppose tax havens;
(d) promote progressive and equitable taxation;
(e) promote corporate responsibility and accountability; and
(f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union
- Australian Services Union
- Baptist World Aid
- Caritas Australia
- Columban Mission Institute, Centre for Peace Ecology and Justice
- Community and Public Service Union
- Friends of the Earth
- GetUp!
- Global Poverty Project
- Greenpeace Australia Pacific
- International Transport Workers Federation
- Jubilee Australia
- Maritime Union of Australia
- National Tertiary Education Union
- New South Wales Nurses and Midwives' Association
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- SumOfUs
- Synod of Victoria and Tasmania, Uniting Church in Australia
- TEAR Australia
- Union Aid Abroad – APHEDA
- UnitedVoice
- UnitingWorld
- UnitingJustice
- Victorian Trades Hall Council
- World Vision Australia

13 March 2017

Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market Street
Sydney NSW 2000
Email: beneficialownership@treasury.gov.au

Re: Increasing Transparency of the Beneficial Ownership of Companies Consultation Paper

Dear Ms Keall,

I am writing in response to the Australian Government Consultation Paper of February 2017 on *Increasing Transparency of the Beneficial Ownership of Companies* to express our support for Australia's implementation of a central, public, free, and open data register of company ownership information.
The B Team is a not-for-profit initiative formed by a global group of business leaders to catalyze a better way of doing business, for the wellbeing of people and the planet. Our B Team Leaders include Richard Branson, Paul Polman, Mo Ibrahim, Bob Collymore, Guilherme Leal, Andrew Liveris and Oliver Bate. Since 2014, The B Team has been actively promoting the business case for ending anonymous companies through increased beneficial ownership transparency.

Access to company ownership information is crucial for businesses and investors, enhancing their ability to manage risks, develop supply chains with integrity, and better allocate capital to worthwhile investments. Being able to identify owners is central to legal certainty in business dealings with third parties to enable enforcement of contracts and safeguard investments. Interest in beneficial ownership information is not in the minority in the business community: for example, EY's 2016 Global Fraud survey found that 91% of senior executives believe it is important to know the ultimate beneficial ownership of the entities with which they do business.

Despite increasing requirements placed on business for due diligence and anti-corruption, accessing relevant information remains costly, difficult or impossible in many parts of the world. Ease of access to verified or verifiable information on ultimate beneficial owners of companies is critical to conducting our business affairs efficiently, ethically and with confidence.

We welcome Australia's continued leadership on this issue including through the G20 Presidency in 2014, at the London Anti-Corruption Summit and through Australia's Open Government Partnership National Action Plans.

In response to your consultation paper, we wanted to emphasise a few overarching points about the business benefits of a centralised, public, free and open data register.

Importance of ease of access and comparative data for business

Public, open data and free access enables business to efficiently access and use information on who they are doing business with, reducing the costs and complexity of due diligence and risk management. Open data enables comparison with other sources including datasets from other jurisdictions, which is of interest to businesses and investors operating transnationally.

Levelling the playing field

As your paper notes, public beneficial ownership transparency brings the minority of companies with complex structures that obscure ownership in line with the public disclosure

requirements of the majority of businesses. If public access to beneficial ownership information is restricted it protects these companies who are may use the corporate form to obscure their illicit operations or actions. We believe that this minority brings business into disrepute and requires no exemption from public disclosure.

Ensuring quality

A core concern for business is the quality of the data on registers. A central aim of this effort must be to ensure that data is reliable and up to date, otherwise it is of less use to business and other actors. Australia should institute approaches to ensure that information is verified on a regular basis, and that there are penalties for false or missing declarations. Again, open data can assist in facilitating regular checks and in supporting other institutions to compare the data to other sources of information.

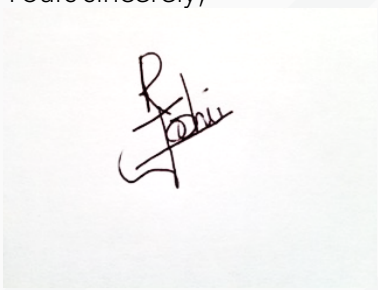
Broader benefits

Lastly, public, free and open data access facilitates broad scrutiny of this information to identify discrepancies and fraud. This form of networked verification is of benefit to business by providing additional ways to identify false information.

The long term aim, in our view, is that beneficial ownership information is transparent and accessible across all jurisdictions, globally. Australia should continue its important leadership on this issue alongside countries engaged in the Extractive Industries Transparency Initiative and those countries that committed to implement public registers of beneficial ownership at the London Anti-Corruption Summit in 2016 or through their Open Government Partnership National Action Plans.

If you have questions about this letter or would like to arrange further discussions please contact May Miller-Dawkins, Director – Governance and Transparency at The B Team at mmd@bteam.org.

Yours sincerely,



Rajiv Joshi
Managing Director
The B Team

Consultation paper on increasing transparency of the beneficial ownership of companies: Submission from Transparency International Australia

Executive summary

Transparency International Australia supports the creation of a central register to record beneficial ownership information. It submits that:

- The register should be publicly available (open access) to increase opportunities for the public to verify and provide information and that the beneficial ownership information should be free of charge.
- The central register could be maintained by either AUSTRAC or ASIC due to those agencies' ability to collect information and to enforce against companies that fail to report information.
- If there is any difficulty with defining the "beneficial owner" of a company, that the definition of "beneficial owner" from Australia's anti-money laundering framework should be preferred.

Transparency International Australia acknowledges that there may be obstacles in implementing the central register including ensuring that trusts would duly report beneficial ownership information and ensuring that accurate information is collected and verified. However in light of the need for greater transparency, Australia cannot nor should it, afford to wait for the perfect system before the central register is implemented. There is value and a need to have a central register of beneficial ownership in Australia - similar to the United Kingdom's register of People with Significant Control - such a register could be implemented in progressive stages while ensuring that the system would continuously improve. Taking these first steps to implement a central register would ensure that Australia complies with its international commitments to increase transparency and could have a beneficial flow on effect to minimising corruption and tackling illicit financial activities.

Transparency International Australia: Background and interest

Transparency International Australia (**TIA**) is a non-profit and non-partisan member of the global Transparency International network of more than 100 chapters dedicated to tackling corruption in all its forms. To pursue that objective, TIA, as a well known civil society group, actively participates with governments, not-for-profit organisations and corporates with similar aims.[1] Apart from law reform, TIA supports the efforts of the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) and other government agencies which are targeted to enhance the anti-money laundering (**AML**) and other anti-corruption measures designed to deprive corrupt parties of the fruits of their crimes.

