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To whom it may concern:

Australian Custodial Services Association Response to Treasury Consultation Paper "Multinational Tax Integrity: Public Beneficial Ownership Register"

The Australian Custodial Services Association (**ACSA**) is the peak industry body representing members of Australia's custodial and investment administration sector. Our mission is to promote efficiency and international best practice for members, our clients, and the market. Members of ACSA include NAB Asset Servicing, J.P. Morgan, HSBC, State Street, BNP Paribas, BNY Mellon, Citi, Clearstream, and The Northern Trust Company.

Collectively, the members of ACSA hold securities and investments in excess of AUD $4.3 trillion[1] in value in custody and under administration for Australian clients comprising institutional investors such as the trustees of major industry, retail and corporate superannuation funds, life insurance companies, responsible entities and trustees of wholesale and retail investment funds, and various forms of international investors into Australia.

The implementation of a beneficial ownership register could result in an excessive burden of compliance for custodians and their clients. It is critical that the laws and regulations accompanying this regime explicitly acknowledges the role of custodians in the Australian market and the global financial system. When custodians receive a beneficial ownership information request they should be required to provide the legally necessary details of their customers to enable a regulated entity to continue their beneficial ownership investigation.

Overview of the custody structure as relates to beneficial ownership

ACSA has published a guide to custody on its website, which can be accessed here: https://cdn.ymaws.com/acsa.com.au/resource/resmgr/website_images/website_documents/institutional_investor_servi.pdf. The guide describes the role of custodians in the Australian market and their role in Australia as its relates to inbound international investment. The guide also details how custodians use omnibus accounts to bring efficiency to post trade operations and thus help keep costs lower for investors.

In relation to this consultation, the custody guide gives context to custodians being recognised as the largest shareholders of Australian listed (and some unlisted) companies, it further notes these shareholdings are held as a nominee or bare trustee and not as the beneficial owner. The custodian has no beneficial rights to the shares it holds and as a bare trustee acts on the authorised instructions of its clients pursuant to the contractual arrangements agreed between custodian and client.

The custodian cannot vote, sell, or seek to influence the company's business or participate in any corporate event without instruction from its client (who has control of their actions as owner of the shares). Custodians

[1] As at 30 June 2022, https://acsa.com.au/page/IndustryStatistics

act purely as a clients' agent in the local market and support clients through connectivity to market infrastructure, expertise in laws and regulations, and a general understanding of the market environment and how to navigate it.

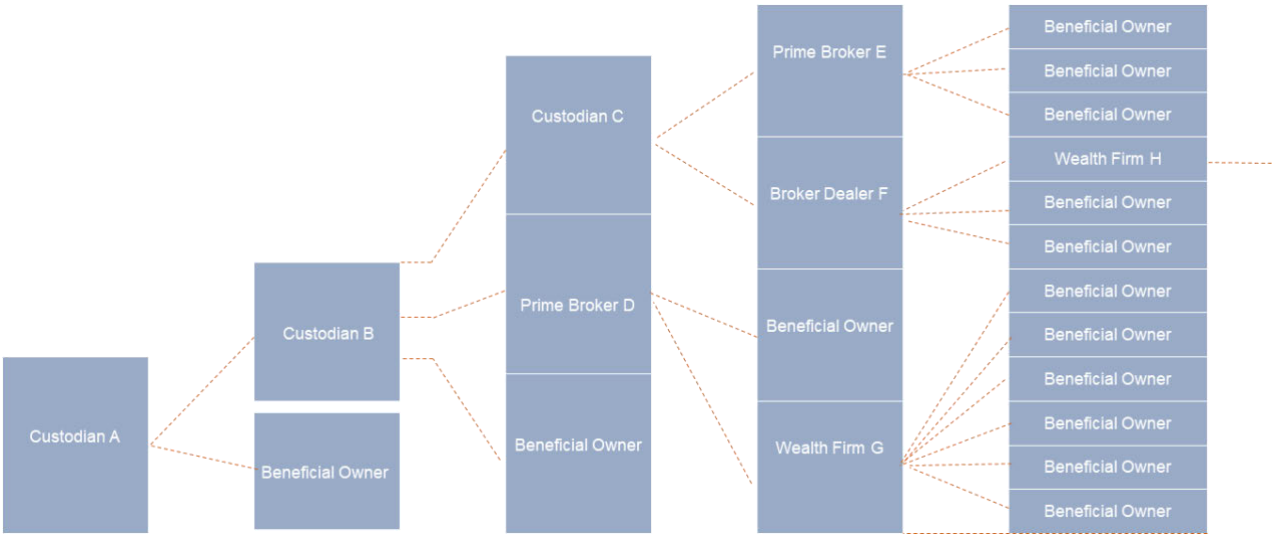
When it comes to substantial shareholder declarations, custodians and nominees are not considered to have a relevant interest in the securities they hold on behalf of their clients for the purpose of determining a substantial shareholding. Section 609 of the CORPORATIONS ACT 2001 states that "a financial services licensee does not have a relevant interest in securities merely because they hold securities on behalf of someone else in the ordinary course of their financial services business".

