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**BY EMAIL**

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Dear Ms Keall

Re: Submission on *Increasing transparency of the beneficial ownership of companies*

Thank you for the extension of time for lodging our submission to the enquiry and Consultation Paper on this topic released in February.

Attached is the TI Australia submission.

Of course, we would be glad to answer any questions you may have.

Yours Sincerely

Greg Thompson
Director, TI Australia

cc Michael Ahrens mca@zeta.org.au
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# 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

[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.

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[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).