As the Minister stated in her Foreword to this Consultation Paper, a key objective of the government is improving transparency around who controls and benefits from companies, which will directly assist with anti-corruption and preventing illicit financial flows.[2] TIA strongly endorses that objective and direction while also recognising that improved transparency will contribute to greater integrity in

[1] TIA's rationale for this commitment is stated at www.transparency.org.au.
[2] See TIA's discussion paper on illicit financial flows available at http://transparency.org.au/wp-content/uploads/2016/01/PP2-Illicit-Financial-Flows-Transparency-International-Australia-Jan-2016.pdf (accessed 13 March 2017).

Government contracting including when public private partnerships are developed and implemented.[3] It will also have benefit by strengthening the integrity of Australia's tax regime.

It is important to lift the veil of secrecy over those who ultimately own or control companies in order to ensure that wrongdoing is exposed and any illicit financial benefits flowing into or through the company (including those from corruption) are disrupted. This could prevent the misuse of companies for illicit activities such as tax evasion, money laundering, bribery, corruption and terrorism financing. There are often a web of corporate structures or other arrangements, often quite complex which the Australian government currently cannot penetrate.

TIA would also anticipate cost reductions for the banking and financial industry to have one public space holding all ownership information of non-listed entities. Those benefits in our view far outweigh any claimed value of privacy for individual wealth holdings so far as ownership of companies is concerned. The advantages of the corporate veil given to company owners justifies removing the secrecy as to their identity whether local or offshore.

This submission does not specifically address the questions raised in the consultation. TIA believes there are other organisations better positioned to provide the details that Treasury seeks. This submission aims to provide further information on the benefits of a publicly available register which records or holds information about beneficial ownership of companies in Australia. Such a register, if properly maintained, would be highly relevant to the Minster's express objective and would be vital for Australia to ensure that it achieves its international obligations in the anti-corruption and AML enforcement phase.

1. International commitments

TIA refers to the following context matters for the Consultation Paper.

First, as the Consultation Paper (the **Paper**) highlights, Australia has committed as a member of the Financial Action Task Force (**FATF**) to fully and effectively implement its standards for combating of money laundering, specifically in respect of transparency of both companies and express trusts. Australia is obliged to "ensure that there is adequate, accurate and timely information on the beneficial ownership and control of [those entities and arrangements] that can be obtained or accessed in a timely fashion by the competent authorities".[4]

The Paper usefully draws attention to the flexibility allowed by FATF to its members to satisfy the obligation to ensure that beneficial ownership information is available and this can be undertaken by three methods (or a combination of them).[5]

Second, the commitments made by the Government in the OGP National Action Plan (**NAP**) to improve transparency of information on beneficial ownership of companies (which is referred to in the Minister's Foreword of the Paper) is clearly based on the recognition that a beneficial ownership register is essential to protect the integrity of the financial systems and to prevent the misuse of corporate structures for corrupt and other criminal activities. Australia aims to provide a beneficial ownership

[3] See http://www.open-contracting.org/data-standard/ (accessed 14 March 2017), and Australia's commitment to the Open Contracting Data Standard, available at http://ogpau.pmc.gov.au/draft-national-action-plan/commitments/theme-4-integrity-public-sector/43-open-contracting (accessed 14 March 2017).
[4] See http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf at page 3(accessed 14 March 2017).
[5] Paragraph 3.1 of the Paper.

register to show who ultimately owns and benefits from the activities of companies[6] as announced at the UK Anti-Corruption Summit in December 2016.

Unlike the FATF, neither the NAP nor this present consultation refer to the important issue of how a beneficial owner could easily be disguised as or hidden behind the veil of a trust structure. While the Government's objectives and steps taken to prevent misuse of company structures for illicit activities including corruption are laudable, the omission of express trusts from the Paper is significant.

Third, the G20 High-Level Principles on Beneficial Ownership Transparency (**G20 Principles**),[7] as referred to in the Minister's Foreword and the Paper, includes a commitment to "ensure that trustees of express trusts [and similar arrangements] maintain adequate, accurate and current beneficial ownership information including information of settlors, protectors (if any) trustees and beneficiaries".

While this commitment does not extend to inclusion of that information in a public or other central register TIA notes that Australia remains to fulfil this score and has also yet to fulfil other gaps in compliance under Australian law.[8]

Fourth, TIA notes that under the Extractive Industries Transparency Initiative (**EITI**), beneficial ownership reporting should be required. The 51 EITI countries (of which Australia is one) have until 2020 to put this in place. Each State has agreed to implement plans for beneficial ownership roadmaps before the end of 2016. This commitment to ensure there is beneficial ownership reporting is groundbreaking as it shows an enormous political will to ensure that citizens have reliable information about what is paid by that sector, and that citizens can understand who the government is doing business with.[9]

Finally in the context of this Consultation, TIA highlights that a central register would present an opportunity to verify and supplement the entries in the existing internal sanctions lists and in risk management databases such as World Check (Thomson Reuters), Accuity, World Compliance (Lexis Nexis) to identify current and past politically exposed persons. Our enquiries indicate that some of these databases may have shortcomings.

Accordingly TIA considers it is necessary and urgent to create a verifiable and open central register of ultimate beneficial owners in Australia.

2. Shell companies and havens

It has been growingly appreciated that shell companies, that is, companies with no business activity, employees or physical presence, are often used by criminals to store, move and hide assets while avoiding detection. There are a number of ways that this is typically achieved.

The ideal shell company for a criminal or corrupt politician allows the control of assets anonymously while also allowing assets to be moved quickly in the unlikely event law enforcement should detect and attempt to identify them.[10] A shell company from a tax haven held through nominee shareholders and

[6] See paragraph 1.2 of the Paper.
[7] See the Minister's foreword to the Paper.
[8] TIA, G20 Principles compliance survey available at: https://www.transparency.org/files/content/publication/2015_BOCountryReport_Australia.pdf (accessed 13 March 2017).
[9] https://eiti.org/beneficial-ownership (accessed 9 March 2017).
[10] The Stolen Assets Recovery Group (StAR) estimate that the value of seized assets is a tiny fraction of assets held by criminals around the world.

directors is one of the best methods of achieving this. The nominee shareholders and directors ensure that all official paperwork does not include the beneficial owner's details and assets can be moved at a moments' notice to another jurisdiction by the nominees should the need arise. A tax haven company set up in such a way allows anonymous banking and asset ownership and, in some jurisdictions, legal protection from foreign government court orders. Such companies could also be used to avoid sanctions[11] and taxation.

For some criminals, alternatives may include trusts, captive insurance companies, foundations or other similar legal entities which in many cases are not registered, but still allow bank accounts and other assets to be held anonymously.