ASIC Regulatory Guide 5 – Relevant interests and substantial holding notices also recognises the nature of a custodian when taking into account who has a relevant interest.

There is no circumstance in which a custodian's holding in a company will meet the definition of beneficial ownership by the custodian in its own right. The laws and regulations put in place to support the public beneficial owner register should not require a custodian to provide its list of owners or shareholders for a public beneficial owner register as the custodian does hold an interest recognised as a beneficial owner.

Financial markets seek ongoing efficiency which has resulted in custodians acting in capacities where they will have both direct beneficial owner client relationships and have other interposed relationships where a custodian's direct client may not be the ultimate beneficial owner. For example, a custodian may act as nominee in Australia on behalf of a client of who themselves are a custodian (in Australia or internationally), and the relationships may go many layers deep.

The below diagram illustrates this concept, where Custodian A would be the registered shareholder or unitholder and the ultimate beneficial owner may be client layers away from Custodian A. The diagram is complicated given the potential layers that may exist, however in many cases the number of layers will be one or two layers deep. For example, Custodian A may act for Custodian B whose client is the Beneficial Owner.



Further complications can arise where a beneficial owner operates with multiple intermediaries (brokers and custodians) between itself and the in-market local Custodian (Custodian A), or there may be multiple in-market local custodians impacted by the way in which a beneficial owner transacts. This means there are circumstances where the different layers of the beneficial owner chain will mean the custodian will not know the full extent of the beneficial interest holdings or be in a position to aggregate a full beneficial owners position.

Custodians provide valuable and necessary asset safekeeping and related services to the financial services sector, including institutional superannuation funds and investment managers. These institutions service a significant portion of the wealth of millions of ordinary Australians and by providing efficient services which keep costs low, ensure that all Australians benefit. The use of omnibus accounts meets this objective whilst also enabling a new investors, both domestic and offshore, efficient timely access to the market. The custodian does not (and cannot) second guess or have a view on the investment decisions made by its clients or override proper instructions, so any framework which intends to uncover the beneficial owner of an asset must take into account the custodian's role in the market.

In relation to enforcement actions being considered, the regime needs to consider the role of custodians and the layers that may exist between it and the ultimate beneficial owner. The enforcement actions should not unfairly penalise shareholders or unit holders who have complied when others may not have responded as this may create market inefficiencies and have the potential for unintended financial implications for compliant beneficial owners.

For example, in the above diagram Prime Broker E has three beneficial owners as clients. If one of the three beneficial owners did not comply with the rules it would not be reasonable for the other two beneficial owners, or for Prime Broker E, or Custodians A, B, and C, or Custodian B's other clients or their underlying clients, to be penalised.

Lastly, the system employed to collect information should take the nature of custody relationships into account and the high number of transactions performed each day by the clients of custodians. The regulated entity should be the entity tasked with gathering this information, and they should be required to follow the chain of custody to the end to determine who the beneficial owners are. As it's possible that one beneficial owner may directly or indirectly use multiple custodians, only the regulated entity will be able to collate a total view of who might meet the beneficial ownership criteria.

Our answers to the consultation's questions are appended below and ACSA welcomes engagement with Treasury regarding any matters we have raised in this consultation.

If you have any questions in relation to this submission please do not hesitate to contact me.

Yours sincerely

David Travers

Chief Executive office

Australian Custodial Services Association

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About ACSA

Custodians provide a range of institutional services, with clients typically favouring a bundled approach to custody and investment administration. Solutions may include traditional custody and safekeeping, investment administration, foreign exchange, securities lending, tax and financial reporting, investment analytics (risk, compliance and performance reporting), investment operations middle office outsourcing and ancillary banking services.

These services represent key investment back office functions – often representing the client's asset book of record and essential source data in relation to the investments they hold.

