Law Council
OF AUSTRALIA

Increasing Transparency of Beneficial Ownership of Companies

The Treasury

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful for the assistance of the Corporations Committee of the Business Law Section, its Anti-Money Laundering Working Group and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to comment on the Treasury's *Increasing Transparency of Beneficial Ownership of Companies Consultation Paper,* released in February 2017 (**the Consultation Paper**).

2. The Hon Kelly O'Dwyer MP has indicated that 'Improving transparency around who owns, controls and benefits from companies will assist with preventing the misuse of companies for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing.'[1]

3. The Law Council opposes financial crime and accepts the Minister's claim that improving transparency will assist in preventing misuse of companies. However, it is unaware of the empirical bases for the Minister's assertion. Accordingly, the Law Council welcomes necessary and proportionate measures to this end provided such measures are subject to stringent review to assess the extent to which the register is effective in achieving its aims in addressing financial criminality.

4. As part of Australia's first Open Government National Action Plan the Government committed to improve transparency of information on beneficial ownership and control of companies available to relevant authorities. A key milestone for this commitment was the release of a public consultation paper seeking views on the details, scope and implementation of a beneficial ownership register for companies.[2]

5. In this context, the Law Council welcomes the release of the Consultation Paper and proposals to increase the transparency of beneficial ownership of companies. This increase in transparency is consistent with international practice. As noted in the Consultation Paper, organisations such as the G20, the Financial Action Task Force (**FATF**), the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes and the World Bank have a strong interest in increasing beneficial ownership transparency.[3] Moreover, the United Kingdom has recently introduced a beneficial ownership register.[4] Article 30(3) of the *Directive (EU) 2015/849*,[5] in the context of AML/CTF, also requires member states to ensure that beneficial ownership information is held in a central register; it is left to member states whether this is a company register or a public register.

6. Action on a register of beneficial ownership is one element of a series of internationally agreed measures[6] directed toward global problems of illicit money laundering, corruption, bribery, terrorism financing and tax evasion, as well as addressing legally (if not morally) legitimate aggressive tax planning arrangements

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[1] The Treasury, *Increasing Transparency of Beneficial Ownership of Companies Consultation Paper* (February 2017), v.
[2] Department of the Prime Minister and Cabinet, *Australia's First Open Government National Action Plan* (December 2016), 16.
[3] The Treasury, *Increasing Transparency of Beneficial Ownership of Companies Consultation Paper* (February 2017), 1.
[4] Part 21A of the *Companies Act 2006* (UK) and the *Register of People With Significant Control Regulations 2016* (UK).
[5] Directive (EC) No 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L 141/73.
[6] Other measures include the AML/CTF regime, including international exchange of information and cooperation, and proposals for action on Base Erosion and Profit Shifting.

that leverage gaps and mismatches between national taxation laws and systems. A core theme of the responses is to place a series of client due diligence, 'risk management' and reporting obligations on financial institutions, service providers and professional advisers (collectively referred to as the 'regulated community'), as means of providing additional streams of information to assist revenue and law enforcement agencies to deal with these problems.

7. Federal, state and territory governments already require businesses and the regulated community to collect and report to multiple government agencies a substantial amount of identity, financial and business information under, for example, revenue, land and property conveyancing, business and entity registration, and licensing schemes; and the existing Corporations Law.

8. The Consultation Paper suggests that improving the collection and utilisation of beneficial ownership information will significantly contribute to authorities' efforts to combat illicit activities, and will, in turn, promote greater integrity and transparency with the domestic and global financial system.

9. While the Law Council acknowledges the problem identified, and that the introduction of a central register of beneficial ownership might assist in addressing the revenue and law enforcement objectives, we urge the Government not to implement the measure in a way that simply adds an additional layer of due diligence and reporting obligations on business and regulated communities, or which simply creates an additional, 'stand alone' data set.

10. The Law Council considers Australian governments need to holistically examine what information is called for across all levels of government; what verification, due diligence and reporting burdens are being placed on business and the regulated community in assembling and supplying that information; whether the compliance burdens and disclosure obligations are reasonable and proportionate; whether the privacy of individuals is being respected and protected; whether government agencies are maximising efficiency in the way they store, analyse and share that information; and whether the revenue and law enforcement objectives are being achieved. By way of example, the design of a register of beneficial ownership should actively contribute to simplifying and reducing the client due diligence and reporting obligations of financial institutions, service providers and other reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF**) regime in a manner which imposes the minimum incremental cost burden on companies, as is consistent with the G20 objectives.

11. The Law Council makes the following key recommendations in relation to the Consultation Paper proposals:

    - The register of beneficial ownership should comprise a company's own register and the additional information provided on the Australian Securities and Investments Commission's (**ASIC**) current company register system, so as to provide a necessary response to the legitimate objectives of increased transparency, accountability and information access for the purpose of preventing companies being used as a vehicle to disguise the identity of those involved in illicit activities, while also leveraging off existing requirements and systems to the maximum extent possible. The Law Council considers that the following model achieves these dual aims:

- for listed companies: listed companies should be exempt from the beneficial holder register due to the considerable reporting obligations already in place that provide for beneficial ownership information to be collected for listed companies, such as existing substantial holder notices, the share register which a listed company is required to maintain, and the tracing notices register kept under section 672DA of the *Corporations Act 2001* (Cth) (**Corporations Act**).