Examples of how these structures have been used over the years are provided by the International Consortium of Journalists[12] and also the Stolen Assets Recovery Initiative.[13] These examples include a range of despotic world leaders who have used, among other methods, tax haven shell companies to impoverish their nations.

A tax haven company, with nominee shareholders and directors, a virtual office and a bank account can be purchased in a few minutes online for a few thousand dollars – the price being dependent on the jurisdiction and the level of anonymity desired.

SFM[14] is a Swiss firm that supposedly offers shell companies domiciled in any one of 21 tax haven jurisdictions with a bank account in any one of nine jurisdictions. It has been alleged that such a structure allows international banking in complete anonymity rendering anti-money laundering systems all but useless. Such a structure may also frustrate attempts by international law enforcement to penetrate the system.

The Panama Papers (and other similar leaks) provide a wealth of information on how legal entities created in tax havens are used to commit crimes and launder the proceeds. The benefits of ensuring that the beneficial owners of such structures are exposed can hardly be overstated. What is less well known perhaps is how many legal structures in Australia are abused in a similar way.

An indication of the use of shell companies in Australia can be seen through AUSeCorporate[15] which appears to offer for sale Australian companies with a bank account and nominee directors thereby rendering Australia's AML systems fairly impotent. The supposed reasons based on AUSeCorporate's website, for avoiding being named on Australian corporate register is as follows:[16]

> *"clients large and small are often in a position where it is unwise for their name to appear on the corporate registers of a company, especially where such registers are available to be viewed via a basic company search. We can provide you with a Resident Director (formerly*

[11] A company (Pangates International)registered in Niue, Samoa and then the Seychelles was alleged in the Panama Papers to have been used by the Syrian regime of Bashar Al Asad to avoid US sanctions on aviation petroleum products. Similarly, tax haven companies have alleged to have been used by North Korea and Iran to avoid sanctions. See http://time.com/4281652/panama-papers-companies-blacklisted-us-sanctions/ (accessed 14 March 2017).
[12] https://www.icij.org/ (accessed 14 March 2017).
[13] http://star.worldbank.org (accessed 14 March 2017).
[14] https://www.sfm-offshore.com (accessed 14 March 2017).
[15] http://www.ausecorporate.com.au/ (accessed 14 March 2017).
[16] See http://www.ausecorporate.com.au/corporate-services/australian-resident-director/ (accessed 14 March 2017).

known as Nominee Director) who will help to protect your reputation, other business interests, current employment, family & associates".

If leaks of large amounts of data from firms such as Mossack Fonseca, the firm at the centre of the Panama Papers, has highlighted one thing, it would be this. The only thing that is likely to stop or curtail the misuse of shell companies and other legal structures for criminal activity is the ability for law enforcement, journalists, financial institutions and interested members of the general public to cheaply (or freely) access the names of the people behind the ownership of assets and bank accounts.

In addition to the issues posed by shell companies, there is also an issue with phoenix companies being incorporated off the back of their failed predecessors. Phoenix activity would be illegal where the intention of creating similar businesses is to exploit the corporate form to the detriment of unsecured creditors, including employees and tax authorities.[17] Hence there is the need to ensure that illegal phoenix activity is stamped out and a key method of achieving better detection of phoenix activities would be by reliably gathering and sharing information.[18]

3. Central register - Public access and open data

3.1 Creating a public register

TIA strongly recommends that instead of merely relying on individual companies to maintain any beneficial ownership details, a central register ought to be established in Australia. The central register could be established on similar bases as the UK register that is maintained by Companies House in London.

The register should be publicly accessible and either maintained or supervised by either the Australian Securities and Investments Commission (**ASIC**) or AUSTRAC such that all companies could remain incorporated by ASIC but the directors would need to certify the ultimate beneficial owners and any changes on at least a quarterly basis. TIA proposes that entries should be based on drop-down options instead of allowing an open entry. The information gathered would be kept by either ASIC or AUSTRAC in an open data format. As evident from the UK model, companies or other parties lodging with the register would have no ability to nominate a tax haven entity as the beneficial owner with a controlling interest and would have an obligation to use their best efforts to locate an identity of that owner and any changes. The fundamental objective is to create a system which is open and kept on an accurate and therefore credible basis. In our view this cannot happen unless it is properly supervised.

Creating an open register is very important for a number of reasons, not just for the purpose of enhanced verified content:

- TIA perceives the new register will incentivise and assist banks and other financial industry bodies with obligations to report suspicious transactions to AUSTRAC and reduce their cost of compliance.

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[17] H. Anderson, et al, "Defining and profiling phoenix activity", December 2014, published by University of Melbourne Law School and Monash Business School, available at: http://law.unimelb.edu.au/__data/assets/pdf_file/0003/1730703/Defining-and-Profiling-Phoenix-Activity_Melbourne-Law-School.pdf (accessed 14 March 2017).

[18] http://theconversation.com/heres-what-must-be-done-to-detect-disrupt-and-deter-phoenix-activity-in-australia-73367 (accessed 14 March 2017).

- The new register will alleviate "'Know Your Customer' headaches" faced by current reporting entities (and headaches that will likely belong to designated non-financial businesses and professions (**DNFBP**s) once such entities are also subject to customer due diligence and beneficial ownership requirements).

- Upon extension of AML reporting obligations to law firms and other DNFBPs, such a register will have particular benefits. When such a firm is approached professionally on a corporate or real estate project of a client, the ability to initially search the register for names and connections prior to accepting instructions would be an invaluable tool.

- In our view the entries in the register would be much less valuable if access was restricted to "the competent authorities", as media and citizen oversight can be a positive source of valuable information to update register entries.[19]

- The advent of the Fintel Alliance presumably means a greater sharing of information between the regulatory agencies and the members of the Alliance. Unless it is contemplated that only such members would have access to a new BO register, which could hardly be the case, it will in our view perforce have to be open access.[20]

In the context of a central register with open data, TIA notes that five key G20 countries are failing to meet their commitments to publish data to help tackle corruption If the data was publicly available, it could be used to curb criminal activities including money laundering and tax evasion.[21]

3.2 ASIC company register

Some features of the long-standing ASIC national register of companies are worth noting. First, the required entries as to director details include date of birth and residential address. Over many years, (remembering that the open access archives are very extensive) this has hardly been seen to be a difficulty either in privacy terms or otherwise. As mentioned above however, recently the services for shelf companies have advertised more intensively and TIA believes with conscious appeal to the overseas owners behind shell company buying real estate here.

