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Ms Jodi Keall
Senior Adviser, Financial System Division
The Treasury
100 Market Street
SYDNEY NSW 2000
By email beneficialownership@treasury.gov.au

Dear Ms Keall

Consultation Paper: Increasing Transparency of the Beneficial Ownership of Companies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Increasing the transparency of beneficial ownership of Australian companies

Which companies are in scope?

Questions

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

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

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

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

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

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

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

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

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

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

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

What beneficial ownership information should be captured?

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

Questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Ibid

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

9 Ibid, p. 34

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

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

Details of beneficial owners to be collected

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

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

AML fields

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

FATCA/CRS

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

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

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

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

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

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

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

Companies

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

Trustees

- Requirements for individual or company as appropriate

Trust details

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

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

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

How and where to record beneficial ownership information?

How should this information be collected and stored?

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

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

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

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

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

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

13) Should each company maintain their own register?

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

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

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

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

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

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

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

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

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

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

As outlined in our response to question 13.

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

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

Operation of a central register

Questions

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

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

a) Financial intelligence units

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

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

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

a) Be a Commonwealth Government authority;

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

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

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

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

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

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

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

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

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

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

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

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

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

Ensuring information is accurate and current

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

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

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

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

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

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

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

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

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

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

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

Exchange of information between authorities

Questions

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

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

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

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

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

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

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

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

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

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

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

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

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

Other implementation and administration issues

Sanctions

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

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

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

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

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

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

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

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

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

Transitional arrangements

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

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

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

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

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

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

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

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

Impact on affected companies and stakeholders

Questions

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

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

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

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

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

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

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

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

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

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

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

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

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

Other beneficial ownership transparency issues

Identifying those who can control listed companies

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

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

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

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

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

See our answer to question 36.

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

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

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

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

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

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

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

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

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

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

41) How often are nominee shareholding arrangements used?

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

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

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

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

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

Not for listed companies nor managed investment schemes.

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

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

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

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

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

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

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

46) How often are bearer share warrants used?

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

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

Benefits can include:

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

Negative aspects could include:

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

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

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

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

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

Yours sincerely

Signed by A O'Shaughnessy

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