- for unlisted companies: unlisted companies should collect beneficial ownership data which relates to a natural person having a 'relevant interest' in more than 20% of shares in the company, to align unlisted companies' obligations with the current 'relevant interest' provisions that apply to listed companies. This information should be collected at various stages: at incorporation, when a company becomes aware of a change of beneficial ownership and in response to ASIC's annual statement.

- privacy measures should be taken to ensure the model's compliance with privacy standards, including review and consultation with the Office of the Australian Information Commissioner (**OAIC**) and the Australian Government Solicitor to ensure that publicly available information on the register does not include confidential information of private citizens.

- The Law Council submits that the legal concept of 'relevant interest' as under the Corporations Act already subjects Australian listed companies to a state of the art, anti-avoidance disclosure regime which appears to meet the G20 objectives in relation to a 'beneficial ownership register.' Utilising the concept of 'relevant interest' ensures consistency across domestic regimes and compliance with the standards that the Consultation Paper seeks to implement in relation to beneficial ownership. Further the definition of beneficial ownership adopted in our domestic laws should be aligned to internationally agreed standards, such as recommended by the FATF and adopted in AML/CTF legislation;

- ASIC should be appointed as the regulator with responsibility for holding and maintaining the register of beneficial interests information which companies will be required to lodge, alongside a company's existing register, which should also include the beneficial ownership information collected as we describe;

- The level of obligation should dovetail into existing reporting obligations of companies and not be unduly onerous. If ASIC was to introduce an obligation on the company beyond reporting beneficial ownership information to verify or interrogate the information provided, that would risk being unduly onerous and imposing disproportionate cost on the company concerned. If any more onerous regime was proposed, it would be necessary to consider exemptions to the categories of companies which had to provide the information (e.g. small proprietary companies) to avoid undue administrative and cost burden; and

- AML/CTF reporting entities should be relieved of the obligation to undertake beneficial ownership due diligence where the company (i.e. customer) has an entry on the register.

12. This submission begins by providing some general comments on key aspects of the Consultation Paper before addressing specific Consultation Paper questions. As the questions in the Consultation Paper relate exclusively to companies and do not relate to the use of trusts, the Law Council's answers to the specific questions, provided below, do not canvass any issues that may arise from the use of trusts.

General comments

13. As a general proposition, Australian business is affected by the increasing cost of compliance with regulation, at state, territory, federal and, increasingly, international levels. The more consistent the requirements can be across each of those jurisdictions, and across agencies, the better.

14. It is worth noting that, in Australian law, the expression 'beneficial ownership' is often used interchangeably with the legal concept of 'equitable ownership.' The G20 principles seem to go to control and influence, which is closer to the 'relevant interest' Australian law concept than to equitable ownership. This submission uses the term 'beneficial owner' or 'beneficial holder' in the same way that the Consultation Paper does, rather than in the Australian legal sense of that term.

15. To avoid confusion, and since the policy objectives of a 'beneficial ownership register' would be best achieved by using the 'relevant interest' concept, we would recommend against using the term 'beneficial ownership' in any legislation which may be introduced to address the G20 principles on this topic, albeit it could be made clear that the purpose of the legislation was to meet the G20 principles in relation to beneficial ownership. We would be happy to assist with thoughts on how this approach could be drafted into legislation.

16. ASIC, as the national regulatory authority for corporations, should be responsible for collecting and maintaining the beneficial ownership information to the extent it is to be stored on a central register. The public accessibility of that register of beneficial ownership of companies should also be explored as a way of leveraging reductions in compliance burdens for regulated entities under, for example, the AML/CTF regime. At present, financial institutions and service providers are required to obtain and verify beneficial ownership information as part of their client due diligence and 'know your customer' duties whenever an AML/CTF reportable transaction is in contemplation. This process may have to be repeated by different institutions and service providers at various stages of a transaction's pathway.

17. Arguably, a lot of this information is of no business relevance to the financial institution or service provider, but is being collected and reported, firstly, to provide a deterrence/unwitting risk management tool against illicit transactions by a customer/client and, secondly, to provide a stream of financial transaction 'intelligence' to AUSTRAC. It has been established from empirical and other studies – particularly in the United Kingdom – that there is a very high compliance cost for private sector reporting entities associated with client due diligence obligations under AML/CTF legislation. A publicly available register of beneficial ownership information, maintained by a trusted national agency (along with the company's own register), could provide a basis for relieving financial institutions and other service providers from having to duplicate beneficial ownership information gathering and verification obligations under the AML/CTF regime.