TIA's view is that it would be cumbersome to embody the proposed register into that maintained by ASIC unless a wholesale shift is made of that register onto a supervised and strictly enforced basis. At the moment it is too easy to put false entries onto that register.

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[19] See http://www.transparency.org/news/pressrelease/authorities_should_disclose_information_about_efforts_to_stop_banks_launder (accessed 14 March 2017).

[20] https://www.ministerjustice.gov.au/Mediareleases/Pages/2017/FirstQuarter/AUSTRAC-launches-world-first-alliance-to-combat-serious-financial-crime.aspx (accessed 10 March 2017). See also the progress report from the UK's National Crime Agency on the Joint Money Laundering Intelligence Taskforce at http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/joint-money-laundering-intelligence-taskforce-jmlit (accessed 10 March 2017).

[21] See http://www.transparency.org/news/pressrelease/g20_countries_are_breaking_commitments_to_publish_data_that_helps_tackle_co (accessed 14 March 2017), see also the full report by Transparency International and the Web Foundation titled "Top secret countries keep financial crime fighting data to themselves" (15 February 2017) available at https://www.transparency.org/whatwedo/publication/7664 (accessed 14 March 2017).

3.3 Exemptions for providing beneficial ownership information

To limit the proposed register, TIA can see the merit of exempting listed Australian companies and wholly owned subsidiaries of those listed in certain approved regulated markets, unless more than 50% of its shares are held by another group which is not listed on an approved stock exchange. Excluding listed entities, means that the definitions of "relevant interest" and "substantial shareholder" in the Corporations Act become much less relevant and could be confusing in this context.

The purpose of the central register would be quite different and hence, TIA would strongly prefer the use of the definition of "beneficial owner" in the AML legislation administered by AUSTRAC.[22] TIA considers that limiting the reporting obligation on companies in other ways, such as a common report from all companies in the same group, would not affect the value of the register.

3.4 Other benefits of a public register - potential security risks

It is important also to maintain the register as it could assist with identifying any potential security risks to government facilities and agencies.

By way of example, in 2013, a Global Witness investigation supposedly exposed details that the former Chief Minister of Sarawak in Malaysia, Abdul Taib Mahmud, and his family, had used their political status to purchase land and forest concessions for an amount less than their commercial value. It was alleged that the former Chief Minister's brother then used a secretly owned Singaporean company to hide profits from corrupt forest and land deals to avoid paying taxes. Additionally a further investigation by the United States' Government Accountability Office (**GAO**) alleged that the former Chief Minister's family ultimately owned the building which was leased to FBI's Seattle field office. Questions were then raised as to how the GAO could find better ways to track contracting companies to ensure that taxpayer monies would be awarded with integrity. It has been recommended that the government body that leases office spaces for government entities should adopt a contractor identifier that is an open system which includes the collection and publication of beneficial ownership information.[23] Accordingly having such a system is a prospective step which could be essential to protect a country's national security and their taxpayers.

In late 2015, questions were reportedly raised when the Northern Territory government agreed to lease the Darwin Port to a Chinese owned company, Landbridge Group. Concerns were raised too late about the security implications of a Chinese company owning a port seen to be critical to Australia's national infrastructure and defence. Calls were apparently made for the Foreign Investment Review Board (**FIRB**) to examine the deal, even though the value of the lease and that Landbridge was not a state-owned enterprise did not require FIRB approval.[24] One of the security concerns raised by the United States was that China's "port access could facilitate intelligence collection on US and Australia military forces stationed nearby".[25]

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[22] See Part 5 of TIA's submissions below for a more detailed explanation on the various definitions.
[23] https://www.globalwitness.org/en/blog/us-government-has-no-way-telling-who-behind-companies-it-does-business-or-what-risk-they-pose-our-security/ (accessed 9 March 2017).
[24] http://www.abc.net.au/news/2015-10-15/calls-foreign-investment-watchdog-to-probe-china-port-deal/6858254 (accessed 13 March 2017).
[25] See also https://www.nytimes.com/2016/03/21/world/australia/china-darwin-port-landbridge.html?_r=0 (accessed 13 March 2017).

The above examples establish that if beneficial ownership information is publicly available and can be easily accessed before entering into transactions, then security and political risks may be considered more readily and preventative measures may be taken to minimise those security risks.

3.5 Information to be collected - Avoiding duplication

So far as possible, TIA appreciates that any beneficial ownership information collected should not be duplicated with the information that is currently in the AML framework[26] or the information which would be collected for the Common Reporting Standard (**CRS**) that will come into effect from 1 July 2017. The CRS is a standard for financial institutions and banks to report to the ATO, information about accounts held by foreign tax residents. This includes collecting, reporting and exchanging financial account information that could be exchanged with the participating tax authorities from other countries (namely of those foreign residents) in order to ensure compliance with Australian tax laws and to act as a deterrent to tax evasion.[27]

However TIA recommends that the type of information to be collected be similar to that which would be currently collected under the UK's People with Significant Control (**PSC**) register.[28]

4. The UK's People with Significant Control register and critique

As discussed above, TIA recommends that the Australian Government follows the UK approach and publishes beneficial ownership information, enabling public scrutiny and improving the utility of the register.

Information from the UK's PSC register is now freely available to the public (subject to some restrictions for privacy and security reasons).[29] In June 2016, UK companies started filing beneficial ownership information with Companies House along with their yearly Confirmation Statement. In July 2016, the information on the PSC register became publicly available.

Having the benefit of the recent UK experience with the PSC register is now an additional advantage.[30] The fact that the English authorities have progressively improved on their scheme since formation is testament to their recognition of the potentially great harm to reputation in having a sloppy or out-of-date register.[31] Therefore TIA anticipates that there would be further improvements made to the UK's PSC register which could be incorporated into Australia's proposed central register.

Global Witness has collaborated with a number of other organisations to analyse the PSC register data published by Companies House since its inception. Global Witness reports that this data indicates that

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[26] See below Part 5.1 of TIA's submissions which details the type of information collected in Australia's AML framework.
[27] See https://www.ato.gov.au/Business/Large-business/In-detail/Business-bulletins/Articles/The-Common-Reporting-Standard-(CRS)-to-be-implemented-from-2017/, and also https://www.ato.gov.au/General/International-tax-agreements/In-detail/International-arrangements/Automatic-exchange-of-information---guidance-material/.
[28] See Part 4 of TIA's submissions which details the type of information being collected under the PSC register.
[29] See Part 3.2 of the Paper.
[30] Discussed in further detail below at Part 4 of TIA's submissions.
[31] https://www.globalwitness.org/en/blog/what-does-uk-beneficial-ownership-data-show-us (accessed 9 March 2017).

companies are now filing new information that they did not file under the previous reporting requirements.[32]

4.1 Critique of the PSC register

Global Witness noted that, as at November 2016, it appeared that just under 10% of companies (falling from 14% in July 2016) did not report any PSC, most declaring that none existed. This could be because that company has no single individual who satisfy the PSC criteria, for example, 25% ownership of the company. This highlights the need to consider the definition of beneficial ownership carefully. Arguably, the 25% ownership threshold is very high and could be exploited by companies that wish to avoid reporting. However that threshold is broadly in line with the AML and FIRB frameworks.[33]

It has been suggested that the number of companies which failed to report any PSC could indicate a misunderstanding of the conditions qualifying someone as a PSC.[34] By November 2016, only 2% of companies reported that they were struggling to either identify a beneficial owner or to collect correct information.

