

# Submission on increasing the transparency of the beneficial ownership of companies

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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.<sup>1</sup> 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.<sup>2</sup>

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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<sup>1</sup> Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <<http://www.treasury.gov.au/>>. p 11

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>8</sup> and must immediately

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<sup>3</sup> *Corporations Act 2001* (Cth). s672B(2)

<sup>4</sup> *Ibid.* s608

<sup>5</sup> *Corporations Act 2001* (Cth).

<sup>6</sup> ASIC, *Regulatory Guide 5 Relevant interests and substantial holding notices* (November 2013). RG 5.27

<sup>7</sup> *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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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).<sup>12</sup> This obligation is more feasible for a proprietary company because it must have no more than 50 members at any given time<sup>13</sup> 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.<sup>14</sup> 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<sup>15</sup>. The Committee is of the view that the same approach should be adopted in Australia.

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<sup>8</sup> Australian Securities Exchange, *Listing Rules* (as at March 2017). Rule 4.10.4

<sup>9</sup> *Ibid.* Rule 3.17.2

<sup>10</sup> *Corporations Act 2001* (Cth). s 672DA

<sup>11</sup> *Ibid.* s169(54)

<sup>12</sup> *Ibid.* ss 178A and 178B

<sup>13</sup> *Ibid.* s 113

<sup>14</sup> *Small Business, Enterprise and Employment Act 2015* (UK). s 81

<sup>15</sup> *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,<sup>16</sup> 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<sup>17</sup> 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

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<sup>16</sup> Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <<http://www.treasury.gov.au/>>.

<sup>17</sup> *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<sup>18</sup> (**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.<sup>19</sup> 'The definition of 'beneficial owner' adopted under the AML/CTF Rules is consistent with the definition proposed by the Financial Action Task Force (**FATF**),<sup>20</sup> 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:<sup>21</sup>

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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<sup>18</sup> *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)

<sup>19</sup> *Ibid.* Part 4.12 and Rule 1.2.1

<sup>20</sup> Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <<http://www.treasury.gov.au/>>. p 2

<sup>21</sup> *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.<sup>22</sup> Beneficial ownership is not defined under the tax law, and is given its common law meaning.<sup>23</sup> Under the common law, ‘beneficial ownership’ means ‘ownership for one’s own benefit, not for the benefit of others’,<sup>24</sup> and is to be distinguished from legal ownership, like the legal ownership of shares according to the register of its members.<sup>25</sup> 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 than the former.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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

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<sup>22</sup> *Income Tax Assessment Act 1997* (Cth), s 165-150; CCH, *Australian Federal Income Tax Reporter (ITAA 1997)*, (at 181-520)

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* Citing *Ayerst (HMIT) v C&K (Construction) Ltd* (1976) AC 167.

<sup>25</sup> *Ibid.* Citing *Avon Downs Pty Ltd v FCT* and *Patcorp Investments Pty Ltd v FCT*.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Corporations Act 2001* (Cth), s 169(5A)

<sup>28</sup> *Ibid.* s178A(1)(b)(viii)

definition of PSC.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

**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.<sup>32</sup> This definition of control is similar to that which is adopted under the Corporations Act when determining whether an individual has 'control' for

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<sup>29</sup> *Companies Act 2006* (UK). Schedule 1A Part 1

<sup>30</sup> ASIC, *Regulatory Guide 5 Relevant interests and substantial holding notices* (November 2013).

<sup>31</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 22.

<sup>32</sup> *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.<sup>33</sup> 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).<sup>34</sup>

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<sup>33</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). ss 41, 43 and 45

<sup>34</sup> 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.<sup>35</sup> 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'.<sup>36</sup>

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.<sup>37</sup>

### **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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<sup>35</sup> Ibid. p 6

<sup>36</sup> 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

<sup>37</sup> 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,<sup>38</sup> 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

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<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

## **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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<sup>39</sup> *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015* (Cth).

<sup>40</sup> Nassim Khadem, 'Private Companies Restructure to Avoid Being Named on ATO's Tax Disclosure List', *The Sydney Morning Herald*, 21 March 2016.

<sup>41</sup> 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;<sup>42</sup>
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

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<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup>

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.<sup>45</sup>

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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<sup>43</sup> *Anti Money Laundering and Counter-Terrorism Financing Rules 2007 No. 1. part 4.12*

<sup>44</sup> 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.

<sup>45</sup> *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.<sup>46</sup> 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.<sup>47</sup>
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.<sup>48</sup> In the process, they exploit corporations for money laundering purposes,<sup>49</sup> especially a serious risk in Australia.<sup>50</sup> 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,<sup>51</sup> aided in no small part arguably by its having a functional, centralised database of such intelligence. The FATF

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<sup>46</sup> Australian Transaction Reports and Analysis Centre, *AUSTRAC Annual Report: 2015-16* (2016). p 9

<sup>47</sup> Australian Transaction Reports and Analysis Centre, *AUSTRAC Annual Report 2014-15* (2015). p 9

<sup>48</sup> 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

<sup>49</sup> Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership* (October 2014). p 3

<sup>50</sup> Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures: Australia Mutual Evaluation Report* (2015). p 112

<sup>51</sup> 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.’<sup>52</sup>

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,<sup>53</sup> 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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<sup>52</sup> Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership* (October 2014).

<sup>53</sup> 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<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

## **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.<sup>57</sup> 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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<sup>54</sup> 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.

<sup>55</sup> Australian Government, *Increasing Transparency of the Beneficial Ownership of Companies* (February 2017) <<http://www.treasury.gov.au/>>. p 4

<sup>56</sup> 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', March 2016 ('UK Department for Business Innovation and Skills Report') 27.

<sup>57</sup> 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.<sup>58</sup>

#### *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

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<sup>58</sup> 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.<sup>59</sup>

## **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

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<sup>59</sup> 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<sup>60</sup> 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<sup>61</sup> 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,<sup>62</sup> and
6. ensure that companies cooperate with competent authorities to the fullest extent possible in determining the beneficial owner.

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<sup>60</sup> 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.

<sup>61</sup> 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.

<sup>62</sup> 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*', March 2016 ('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*,<sup>63</sup> 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.

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<sup>63</sup> *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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> 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

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<sup>64</sup> The Australian Financial Markets Association, Submissions to Australian Treasury, *Improving Australia's Framework for Disclosure of Equity Derivative Products*, 31 July 2009

<sup>65</sup> 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/>

<sup>66</sup> 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/>

<sup>67</sup> 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.<sup>68</sup> The Committee submits that any criminal penalties imposed should be 'proportionate and dissuasive',<sup>69</sup> 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.

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<sup>68</sup> *Corporations Act 2001* (Cth), Schedule 3

<sup>69</sup> 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.<sup>70</sup>

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

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<sup>70</sup> *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.<sup>71</sup> The person is required to make a disclosure within two business days of being given the direction, or receiving an exemption to disclose,<sup>72</sup> 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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<sup>71</sup> Ibid. s 672A

<sup>72</sup> *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.<sup>73</sup> Failure to do so is a civil liability offence.<sup>74</sup> 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

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<sup>73</sup> ASIC, *Substantial holding disclosure: Securities lending and prime broking*, Regulatory Guide 222, April 2011

<sup>74</sup> *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.

## 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.

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