A workable regime

18. A workable regime which leverages off existing measures could be as set out below.

19. For listed companies, leverage from the:

    - existing substantial holder notice regime;
    - share register which the listed company is required to maintain; and
    - register kept under section 672DA of the Corporations Act, which contains the responses to tracing notices. The frequency with which companies have this analysis (often colloquially described as 'beneficial holder analysis') done through the issue of tracing notices varies, but the results of any tracing notices which are issued are made available on the register. Generally, this has application with respect to holdings of less than 5% (below the substantial holder notice disclosure requirement), so well below the area of focus of the FATF. While some improvements to this regime may be desirable – and are addressed below – they are not necessary for Australia to meet the G20 obligations. Australia already significantly exceeds those requirements through the substantial holder notice regime.

20. For unlisted companies:

    - provided the obligations are not too onerous, it should be practical and cost-effective for the company to add collecting beneficial ownership data to its existing data, dovetailing into its current data review/disclosure points. Specifically:
        - at incorporation, require the company to disclose the beneficial owners, not just whether shares are beneficially held;
        - if the company becomes aware of a change of beneficial ownership which relates to a natural person having a relevant interest in more than 20% of shares in the company, impose an obligation on the company to notify ASIC, in the same way that a proprietary company is currently required to notify a change of shareholding. These changes were previously notified through a paper form 484. It is now done through the online equivalent where the company can submit the information directly to ASIC; and
        - impose an obligation on the company to enquire of its shareholders after receiving ASIC's annual statement whether there has been any change of relevant interest of a natural person, and to notify ASIC of any change which is notified to the company. This could include an obligation to include in the updated details to ASIC the identity of any shareholder which did not respond to the request.

21. The Law Council submits that, to ensure that this model meets privacy standards, the following privacy measures should be taken:

    - OAIC should be involved in and consulted on how the register addresses the safeguarding of personal information and auditing of the register; and

- the Australian Government Solicitor should conduct a privacy impact assessment.

Specific responses to the questions in the Consultation Paper

Beneficial Ownership

Which companies are in scope?

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

22. Companies listed on any exchange, including the Australian Securities Exchange (**ASX**) should be exempt from the new requirements. There is sufficient information available via the tracing notice provisions and other mechanisms referred to below. Requiring listed companies with diverse and dynamic share registries to comply with these obligations would impose an unfair and unnecessary compliance burden on them.

23. The Law Council notes that Australian listed companies are already subject to a state of the art anti-avoidance disclosure regime which appears to meet the G20 objectives, through:

    - 'substantial holder notices' – under this regime the holders and associates of holders of a 'relevant interest' in voting shares must report that interest to the company. The company then discloses it to ASX. These notices relate to voting power of 5% or more in a company, held individually or when aggregated with an associates' voting power. This regime generates disclosure significantly below the 25% FATF threshold;

    - 'share registry' – under this regime the company keeps a share register (which discloses legal but not necessarily beneficial interests); and

    - 'beneficial shareholdings analysis' under this regime where the company does a beneficial holder analysis by issuing tracing notices, the company keeps the responses to those notices. Beneficial holder analysis can be quite costly. Companies typically do it when they are preparing for a capital raising, since some capital raising structures involve offers being made direct to the beneficial holders. Also, companies do a beneficial holder analysis if they are monitoring shareholders for early signs of intended changes to shareholdings. Since the substantial holder regime already identifies beneficial interests of 5% or more, beneficial holder analysis typically makes inquiries about shareholdings at a lesser threshold – i.e. below 5% interests.

24. Between them, the above requirements are considerable, since they apply to interests of 5%, or even less in the case of the beneficial interest register. The penalties for non-compliance with the above requirements are also significant:

- a person who does not disclose their substantial holding or does not respond to tracing notices is liable for any loss or damage suffered as a result of their contravention (sections 671C and 672F of the Corporations Act) and may be subject to the broad range of orders, including remedial orders, that a Court is entitled to make pursuant to section 1325A of the Corporations Act; and

- a company which does not correctly maintain a share register may be liable to pay a penalty of up to $9,000, and individuals (such as directors) may be liable for both payment of $1,800 and imprisonment for 3 months (section 168, Schedule 3, section 1312 of the Corporations Act).

25. In relation to interests of over 20%, there is already a high degree of scrutiny in place for listed companies, as a result of the strict regulation of any acquisitions over this percentage under chapter 6 of the Corporations Act.

26. There is therefore no need to impose additional requirements on listed companies to meet the G20 requirements. They could be met either by exempting listed companies from the beneficial ownership register requirements and relying on the substantial holder regime, or by otherwise taking their actions under the Corporations Act to constitute compliance with the beneficial ownership register requirements.

27. The substantial holder notice requirements in the Corporations Act apply to listed companies (section 671B). It would be appropriate to use the existing Corporations Act definition of 'listed company' (section 9), which is as follows:

> A company is listed … if it is included in the official list of a prescribed financial market operated in this jurisdiction.

28. 'Prescribed financial markets' are as specified by regulation from time to time. The current list, set in Corporations Regulation 1.0.02A comprises the following list:

- Asia Pacific Exchange Limited;

- ASX Limited;

- Chi-X Australia Pty Ltd;

- National Stock Exchange of Australia Limited; and

- SIM Venture Securities Exchange Ltd.