Global Witness' analysis of the data also indicated some quality issues in relation to some key fields which allowed for free text entries. For example, responses in the free text field for a PSC's nationality included "British", "UK", "United Kingdom", "Great Britain" and "English", thereby hindering the analysis of the data. To avoid such issues, TIA recommends limiting free text fields and implementing drop down options instead to improve the consistency of responses, with a potential "other" option with a free text field in situations where there is no other option available.

The date of birth field also posed problems as a significant number of responses indicated PSCs were born in 2016 or in the future. TIA recommends that fields like these be limited so erroneous responses are rejected which would decrease the possibility of inaccurate information.

Another major concern raised was in relation to the credibility of the PSC register. It was not clear from the data whether companies have provided inaccurate information and there are calls for the UK government to provide greater reassurance as to the accuracy of the data already on the PSC register. There are measures in place to improve the credibility of the PSC register which could provide some examples to be adopted by Australia in implementing its central register.[35] These include:

- sanctions where a company deliberately fails to meet PSC reporting obligations (after being made aware of an error) including maximum criminal penalties of 2 years' imprisonment and fines;[36]
- imposing duties on individuals who should be registering their own information onto the PSC register so their information is known to the company;[37] and

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[32] https://www.globalwitness.org/en/blog/first-look-uk-beneficial-ownership-data/ (accessed 13 March 2017) and https://www.globalwitness.org/en/blog/what-does-uk-beneficial-ownership-data-show-us/ (accessed 13 March 2017).
[33] See Part 5 of TIA's submissions below for details on the definition of "beneficial owner".
[34] https://www.encompasscorporation.com/blog/psc-101-an-overview-of-psc-register-from-companies-house/ (accessed 13 March 2017).
[35] See Part 9 of TIA's submissions for discussions on the possible penalties and sanctions.
[36] See for example, sections 790I and 790R *Companies Act 2006* (UK).
[37] See for example, section 790G *Companies Act 2006* (UK).

- granting some powers to companies to obtain beneficial ownership information for example, the power to freeze an individual's interest in the company where that individual fails to adequately respond to a notice for information.[38]

4.2 Takeaway points for Australia

The Australian government could gain from the UK experience, some of the following key points:

- providing detailed guidance for companies around the definition of a beneficial owner to minimise any misunderstanding and improve the quality of information filed on a register;[39]
- carefully considering the design of beneficial ownership reporting templates, particularly the use of drop down options rather than free text fields and limiting certain fields to decrease errors in data entry;
- considering the use of unique identifies for individuals and companies to assist with cross-matching beneficial owners; and
- initially, allowing companies to indicate whether they have had difficulties identifying a beneficial owner or collecting the right information ("don't know" category).

5. Defining the "Beneficial Owner"

Further to the process of disclosing beneficial owners of shares in listed companies which is identified in the Paper,[40] TIA notes there are two other regimes in Australia where ownership information is also provided and utilised - in the AML framework as part of customer identification/verification obligations,[41] and in the foreign investments framework for FIRB approval for investments into Australia.

5.1 AML definition of "beneficial owner"

For the purpose of carrying out customer identification/verification (including identifying and verifying the identity of beneficial owners), the AML framework defines a beneficial owner as "an individual (a natural person or persons) who ultimately owns or controls (directly or indirectly) the customer". Ownership for the purposes of determining a beneficial owner means **owning 25% or more** of the customer and 'control' includes where an individual can exercise control through making decisions about financial and operating policies. There are certain exemptions which apply to the beneficial owner identification/verification obligations (for example, companies and trusts which fall within the simplified verification procedures set out elsewhere in the legislation are exempted from the beneficial owner identification/verification obligation).

5.2 FIRB definition of "foreign person"

Meanwhile, for the purpose of considering whether FIRB approval is required for foreign investments in Australia, a "foreign person" is defined as either a natural person or a corporation not ordinarily

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[38] See for example, sections 790D and 790E *Companies Act 2006* (UK).
[39] For the guidance papers issued by Companies House see https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships (accessed 13 March 2017).
[40] See Part 2.2 of the Paper which deals with disclosure requirements under Chapter 6C *Corporations Act 2001* (Cth) for beneficial owners of share in listed companies for individuals with a substantial holding in the listed company.
[41] Also discussed at Part 2.4 of the Paper.

resident in Australia, who holds either **at least a 20% interest** in an entity, or a 40% aggregate substantial interest for two or more foreign persons.[42] This definition would also extend to trustees of a trust, a foreign government or any other person that meets the conditions as prescribed by the FIRB regulations.[43]

5.3 TIA's recommendation

Amongst the three possible definitions to determine who is a beneficial owner. TIA believes that at this stage, it is not necessary to formulate a common and appropriate definition to reconcile the three.

Ultimately TIA would recommend that there should be a consistent definition of "beneficial owner" not only for the Australian domestic definitions but also consistency with other countries that have or are looking to introduce the central UBO register. TIA notes the definition in the AML framework contributes towards Australia's implementation of Principle 7 of the G20 Principles and FATF Recommendation 10[44] which could be considered as the accepted international standard. Accordingly in the event there is a conflict between different thresholds and definitions of "beneficial owner", TIA prefers the definition under the AML framework in order to enhance consistency with the emerging global standards.

6. Express trusts

TIA notes that the Paper is **not** specifically about possible inclusion of express trust arrangements in the central register, however TIA offers some comments in light of:

- the specific reference to trusts included in the G20 Principles;
- the close relevance of trusts in the context of corporate ownership; and
- the potential for easy disguise of beneficial owners and evasion through trusts.

There appears to be a lack of knowledge and practical experience as to the full flexibility of trusts, particularly in respect of discretionary trusts which may conceal the identity of the true beneficial owners of the underlying assets.