The key sectors supported by ACSA members include large superannuation funds and investment managers, as well as other domestic and international institutions.

ACSA works with peer associations, regulators and other market participants on a pre-competitive basis to encourage standards, promote consistency, market reform and operating efficiency.

Note: The views expressed in this letter are prepared by ACSA for the purposes of consideration by Treasury in response to Treasury Consultation Paper Multinational Tax Integrity: Public Beneficial Ownership Register (November 2022) and should not be relied upon for any other purpose. The comments in this letter do not comprise financial, legal or taxation advice and should not be regarded as the views of any particular member of ACSA.

www.acsa.com.au

Consultation Questions

Introduction

1. Should substantial holding and tracing notices be amended to capture additional beneficial ownership information to identify and disclose the true beneficial owners of listed entities? If so, what additional information should be captured?

As ACSA is not subject to substantial holding notices we have no view regarding the information those requests contain. Optimising tracing notices to capture the additional information may be an effective means of gathering beneficial ownership information without creating a new process for this purpose and the tracing notice system, while over complicated, has the advantage that companies already use it to drill down through the custody structure to identify the end holder.

It should be noted that the request should be designed in such a way that where the respondent is acting in a custodial or nominee capacity, that they can respond with the details of their clients so the company can reach those parties to determine whether they are the beneficial owners, without needing to provide unnecessary or extraneous information related to the custodian itself. Similar consideration should be given to custody clients who themselves might be custodians, or whose underlying investors may not be relevant. For example, Superannuation funds are not required to detail who their underlying holders are. Other types of custody client such as an unlisted unit trust who holds their underlying assets in a custody account should not be expected to provide the details of their unit holders, but rather the owners of the entity offering that investment product and making the decisions regarding the shareholding or unitholding in the regulated entity.

2. Should the tracing notice and substantial holding notice regimes be fully aligned so responses to each notice capture the same information?

ACSA has no view on the value of harmonising these regimes as we are not subject to substantial holding notices. We expect that tracing notices will not be expanded to capture additional information related to substantial holding notices or, if they are, that custodians will continue to be exempt from that requirement, as the amount of information already required under the tracing notice regime can be excessive and burdensome.

3. As is the case for tracing notices, should listed entities be required to maintain a register of information collected by substantial holding notices?

As ACSA is not subject to substantial holding notices we have no view regarding whether companies should be required to maintain a register of information collected. However, where a register is maintained any entity maintaining such a register must ensure that it has appropriate systems and controls to enable

the effective management and dispersant of private and confidential information and maintain appropriate systemic controls to protect data from cyber-attacks.

4. How could the accessibility and useability of registers maintained by listed entities of information received from tracing notices be improved for users of beneficial ownership information?

No response

Definition of beneficial ownership

5. Are there any elements missing from the proposed definition of beneficial ownership?

The definition is consistent with ACSA's understanding of beneficial ownership.

6. Are there any potential unintended consequences which could result from adopting a 20 per cent threshold for beneficial ownership?

ACSA foresees two areas which will require careful consideration in the drafting of any legislation or regulations related to this register:

1. For example an individual custodian could have a small registered holding in a company, say 1%, but the beneficial owner of that holding may exceed the 20% threshold because they hold securities through multiple custodian layers, the rules should facilitate all layers of ownership respond to a request from a regulated entity confirming the details of their underlying holders until the beneficial owner is identified fully, similar to the 672 concept. This ensures that the regulated entity will have enough of a detail to understand whether any beneficial owner meets the 20% threshold or not. It should be clear that all custodians or recipients of 672 notices must reply to the notice, and not only holders who directly have 20% or more of holdings/voting rights.
2. If the process for compliance with beneficial ownership reporting for their clients is too complex or inefficient they may preclude custodians from holding or servicing certain assets, particularly unlisted assets, or may require custodians to pass on the cost of compliance to clients, which could make it harder for custody clients to hold these assets and increase costs in the market.

Entities subject to beneficial ownership disclosure requirements

7. Should the requirement to maintain a beneficial ownership register be applied to any other entities or legal vehicles (noting beneficial ownership requirements for property not including regulated entities held on trust will be subject to a separate consultation process)?

No response

8. Should some entities, such as certain not-for-profit entities, have bespoke or limited beneficial ownership register requirements? If so, what types of entities, and what relief from the general disclosure requirements should be provided?

No response

9. What factors would be relevant to determining whether a regulated entity has taken reasonable steps to identify its beneficial owners?