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

29. The Law Council considers that the current regime for listed companies does allow for timely access to adequate and accurate information by relevant authorities. Substantial holder notices are publicly available. They can be accessed at no charge by regulators and anyone else who is interested in the information.

30. Share registers and beneficial holder registers can be accessed, and copies available for a cost which reflects the incremental cost to the company of providing them to the party requesting the copy. Regulators typically have powers (for example ASIC's

power under section 30 of the *Australian Securities and Investments Commission Act 2001* (Cth)) to require production of such information at no cost to the regulator.

What beneficial ownership information should be captured?

Question 3—How should a beneficial owner who has a controlling ownership in a company be defined?

31. The Law Council notes that there is a definition of 'control' in section 50AA of the Corporations Act that might be used. Under the takeovers rule in Chapter 6 of the Corporations Act, which applies to listed companies, 20% is seen as a significant level in that:

    - a person cannot acquire that percentage or more of a listed company without a takeover bid or other permitted gateway; and
    - a person who has 'voting power' of at least 20% in another company (A) is deemed to have the same 'relevant interest' as company A has in company B.

32. Similarly, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) deems a person who has a 20% interest in an entity as having a 'substantial interest'.[7]

33. The UK has a 25% threshold. It might be more practical in Australian law to use a 20% threshold given its existing significance in the context of both the takeover rules and the FATA regime. Otherwise the same rules could apply as under chapter 6 of the Corporations Act but with 25% substituted for 20% in this context.

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

(a) Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?
(b) Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exercised via other means other than owning or having interests in shares, or by a position held in a company? If so, how would those types of control be defined?

34. A 'relevant interests' test is the most appropriate test to adopt in Australia. As noted above, in the context of the existing requirements in Chapter 6 of the Corporations Act, a 20% threshold may be the most logical threshold.

35. The 'relevant interest' concept already has anti-avoidance measures built in to ensure that they are not evaded by legal constructs. As noted at page 5 of the

[7] *Foreign Acquisitions and Takeovers Act 1975* (Cth), s 4.

Consultation Paper, they extend to situations where the relevant power or control is 'indirect, or can be exercised as a result of a trust, agreement or practice'.

36. In the absence of unusual circumstances, a person would not be taken to have a relevant interest or voting power by virtue of having a particular position in the company (e.g. director or management role). This is because, under the usual governance regime applicable to Australian companies, people in those positions owe duties to exercise them for the benefit of others. For example, subsections 50AA(4) and 608(7) of the Corporations Act each provide that, where a person who would otherwise be taken to control a company or to have a relevant interest, the person will not be taken to have that control or relevant interest if the person is under a legal obligation to exercise their capacity for the benefit of someone other than either themselves or (if the person is a company) someone other than its own members.

37. Instead, subsection 608(4) of the Corporations Act takes a practical approach; that section provides that a person will be taken to control a company where that person has the capacity to determine the outcome of decisions about the company's financial and operating policies. Further, under subsection 608(5), in determining whether a person has that capacity, the practical influence a person can exert (rather than the rights they can enforce) is the issue to be addressed, and any practice or pattern of behavior is taken into account.

38. We would suggest the same approach in this case.

Question 5—How should the natural persons exercising indirect control or ownership (that is, through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?

39. The Corporations Act currently imposes a legal obligation on a person with a substantial holding, of more than 5%, to disclose this to the company and to the ASX. That is important because it is not practical for a company to report such information in the absence of a legal obligation on that person to report the information to the company. The Corporations Act contains sanctions for a party which does not comply with the obligation to notify a substantial interest, namely, that the party will be liable for any loss or damage arising from non-compliance.[8]

40. Often in the takeovers context it is another shareholder or an actual or potential takeover bidder who brings the non-disclosure to the attention of ASIC or the Takeovers Panel, which results in some form of enforcement action. Similar sanctions could apply to non-disclosure under a beneficial ownership reporting regime.

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

41. The substantial holder notice regime in the Corporations Act already makes provision for this in respect of listed companies.

[8] *Corporations Act 2001* (Cth), s 671C.

42. For the new reporting obligation to be imposed on unlisted companies, the objective of the G20 principles, and the UK legislation, appear to be directed to natural persons with a large beneficial ownership level. To address that concern in a way which imposes the minimum incremental burden on companies required to achieve the G20 objectives, the Law Council suggests requiring disclosure of natural persons with a 20% or greater relevant interest, or any change in the ultimate holding company of the Australian company.

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

43. The obligation on a beneficial owner to report should have extraterritorial effect in the same manner as the substantial holder notice requirements. If that beneficial owner does not disclose and the beneficial interest is discovered, there are sanctions in the Corporations Act which could be applied to that beneficial owner.

44. If a national register were established, ASIC could develop relationships with its international counterparts to conduct tracing where the domestic Australian company was not able to provide the information.