The civil law counterpart of the trust lacks the English-based ability to separate legal title from beneficial ownership in the same way. Prior to the attempted incorporation of English law trust concepts by statute in Liechtenstein, for example, their counterpart was a creature of contract. Nowadays it does not import trust law, simply a purported statutory equivalent.

The European Union Fourth Anti-Money Laundering Directive 2015 (**EU Fourth Directive**) attempts to highlight the need to penetrate trusts as part of the mandate given to organs of participating Member States to obtain detail of beneficial ownership. Its intent is direct but in this respect the wording is difficult:

> "*In order to ensure a level playing field among the different types of legal forms, trustees should also be required to obtain, hold and provide beneficial ownership information to obliged entities*

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[42] Section 4 *Foreign Acquisitions and Takeovers Act 1975* (Cth) (***FATA***). Note that in certain circumstances, an associate of a foreign person may be taken to be a foreign person even if that associate is not a foreign person: section 54(7) *FATA*.

[43] This extends to general partners of limited partnerships and certain foreign government investors: see regulation 18 *Foreign Acquisitions and Takeovers Regulations 2015* (Cth).

[44] See Part 2.4 of the Paper.

> *taking customer due diligence measures and to communicate that information to a central register or a central database and they should disclose their status to obliged entities. Legal entities such as foundations and legal arrangements similar to trusts should be subject to equivalent requirements.*"[45]

This clearly recognises the need to deal with trust arrangements despite the difficulty of doing so. TIA would however argue that the challenge should not delay the creation of a central register.[46]

Additionally, the revelations through the Panama Papers have shown that secrecy using offshore accounts could facilitate illicit financial activities such as money laundering, financing of terrorism, tax evasion and corruption. Despite the European Commission's proposed improvements to the EU's anti-money laundering regulations, there remains an issue concerning trusts which allows the hiding of assets and their connections to beneficiaries by transferring any assets to a trustee.[47]

The issues relating to trusts are highlighted in a Global Witness Briefing Paper titled "Don't take it on trust",[48] which TIA considers has merit and that weight should be given to its contents. The paper notes that trusts pose a major hurdle to law enforcement as they "provide an unparalleled degree of secrecy, making them an ideal getaway vehicle for money launderers". The paper advocates the following points:

- that beneficial ownership information should be publicly available for good reasons such as to strengthen the EU Fourth Directive, to support law enforcement, to deter money laundering and to support non-EU countries to tackle corruption and improve data quality;
- that publishing trusts' beneficial ownership information is "legitimate and proportional to its impacts on citizens' right to privacy and to family life", and all parties to a trust should be disclosed as beneficial ownership (ie settlors, trustee, protector, beneficiary or class of beneficiaries); and
- finally, exemptions for disclosing identities of "minors or people otherwise incapable" ought to be removed as that would provide a loophole that could be exploited.

TIA considers that case-by-case exemptions could be considered for parties including superannuation funds, charitable foundations, not-for-profit organisations, minors and those with disabilities. However the basic question would remain as to what conditions and for how long should the exemptions last in order to prevent exploitation of these protections (ie when and what is the scope for review on the exemptions granted).

TIA considers that one method should be considered early to identify trusts is to have a drop-down option in the register to ask whether an express trust is involved. However, that said, it could still be a basis to evade disclosure and could be incorrectly reported by parties who had intended to exploit any possible loopholes to prevent accurate reporting.

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[45] See subparagraph 17 of the EU Directive 2015/849 dated 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:JOL_2015_141_R_0003&from=EN (accessed 20 March 2017).

[46] See: https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/FinancialServices/IE_2016_fourth_EU_AML_Directive.pdf (accessed 10 March 2017).

[47] https://www.globalwitness.org/en/blog/trusts-hole-eus-response-panama-papers/ (accessed 11 March 2017).

[48] Global Witness, Briefing paper titled "Don't take it on trust - The case for public access to trusts' beneficial ownership information in the EU Anti-Money Laundering Directive", 23 February 2017.

7. Supervising and monitoring the central register

7.1 Ownership

Ownership/monitoring of the new register will need to be allocated to an appropriate regulator (or other party). Each of AUSTRAC and ASIC are in a position to take "ownership" of the new register. For example:

- **AUSTRAC** currently requires reporting entities to identify and verify the identity of certain beneficial owners (i.e. in respect of customers that fall outside existing exemptions). Currently, there is no obligation to report the beneficial owners to AUSTRAC. The information on beneficial ownership, if known, is retained by the various reporting entities. One option could be for AUSTRAC to impose a reporting obligation (whether this obligation is compulsory or not would need to be considered) on reporting entities requiring them to report beneficial ownership to AUSTRAC/the new register. Under this approach, AUSTRAC would be best placed to take "ownership" of the new register.

  The downside to this approach is that an additional burden is placed on reporting entities (i.e. they will incur the costs (time/administrative burden) of reporting something to AUSTRAC/the new register that they are currently not obliged to report on.

  Another downside is that many company types and trust types fall within the parameters of exemptions (meaning reporting entities are not required to identify/verify beneficial owners for those entity types). This will mean that a large amount of beneficial owner information will not be captured by/reported to the new register.

- **ASIC** currently requires companies/trust to provide certain information upon registration. Another option could be that ASIC require additional beneficial owner information to be disclosed by the company at the time of registration. Under this approach, ASIC would be best placed to take "ownership" of the new register.

  The downside to this approach is that verification of the information disclosed would fall to ASIC.

Under either approach, legislation will need to be amended in order to both require the reporting of the information in the first instance (i.e. *Corporations Act 2001* (Cth) or *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)) and to give the relevant regulator the power to "own" the new register, supervise and monitor it and its contributors and to penalise those who fail to meet their legislative obligations in relation to the new register.[49]

7.2 Verification

Verification of the reported data / the data quality of the new register will be an important factor for consideration. Similar to what reporting entities under AML legislation find in respect to their own customer due diligence processes, "if you have junk coming in, you will have junk coming out". As mentioned in Parts 3 and 4 above, TIA recommends a model whereby a drop-down input approach

[49] See Part 9 of TIA's submissions below on a brief discussion about the possible penalties and sanctions.

is adopted. This is one method that can help to enhance the quality of data being reported into the new register.

Under either model described above, there will be disparity of quality/processes of those required to input data. Without some form of verification that is separate from that performed by the data inputters themselves, the quality of the data on beneficial ownership will not necessarily be reliable. Unverified data will enable exploitation by those seeking to input false or misleading data.