A regulated entity should be considered to have taken reasonable steps to identify its beneficial owners when it has successfully sent tracing notices to each party in the chain and received a response, or reached a party who refuses to respond further and escalated that party's refusal to the appropriate enforcement agency. Where it is possible for the regulated entity to perform additional research such as looking at overseas beneficial ownership registers, this could also be undertaken.

Recording requirements

10. What, issues, if any, may arise with the proposed recording requirements?

Regulated entities must be responsible under legislation and regulations for maintaining their own register in a process similar to that used for 672s. They should not be able to push the requirement to maintain this information down to their shareholders or unit holders. The reason for this is that if an underlying beneficial owner has their holdings spread across multiple agents, the only party who would be able to collate this information and determine beneficial ownership thresholds is the regulated entity itself.

Additionally, unlike listed entities which can generally be transferred instantaneously via CHESS, transfers of holdings in regulated entities are performed via Australian Standard Transfer Form. The laws and regulations governing this regime should acknowledge that respondents to a beneficial ownership question can only respond based on their holdings at the time, and that these holdings can and will change as they do for listed companies.

We note that the UK has similar requirements to the proposed tracing notices and Australia's usage f s672 notices for disclosure of beneficial ownership. In the UK Registered Entities wishing to ascertain the beneficial owners of the holdings may contact the shareholders (via Section 793 of the companies Act) and

request beneficial owner details. Quite often, the nominee holdings can be held by multiple chains of custodians, and agents. Each shareholder must provide their client information to the registrar, the registrar would then contact each client, and they would provide details, and so on until the Bene owner is identified. The UK has a similar nominee model to Australia so this is put forward as global best practice approach.

11. Should regulated entities have bespoke disclosure requirements with respect to discretionary trusts listed on their beneficial ownership registers? If so, what information should be disclosed?

No response

Content and availability of beneficial ownership register

12. How should public access of regulated entities' registers be facilitated? Should registers be accessible on request or published on the regulated entities' websites?

No response

13. What other information should be collected on the beneficial ownership register?

The legislation and regulations should limit the amount of information required to the minimum level of information needed in order to record beneficial ownership. The exact data to be asked for should not be left open to the interpretation of the regulated entity and the regulated entity should be prohibited from asking for more information than is prescribed in the laws and regulations. This is important for privacy purposes, as generally a custodian will only release information about its underlying customers when required to by law or regulations. As such it is equally important that the laws and regulations explicitly define and limit the data points which can be collected under the regime as it is that the laws and regulations ensure sufficient data points are collected such that the regime serves its purposes.

In the same vein as substantial shareholder declarations, the laws and regulations should acknowledge the existence and role of custodians and explicitly limit our role in the regime to being required to provide the number of shares our clients hold, and the clients' contact details.

Where a register is maintained any entity maintaining such a register must ensure that it has appropriate systems and controls to enable the effective management and dispersant of private and confidential information and maintain appropriate systemic controls to protect data from cyber-attacks.

14. Should any of the proposed beneficial ownership information not be collected?

No response

15. What key risks, if any (including privacy risks), are associated with making the proposed information available to the public? How can these risks be mitigated?

No response, however please consider our response to question 13 in the context of this question.

16. Are there any potential unintended consequences which could result from adopting the proposed approach to protect some beneficial owners' information from public disclosure?

No response

17. In what other circumstances should beneficial ownership information be protected from disclosure? What should be the scope of the protection in those circumstances?

No response

18. Should disclosure exemptions be granted on a graduated basis, so in each case, only the specific details on the register that would put a person's personal safety at risk are exempt from disclosure (e.g. a beneficial owner's name may still be publicly accessible while other identifying information about the owner on the register may be exempt)?

No response

Accuracy and currency of beneficial ownership register

19. Are there any potential unintended consequences which could result from requiring regulated entities to be reasonably assured of the identities of their beneficial owners? How could these be addressed?

As stated in the consultation, regulated entities are required to maintain an up to date register, and in the absence of information to the contrary it will be assumed that in order to comply with the laws and regulations a regulated entity must have the register up to date at all times.

It is not feasible for a regulated entity to do this, as at the extreme end it could be taken that a regulated entity would need to send incessant tracing notices in case anything has changed since the last notice was sent. We propose that the rules should require the register to be updated ahead of key events including, as examples but not an exhaustive list, AGMs and EGMs, or other events which Treasury determines might mean that the beneficial ownership of the entity would be relevant. Potentially as a catch all the rules could require a minimum interval of (say) two years to refresh the list in the case that no other event arises which would lead to a refresh. Treasury should also consider companies in liquidation and what requirements might need to apply to them.