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

45. As noted above, there is already a high degree of scrutiny in place of the beneficial ownership of listed companies through the substantial holder regime, tracing notices regime and strict regulation of acquisitions over 20% under chapter 6 of the Corporations Act.

46. There is therefore no need to impose additional requirements on listed companies to meet the G20 requirements. They could be met either by exempting listed companies from the beneficial ownership register requirements and relying on the substantial holder regime, or by otherwise taking their actions under the Corporations Act to constitute compliance with the beneficial ownership register requirements.

47. For unlisted companies, provided that the obligations are not too onerous, it should be practical and cost-effective for the company to add collecting beneficial holder data to its existing information. This should dovetail into companies' current data review and disclosure points. Specifically:

- at incorporation, require the company to disclose the beneficial holder, not just whether the shares are beneficially held;
- if the company becomes are of a change of beneficial ownership which relates to a natural person having a relevant interest in more than 20% of shares in the company, impose an obligation on the company to notify ASIC, in the same way the company is currently required to notify a change of shareholding; and
- impose an obligation on the company to inquire of its shareholders upon receiving the annual statement from ASIC, whether there has been any change which is notified to the company. This could include an obligation to include

the updated details to ASIC, the identity of any shareholder which did not respond to the request.

48. If a regime of that level is imposed, given that companies have an annual review checking obligation with ASIC, and the obligation to notify certain updating details within 28 days of becoming aware of them in any event, this additional obligation should not be unduly onerous.

49. However, if ASIC was to introduce an obligation on the company to do more than that – for example to verify or interrogate the information provided – that would add cost and effort which is disproportionate and impractical for smaller companies. If that more onerous regime was proposed, it would be necessary to consider exemptions to the categories of companies which had to provide the information (e.g. small proprietary companies).

50. OAIC and Australian Solicitor General should be consulted to ensure that information cannot be accessed by those who are not relevant authorities, financial intelligence units and obliged entities where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise does not have legal capacity. Such a regime would allow persons with significant control over the corporate body who would be at risk of serious violence or intimidation due to the company's activities or their association with the company to protect all of their information through the suppression of that information. The corporate regulator should be the body responsible for considering applications for 'protection' and should take advice from law enforcement authorities in making a decision. This exemption should only be available on a case-by-case basis in exceptional circumstances.

51. Consultation with the OAIC should also be undertaken regarding whether the identity of any private citizen that would not already be publicly available should be publicly available on the register.

Details of beneficial owners to be collected

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

52. For efficiency, these would be consistent with the usual data a company is required to collect from its shareholders and record on its register, being:

- the name and address of each shareholder, and the date on which the shareholders name is entered into the register;
- the number and class of shares and when the shares were acquired;
- the amount paid on the shares; and
- whether the shares are fully paid and (if any) the amount unpaid.[9]

53. Reform should also incorporate the following privacy measures:

[9] *Corporations Act 2001* (Cth), s 169.

- OAIC to be consulted as to how the register addresses the safeguarding of personal information and auditing of the register; and

- the Australian Government Solicitor to conduct a privacy impact assessment of any proposal for a register.

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

54. See above answer to Question 9.

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

55. See above answer to Question 9.

How should information be collected and stored?

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

56. There should be an obligation on natural persons to disclose their beneficial ownership to the company (where it relates to more than 20%). The obligation on the company should be to ask and report that information. The obligation should not be to verify that information, at least if this obligation is proposed to be imposed on all companies regardless of size or the scope of their business activities, since it would not be cost-effective or practical to expect them to do that.

57. The obligation of the company to report should be applied:

    - at the point of applying for registration as a company;

    - within 28 days of the company being notified of a change by a beneficial owner, which relates to 20% or more of the company; and

    - each year after receiving its annual statement from ASIC.

58. There should be an obligation on the beneficial owner at all times to notify the company of any beneficial ownership. At any time when the beneficial holder notified the company, this would flow through into an obligation on the company to notify ASIC under the second bullet above.

Question 13—Should each company maintain their own register?

59. As long as the reporting is limited to the matters set out in the Law Council's response to question 12 above, it should be practical for each company to maintain its own register just as it maintains its share register. However, this information would also appear on the ASIC register as a result of the company notifying ASIC.

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

60. For listed companies, because the information is public, it would be readily available to relevant authorities immediately. The majority of company registers are now maintained electronically and, as such, it should be relatively straightforward for the information to be taken from the register and provided to the relevant authorities.

61. The proposed timing in the answer to question 12 above is consistent with the obligation on companies to notify changes of shareholding, so provides reasonably timely information for relevant authorities.

Question 15—Should a central register of beneficial ownership also be established?

62. Under the model we support as set out above, the ASIC register would perform this function with respect to unlisted companies. It would not be necessary with respect to listed companies because the information is already publicly available.

63. Being able to rely on the existence of a public register of beneficial ownership should be a basis for reducing or relieving AML/CTF compliance burden on reporting entities.

64. The register maintained by ASIC should be publicly searchable (subject to appropriate limitations as developed in conjunction with OAIC and the Australian Government Solicitor). It is noted that the idea of a company keeping information in a format that can be shared between agencies is the basis for Standard Business Reporting that underpins the Australian Business Register.