8. Whistleblower incentives

TIA considers that incentives for whistleblowers will be important for increasing the transparency of beneficial ownership of companies. Whistleblowers play a key role in exposing otherwise unknown acts of corruption.[50] With regards to increasing the transparency of beneficial ownership of companies, whistleblowers could assist with exposing failures to report beneficial ownership information or the reporting of inaccurate beneficial ownership information.

TIA has recently released an updated position paper on whistleblower protection[51] which called for improvements to Australian whistleblower protection laws, including:

- making deliberate reprisals against public interest whistleblowers criminal;
- seriously considering the benefits of *qui tam* provisions to offer up to 25% of recovered damages or penalties to whistleblowing corporate employees; and
- an Australian Standard on Whistleblower Protection, supported by independent monitoring and oversight to help drive a national integrity culture.

TIA recommends that the Australian government considers these proposed improvements to whistleblower protection to assist with increasing the true transparency of beneficial ownership of companies.

9. Penalties / Sanctions

The extent to which the register will be effective to materially assist in identifying links of beneficial ownership for the purpose of minimising illicit financial activities and prevent money laundering must significantly depend on the types of penalties, sanctions and/or incentives that would be implemented.

Currently under AML law, the most common penalty leveraged is an infringement notice (which is a public notice of a breach and an accompanying fine (which is also publicised)). AUSTRAC relies on the "name and shame" concept as reputational damage is often far worse for a prominent reporting entity than the monetary penalty. It has recently leveraged civil penalties against the Tabcorp Group companies and the Federal Court has confirmed significant penalties.[52] TIA notes separate consultations by the Attorney-General's Department on amendments to the AML legislation to vastly

[50] See for example, the LuxLeaks scandal in Luxembourg where there was uproar after whistleblowers were found guilty for exposing tax arrangements which may otherwise not have been revealed: http://www.bbc.com/news/world-europe-36662636 (accessed 14 March 2017).
[51] TIA's position paper is available at http://transparency.org.au/wp-content/uploads/2017/02/PP8-Whistleblowing-Transparency-International-Australia-Feb-2017-Copy.pdf.
[52] See http://www.austrac.gov.au/media/media-releases/record-45-million-civil-penalty-ordered-against-tabcorp (accessed 20 March 2017).

broaden the legislative framework under which infringement notices could be leveraged. TIA would endorse this as a preferred approach by the regulators.

It would be important to empower those who would be charged with reinforcing supervision, to raise the bar for regular compliance with the aim of a reliable, complete and up-to-date register. To deal with instances of falsity in identity, failure of companies to make adequate enquiries and other non-compliance, TIA would expect significant attention to both an incentive and a penalty regime.

It will be important that those constructing the register are experienced with and not be deterred by the complex structures and ruses some BO's will use in efforts to conceal their identity. Proactive steps may be necessary.[53] TIA would be glad to engage in further consultation as to remedies and penalties once a firm decision has been made on setting up a register.

Transparency International Australia
info@transparency.org.au
www.transparency.org.au

20 March 2017

[53] See for example, the B team's initiative available at http://bteam.org/wp-content/uploads/2015/11/B20-Beneficial-Ownership-in-Practice.pdf (accessed 13 March 2017) and http://blog.transparency.org/2016/09/22/a-growing-call-from-business-for-company-ownership-transparency (accessed 14 March 2017).

13 March 2017

Email: beneficialownership@treasury.gov.au

Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market Street
SYDNEY NSW 2000

Dear Ms Keall,

Submission on the Australian Government's *Increasing Transparency of the Beneficial Ownership of Companies* Consultation Paper

Tyro Payments Limited (Tyro) welcomes the opportunity to provide this submission on the above-named Consultation Paper.

Tyro is Australia's only independent eftpos banking institution and is the first new entrant in the banking business in more than 18 years. Tyro holds an authority under the *Banking Act 1959* (Cth) to carry on a banking business as an Australian Deposit-taking Institution (ADI) and operates under the supervision of the Australian Prudential Regulation Authority (APRA).

Tyro provides credit, debit, eftpos card acquiring, Medicare and private health fund claiming and rebating services, as well as a transaction and deposit account integrated with Xero cloud accounting. Tyro takes money on deposit and offers unsecured cashflow-based lending to Australian eftpos merchants.

Tyro recommends to entrust the Australian Securities & Investments Commission (ASIC) with the collection and providing of beneficial ownership information.

As an independent Australian government body that acts as Australia's corporate regulator, ASIC already provides many trusted public-facing registers. Thus, it is uniquely suited to widen the scope of the ASIC company register with the required beneficial ownership information:

1. Users would have one register to consult for company and beneficial owner identification.
2. Businesses could use the same Application Programming Interface (API) to import machine readable data.
3. ASIC already has the richest data set on company identity including director and shareholding structure.
4. Users already have the legal obligation to keep their data updated in the ASIC registry.

Tyro Payments Limited
abn 49 103 575 042
afsl 471951

155 clarence st
sydney nsw 2000
p+61 2 8907 1700
f+61 2 8907 1777
h+1 300 966 639
www.tyro.com

5. ASIC has the authority to collect the data and the tools to enforce the collection (fines and deregistration).

Regulatory Background

Australia is a founding member of the Financial Action Task Force (FATF), an independent, inter-governmental body whose role is to combat money laundering, the financing of terrorism and the spread of weapons of mass destruction.

In 2006, the Australian Government introduced the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (AML/CTF Act) and the *Anti-Money Laundering and Counter-Terrorism Financing Rules*, overseen by the Australian Transaction Reports and Analysis Centre (AUSTRAC). Through this piece of legislation, all reporting entities were required to abide by the requirements which include collecting and verifying certain information about a customer, known as Know Your Customer (KYC).

In 2014, the obligations were further enhanced after FATF released revised international standards on AML/CTF in 2012, clarifying customer due diligence obligations. One of the recommendations provided by FATF, that is relevant to this submission, was the 'transparency of the beneficial ownership.'[1]

On 1 January 2016, reforms to the AML/CTF legislation came into effect that required reporting entities to gain an appropriate understanding of the beneficial ownership and control of their customers. These reforms placed stringent obligations on reporting entities when adhering to KYC obligations, which further identified the lack of available public information on ASIC's companies, ATO or other registers.

KYC is a significant barrier to innovation and competition

Tyro supports the authorities' efforts to combat and prevent illegal activities and to secure the integrity of the financial system through greater transparency. At the same time, a process has to be found that prevents the KYC process from discouraging Australian businesses from seeking competitive alternatives.

When on-boarding a new customer, Tyro undertakes a customer identification process that fulfils our KYC requirements as a reporting entity. Tyro has an obligation to ensure that a customer exists and we must determine whether the customer or the persons with 25 per cent or more ownership or control of the company is politically exposed, subject to sanctions, or present in a foreign jurisdiction that is subject to sanctions. We also must ensure that our customers have an active ABN and a physical place of business in Australia.