20. Are there other methods, procedures, and approaches to verifying the information on beneficial ownership registers?

In terms of minimising compliance burden, it is suggested that the laws and regulations specifically contemplate the role of custodians in the market and limit the information required accordingly as outlined in our other responses to this consultation.

In order to create improved market efficiencies, the regulations should allow for the electronic lodgement of beneficial ownership information through secure apps or websites to eliminate the need for manual or paper based "wet" responses. Identification could further be verified through use of green ID or mygov for individuals and through the inclusion of verifiable identifiers such as ACN, or ABN for companies and trusts.

Given most custodians operate through global operating models, any secure apps or websites should allow for the secure completion of data from a custodian operations team located outside Australia.

21. Are there any potential unintended consequences which could result from implementing the proposed requirements for ensuring beneficial ownership registers are kept up to date? How could these be addressed?

- It is possible that despite the best intentions of all parties, the implementation of the first phase of the register will run into unforeseen practical challenges. We suggest considering whether the scope of regulated entities included in phase 1 can be more targeted, such as (for examples) with a focus on critical infrastructure (in line with the Critical Infrastructure Act) or key industries or a certain company size. Once the regime is established and working as intended it could be expanded further with relative ease.
- As outlined elsewhere in our response, the implied requirement to keep the register up to date would create undue administrative burden both on the company and on the legal shareholders.
- The laws and regulations should explicitly state that the regulated entity must be responsible for each step in the chain and cannot pass responsibility to the registered owner (such as via the terms of holding shares for example).

22. What are the key privacy risks, if any, arising from a requirement to verify the identities of beneficial owners? How could these be mitigated?

Where a register is maintained, any entity maintaining such a register must ensure that it has appropriate systems and controls to enable the effective management and dispersant of private and confidential information and maintain appropriate systemic controls to protect data from cyber-attacks.

Enforcement and penalties

23. Is it appropriate to grant ASIC powers in the Corporations Act (equivalent to those it has under sections 72 and 73 of the ASIC Act) for responding to non-compliance with substantial holding notices and tracing notices? Why or why not?

Overseas enforcement of the requirements can lead to challenges. The registered shareholder or custodian of the assets should not be held responsible for behaviour of a single beneficial owner. As outlined in our introduction accompanying this response, it is also important that if a specific beneficial owner or intermediary fails to comply with the regime, that other beneficial holders or intermediaries in the chain of custody are not impacted or penalised. It should also be noted that in certain overseas jurisdictions there are strict privacy regimes such as the EU General Data Protection Regulations (GDPR) which may prevent an intermediary in the chain of custody from providing information about their customers who are EU residents without certain GDPR requirements being in place ie the customers' consent, the party requesting the beneficiary information confirms appropriate safeguards are in place to protect the personal information being disclosed. It is therefore possible that certain beneficial owners may domicile themselves in "privacy havens" in order to avoid disclosing their identity. It is important that not all the intermediaries and other beneficial owners in the chain of custody are not penalised in this case, but only those who have failed to respond or a prohibited from responding are impact=ed by the penalties.

24. Are there any potential unintended consequences which could result from adopting the proposed enforcement regime for regulated entities, if so, how could these be mitigated?

As outlined in question 21, smaller businesses might find the requirements complicated, or be unaware, and they may fail to comply fully despite acting in their perceived good faith. Limiting the scope of phase 1 may avoid seeing smaller companies fined or penalised while the regime stabilises.

25. What other enforcement, incentive or penalty options could be introduced to encourage greater compliance with the proposed beneficial ownership register requirements?

No response

Regulatory costs and benefits

No response to any questions in this section

26. What regulatory and compliance costs are already incurred by regulated entities to collect, verify, and maintain beneficial ownership information under existing regimes including member register and anti-money laundering and counter terrorism financing obligations?
27. What additional financial costs would regulated entities or listed entities incur to comply with the proposals in this paper? Which entities would be affected and what would be the quantified estimate of regulatory burden incurred?
28. What other impacts would the proposals in this paper have on businesses and the economy more broadly? What information can you provide to assist with quantifying the benefits and costs?
29. What other information is relevant to assessing the costs and benefits and regulatory burden of introducing the proposals outlined in this paper?
30. What transitional arrangements would be necessary to enable regulated entities and listed entities to meet the proposed new requirements?