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

65. The Law Council suggests that:

- in the case of listed companies, the advantage of relying on the substantial holder notices is that they are already available publicly and do not need to be recorded on a central register. No additional cost or effort is required by the companies or any regulatory body; and

- In the case of unlisted companies, it would likely be the most practical to add to the ASIC existing register details and documents for each company relating to beneficial ownership. If this model is adopted which dovetails as closely as possible into the companies' existing reporting requirements and systems, the register could be maintained at what should not be significant incremental cost or effort.

66. The Law Council is not in favour of a new central register, separate from the existing ASIC register system, being created. It appears to be no simple matter to set up a new register. For example, the establishment of the PPSR register, at substantial

cost, demonstrated numerous teething and practical difficulties in establishing new registers of information. It continues to be non-user friendly and expensive to administer and use. The manageable changes proposed to the existing ASIC register and lodgment requirements would be more practical for companies and should minimise incremental cost for companies and the government.

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

67. If the data sets required to be collected by unlisted companies under the new regime are not unduly onerous and can be collected electronically, then there should be relatively low compliance cost under either option.

Operation of a central register

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

68. ASIC is best placed to operate a central register; it already maintains a public searchable central register of shareholders of Australian companies and ought to be able to leverage off existing systems which apply to changes in shareholdings. It should require only minimal incremental details to be added, and should be able to leverage off the existing systems which apply to changes in shareholdings.

69. The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) would not be suitable as it is a regulatory authority that monitors the providers of certain designated services. AUSTRAC's function includes monitoring the threshold and suspicious transactions of individuals as well as corporate entities. This is a fundamentally different function to establishing and maintaining a central register of the beneficial ownership of corporate entities – whether or not they transact in the areas of commercial activity identified by FATF. Further, AUSTRAC is a dedicated financial intelligence unit that provides and shares information and reports with revenue and law enforcement agencies all over the world.

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

70. Both the company (to the extent that it collects the information) and ASIC, with respect to the information it would maintain on its register, should be responsible for collecting, but not verifying beneficial ownership information. In terms of ensuring information is up to date, the obligation would be on the natural person who has a relevant interest of more than 20% to report to the company on a timely basis, and on the company to report within 28 days of being notified of any change as well as on its annual statement response.

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

71. A person who meets the test of being a beneficial owner should be required to report that information.

72. As is the case for the substantial holder regime under the takeover provisions of the Corporations Act, it is important to impose an obligation on the party which has the interests. This assists the company to collect the information by giving the company a reason for requesting and basis for demanding a response. The company would have an obligation to report within 28 days of being notified of any change and on its annual statement checking cycle. The extent of the obligation should be to accurately report the information the company receives and where no information is provided to report that fact.

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

73. Yes, new companies should provide beneficial ownership information to ASIC as part of their application to register a company. This is a simple step, which should be cost-effective, at the point of registration of a company. Part of the 'price' of being permitted to register a company in Australia would be to provide this information.

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

74. Provided that the obligations are not too onerous, for unlisted companies it should be cost-effective for the company to add collecting beneficial ownership data to its existing data, dovetailing into its current data review / disclosure points by way of the following mechanisms:

- at incorporation, requiring the company to disclose the beneficial owners;
- imposing an obligation on companies to notify ASIC within 28 days of becoming aware of a change of beneficial ownership which relates to a natural person having a relevant interest; and
- imposing an obligation on the company to enquire of its shareholders after receiving ASIC's annual statement whether there has been any change of relevant interest of a natural person, and to notify ASIC of any change which is notified to the company. This could include an obligation to include in the updated details to ASIC the identity of any shareholder which did not respond to the request.

75. In each case, providing this information electronically should reduce the compliance and data entry burden.

Ensuring information is accurate and current

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

76. Under the substantial holder notice regime, the holder is required to notify the company within two business days after the change of interest by at least one percentage point. This may be too onerous in the case of an unlisted company. A

period of 28 days may be reasonable for the beneficial owner to notify the company. The company would then have 28 days to update ASIC on the change. In response to each annual statement checking process, a company could be required to ask its shareholders within 28 days of the annual confirmation for any changes, and to notify any to ASIC within 28 days of being informed by its shareholders of any change.

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

77. The information should be included in ASIC's annual statement; however, this should not displace companies' obligation to notify ASIC of relevant changes in beneficial ownership of which they become aware at any time, and the law should impose a corresponding obligation on the holders of relevant interests to disclose the information.

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

78. There should be a legal obligation on the beneficial owner to provide the correct information on a timely basis.

79. As is the case with the substantial holder regime, there should be no obligation on the company to verify the information, as opposed to collecting and providing it to ASIC. The beneficial owners should have this obligation imposed on them. To impose a 'policing' obligation on the company would not be practical or cost-effective for many companies. So if this obligation is to be imposed broadly, it should be an obligation to report, and to request information from shareholders annually, not an obligation to verify. The response could be required to include details of shareholders of 20% or more who had not provided confirmation as to beneficial ownership.