When undertaking the on-boarding application process for a prospective company merchant, the current company extract provided by ASIC does not contain all of the beneficial ownership information that is required for a reporting entity to collect and verify under the AML/CTF legislation. As part of the on-boarding process, a

[1] Increasing Transparency of the Beneficial Ownership of Companies Consultation Paper, p. 7

reporting entity is required to identify information of beneficial ownership of a new customer. This is not a straight-forward process, as information may not be readily accessible from the company merchant and there is no specific register available from ASIC that stores the information that fulfils these KYC requirements.

The complexities, as well as the administrative burden, involved in obtaining beneficial ownership information often leads to customer push-backs. Tyro estimates that 30 per cent of new company merchants require further information to be sourced before their applications may be processed, in order for Tyro to meet its KYC obligations.

Tyro considers that it is at a significant competitive disadvantage when compared with the major retail banks. The retail banks do not experience the same problem, since their retail banking division must satisfy KYC requirements when an Australian person or entity opens their first bank account with them. Tyro is not a retail bank. The switching effort demotivates customers from seeking competitive alternatives, thus stifling innovation and competition in banking.

The frictions in collecting beneficial ownership information

ASIC is tasked with managing a public register of company information, yet due to the additional requirements introduced by the legislation in 2014 (that came into full effect in 2016), the register is now an inadequate source for a reporting entity to meet their KYC obligations. The increased demand for information that company merchants must provide to a reporting entity when changing financial providers has created enough friction for many of them not to follow through with their on-boarding applications.

The collection of beneficial ownership information is a significant pain-point for reporting entities when taking on new company merchant customers. Reporting entities have a responsibility to handle their customer's information with due diligence, yet there also has to be a level of transparency in terms of accessing beneficial ownership information.

<u>The pain-points</u>

- The lack of information on the ASIC public register in relation to beneficial ownership requires reporting entities to seek out the missing information from the company merchants themselves. The process of doing this is cumbersome and time-consuming, as a company merchant may not know what the missing information is or where to locate it
- The administrative burden involved in these applications is significant. For example, Tyro has had to create a dedicated department focused on adhering to KYC protocols, including ascertaining beneficial ownership information in line with AUSTRAC requirements
- Due to the frictions involved in locating the correct information, Tyro suffers a significant loss of revenue from prospective company merchants who decide not to proceed with the on-boarding application process

- The information provided by a company merchant to fulfill KYC requirements often isn't certifiable, which causes inaccuracies with the information that is provided, leading to the inability to fulfil KYC obligations.

Accordingly, these frictions are subsequently restricting the movement of company merchants between ADIs, which is restricting innovation and leading to competition being stifled in the market.

The opportunity in extending ASIC centralised register to beneficial ownership information

ASIC already has the legal authority to collect data on companies to keep its register up-to-date and can impose penalties on companies who do not comply with orders from ASIC for such purposes. It holds this information in its current public companies register. If ASIC was granted the power to require companies to provide beneficial ownership information on its register, this would eliminate the pain points described above.

Tyro proposes for beneficial ownership information of companies to be included on ASIC's companies public register. We believe that this would merely be adding an extension to the current register and such changes to incorporate the new information would not be onerous to implement.

Above all, having a centralised register that contains all information necessary for a reporting entity to fulfill KYC requirements would greatly benefit reporting entities by removing the frustrations of accessing information directly from company merchants themselves.

<u>Proposed changes to the ASIC public companies register</u>

Tyro proposes for the ASIC public companies register to be updated to include the following information:

- detail each individual shareholder on the company's register, including name, date of birth, place of birth and residential address
- where shares are being held on behalf of another entity (trust, company, partnership, individual), list the entity's name and other details regarding beneficial ownership which reporting entities require as a first step to meet their KYC obligations.

To have a centralised register that contains all information, including beneficial ownership, would improve business efficiency and KYC standards for reporting entities. Further, companies should be required to update any changes to their register, so that information is always up-to-date and reporting entities can rely upon these registers to be an accurate summary of a company's structure at all times.

Centralised Register: An international example

As noted in the Consultation Paper, the United Kingdom has implemented a centralised public register containing beneficial ownership information which companies must update annually, in conjunction with companies being required to maintain their own 'Persons with Significant Control' (PSC) register which is also made publicly accessible.

The PSC register must contain details of their beneficial owners, including full name, date of birth, country or state of residence, place of business, residential address, the date when the person become a beneficial owner and any other information on the beneficial interest held by that person.

A centralised public register helps to increase transparency and accessibility of beneficial ownership information. However, the requirement to only update the centralised register annually is not ideal as the most current information would always be held in the PSC register maintained by the company.

Australia should follow the model of having a centralised register but in addition require that any changes to beneficial ownership must be updated as they occur. Having one source of truth for beneficial ownership information and where it is stored would mean that reporting entities will be able to satisfy KYC requirements in a streamlined fashion which will help to decrease the frictions currently being experienced during the on-boarding process.

Increasing market competition

Tyro supports the international directive of enhancing KYC requirements and we are committed to fulfilling our KYC obligations under the AML/CTF legislation. Australia can learn from international models, such as that of the United Kingdom, to understand how increased corporate transparency with a centralised public register can enhance market competition.

As we are seeing in Australia, KYC obligations make it increasingly difficult for company merchants, on the look-out for a better deal, to swap between ADIs. If Australia has a centralised public register that stored all company structure information, the growth of our market would no longer be hampered by the lack of information available to satisfy KYC obligations.

Conclusion

As it says in the Consultation Paper, 'improving transparency around who owns, controls and benefits from companies will assist with preventing the misuse of companies for illicit activities.'[2] The Australian Government needs to make the collection and storage of company information a priority and ensure that there is transparency in how this information is accessed. Adhering to KYC obligations is not just a box-ticking exercise for reporting entities, it is also a measure that

[2] Ibid, p.v

protects our country from illegal activities that could be undertaken by a company that could harm our country.

Tyro would welcome a centralised public register of company information, ideally provided by ASIC, including all necessary beneficial ownership information that is needed to satisfy KYC obligations. Australia needs to keep up with international jurisdictions that have implemented frameworks that ensure beneficial ownership information is accessible.

A centralised public register in Australia containing beneficial ownership information would not only make it more difficult for companies to engage in deceptive behavior, yet it would also bolster the integrity of our financial services market as a result. And this would benefit regulators, financial services providers and company merchants alike.

Kind regards,

Jost Stollmann
Executive Director
Tyro Payments