Exchange of information between authorities

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

80. This information would be publicly available (subject to any information the OAIC and the Australian Government Solicitor indicate should not be made publicly available) so there is no reason for it not to be shared between agencies. Any removal of requirements to provide the same information to different relevant domestic authorities is welcome.

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

81. Since the information would be publicly available (subject to any information the OAIC or the Australian Government Solicitor indicate should not be made publicly available), there should be no particular sensitivity in the information being shared

with relevant authorities in other jurisdictions. Further, such an approach would be consistent with the approach taken by the OECD members on tax compliance under the Base Erosion Profit Shifting proposals, such as country-by-country reporting.

Sanctions

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

82. The sanctions should be comparable with those imposed on:

- in the case of companies, companies which fail to maintain up-to-date registers may be liable to pay a penalty of up to $9,000, and individuals (such as directors of these companies) may be liable for $1,800 and/or imprisonment for 3 months (section 168, Schedule 3, section 1312 of the Corporations Act); and

- in the case of beneficial owners, substantial shareholders who fail to disclose their interests as required by law will be liable to compensate for any loss or damage suffered as a result of their failure to disclosure this interest (section 671 of the Corporations Act) and may be subject to the broad range of orders, including remedial orders, that a Court is entitled to make pursuant to section 1325 of the Corporations Act.

Transitional arrangements

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

83. This is a design question which should be determined through consultation between ASIC and the business community. One option may be after existing companies receive their next annual statement from ASIC – subject to at least a year's lead time for education of companies and beneficial holders as to the new requirements.

Impact on affected companies and stakeholders

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

84. The Law Council suggests that a public education program on the new requirements should be undertaken so that beneficial owners and companies are aware of their obligations. The concept of 'relevant interest' is complex and may be difficult for companies to understand. However, we surmise that companies with sufficient sophistication to have division between legal and beneficial ownership are likely to be able to understand this concept sufficiently to comply with obligations of the limited nature we have suggested above.

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

85. Provided the obligations were limited as set out above, the incremental cost would be additional reporting to ASIC (of changes in beneficial ownership of natural persons of more than 20% and in seeking information annually from shareholders). That should not be substantial. It is noted that any more onerous reporting obligations would lead to additional costs.

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

86. AML/CTF reporting entities should be able to rely on the beneficial ownership information in the register and not have to repeat the process under the AML/CTF client due diligence rules.

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

87. See answer to question 32.

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

88. There are currently multiple entry points into government, whereby reporting requirements should be streamlined. The implementation of a beneficial ownership register should streamline existing reporting requirements as much as possible. In this context, the Law Council notes that the AML/CTF regime for example places an obligation on private sector reporting entities to verify beneficial ownership and to report or make available that information to AUSTRAC, which can in turn make it available to law enforcement and revenue agencies. The AML/CTF regime comes at a heavy compliance cost to the private sector when, paradoxically, ASIC and other government agencies either already have the ability to collect this information, or could with changes to their governing legislation. A register of beneficial ownership may be a vehicle that relieves financial institutions and service providers from repeating some of the AML/CTF client due diligence processes.

Other beneficial ownership transparency issues

Identifying those who can control listed companies

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

89. The Law Council is of the view that the substantial holding disclosure provisions, which are drafted on a broad, anti-avoidance basis, are sufficient. There are rare cases where they do not appear to be complied with, in which case a party can seek

the involvement of ASIC or the Takeovers Panel to deal with apparent non-compliance.

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

90. As noted above, the substantial holder notice regime is generally sufficient to achieve that purpose with respect to interests of 5% and above. The tracing notice regime has greater relevance to holdings of less than 5% in a company, though it may assist in identifying breaches of the substantial holder notice requirements.

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

91. The tracing notices regime generally only has application with respect to interests of less than 5% since the substantial holder regime operates where an interest is above 5%. Beneficial holder analysis performs a function which appears to go well beyond what is required for Australia to meet its obligation to establish a beneficial ownership register.

92. In the case of interests of more than 5%, the ultimate beneficial owner has a direct legal obligation to notify that interest in a substantial holder notice, so any limits on what can be achieved through tracing notices do not affect disclosure of the form of beneficial interest to which the G20 beneficial ownership principles are addressed.

93. Practical difficulties that may arise when using tracing notices include:

- the nominee who owns shares may not know who has an interest, other than the nominee's immediate instructing party. There can effectively be multiple nominees in a chain, requiring sequential tracing notices to be issued in order to identify the ultimate beneficial owner. Generally this delays, rather than prevents, discovery of the ultimate beneficial owner; and
- responses can be slow or not forthcoming, particularly from offshore parties who may not be familiar with tracing notices or not concerned with complying with Australian legal requirements.

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

94. The Law Council supports ASIC having the ability to make an order imposing restrictions on shares which are the subject of a notice until that notice has been complied with, and considers that such an order could address the, at times, inadequate compliance with the regime. The order should only be made once the time for compliance with the tracing notice has passed. The making of this order by ASIC should be subject to review by the Takeovers Panel where the company is a listed entity and in other cases by an application for an internal review by ASIC with

entitlements to further reviews in the Australian Administrative Tribunal or the Federal Court.

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

95. The Law Council suggests that the Court should have the same powers and remedies as are available under section 1325A of the Corporations Act with regard to the existing notice regime. Consideration could also be given to providing a specific power of inquiry for an administrator or liquidator of a company to obtain this information from not only the company's officers but also any other person who may hold this information on behalf of the company.

Nominee shareholders and bearer share warrants

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

96. A number of entities make use of nominee shareholding arrangements, including superannuation funds, custodians or other collective investment funds that hold shareholdings in companies for investment or fiduciary purposes. Private estate planning structures may also use nominee shareholding to increase the flexibility of such structures.

97. The purposes for which nominee shareholding arrangements are used include:

- having a local recipient of communications from the company to liaise with the beneficial owner on matters regarding the company as needed, rather than relying on mail or the beneficial owner having to monitor arrangements locally;
- administrative ease — the shares remain in the name of a broker nominee to facilitate trading;
- institutions which have a reputation for success not wanting to signal their interest in a company before they reach the 5% reporting threshold, for fear that other investors will follow them in investing in the company and thus resulting in a higher share price; and
- potential takeover bidders which seek to acquire a stake in a company before announcing a takeover bid, which they are entitled to do provided they lodge a substantial holder notice within 2 business days after reaching 5%.

Question 41—How often are nominee shareholding arrangements used?

98. Nominee shareholding arrangements for listed company shares are quite common in Australia for investment purposes through custodians. For many listed companies, their major registered shareholders are professional nominees, often holding for multiple investors which have no association with one another. The information available is, however, supplemented by the substantial holder notices which report beneficial ownership.

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

99. The benefits include facilitating the objectives mentioned in answer to Question 40, above. Nominee shareholding arrangements also provide a basis for disparate and diverse groups of investors (such as retail or unsophisticated investors) to invest in diverse assets. They also provide protection to the nominee shareholder by limiting the nominee shareholder's liability.

100. Potential drawbacks include delayed responses by the beneficial owner. However, a temporary lack of transparency is mitigated by the substantial holder regime and the tracing notice regime. Sometimes nominee shareholding arrangements make it difficult for a company to engage with its shareholders on particular issues (for example, remuneration votes) if the company has not recently done a beneficial holder analysis.

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

101. Given the current substantial holder regime and the tracing notices regime, further obligations would appear to be unnecessary. Australia has among the greatest transparency of beneficial ownership of listed companies in the world.

Question 44—Are you aware of any practical obstacles which would make increasing reporting in respect of shares held by nominee shareholders problematic?

102. As most nominee shareholders shown on share registers are custodians, the custody records can produce reports of the beneficial owners for which they hold, although this would incur costs.

103. Increased reporting could undermine takeover bidders' ability to acquire a pre-bid stake in a listed company in a manner which is permissible by law, that is, acquiring a stake over time without disclosure provided the stake is disclosed in a substantial holder notice within 2 business days after the bidder reaches a 5% stake. Similarly, institutions which do not wish to signal their presence on the share register before they reach the 5% threshold could be 'outed' earlier.

Question 45—Who uses bearers share warrant, and for what purpose?

104. The Law Council has no information on who holds bearer share warrants which were issued in other jurisdictions or issued in Australia before their further issue was prohibited. The Law Council has no information on the purposes for which issued bearer share warrants are held. It is not permitted for bearer share warrants to be issued by companies under Australian law. If any bearer shares (that predate the prohibition) still exist and are surrendered, the company is under strict liability to cancel the share and enter the bearer's name into the register.

105. The *Companies Act 1981* (Cth) provided that 'a company shall not issue any share warrant.' This prohibition was carried forward in the same terms in section 189 of the Corporations Law. This provision, in turn, was eventually replaced by section

254F of the Corporations Act, which provides that 'a company does not have the power to issue bearer shares.' This change was made in 1998 as part of the Simplification Program with the report leading to the change saying:

Share warrants

26. Companies will be prohibited from issuing share warrants, as at present.

106. Bearer share warrants are the certificates which prove the entitlement of the person who holds that certificate to the relevant bearer shares. Since Australian companies do not have the power to issue bearer shares, it follows that bearer share warrants (as certificates of entitlement to bearer shares) cannot be issues by Australian companies.

Question 46—How often are bearer share warrants used?

107. They are not issued in Australia since, as noted in the response to question 45, Australian companies have no power to issue bearer shares by virtue of section 245F of the Corporations Act.

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

108. The Law Council sees no reason why bearer share warrants ought to be made lawful in Australia.

Question 48—Should a ban be introduced on bearer share warrants?

109. This is already in place to prevent bearer share warrant being issued by Australian Companies, see section 254F of the Corporations Act. Making the possession in Australia of bearer share warrants with respect to foreign companies illegal would, possibly, be an appropriation of private property.