

16 December 2022

Beneficial Ownership and Transparency Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: BeneficialOwnership@TREASURY.GOV.AU

Dear Treasury

Implementing beneficial ownership identification and disclosure requirements for Corporations Act entities

Thank you for the opportunity to provide a submission to Treasury's consultation on implementing beneficial ownership disclosure requirements.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 50,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small businesses and the government sector.

1. Executive Summary

The AICD acknowledges the important role companies can play in assisting authorities combat and prevent illicit activities such as tax avoidance, money laundering, bribery and corruption. We support the Government's commitment to improving the integrity of the domestic and global financial systems, and measures aimed at improving the transparency of information on beneficial ownership that are targeted, proportionate and consistent with existing regulation.

That said, we have a number of concerns with a new beneficial ownership disclosure regime as currently proposed. Our submission provides the following key points:

- The AICD does not consider that the proposed 'phased approach' for the introduction of a beneficial ownership disclosure regime is practical or cost-effective. We have particular concerns with the proposed requirement for entities to maintain their own individual beneficial ownership registers until a single and central public register is established. This would be unduly onerous on Australian entities – particular small, NFP or family-owned and operated entities. A risk-based approach should be taken rather than imposing obligations of wide reach.
- The AICD strongly recommends that a beneficial ownership disclosure regime be facilitated via a central register from the commencement of the regime, applying only to large entities with the resources to comply determined by an appropriate monetary threshold.
- A beneficial ownership disclosure regime should only require entities to collect and report beneficial ownership information to a central register, and should not require entities to verify and/or 'police' beneficial owners' non-compliance with the requirements to provide information.

These activities would come at considerable cost to entities and should be undertaken by the central registry with the adequate resources to do so – including existing intermediated 'self-verification services' such as myGovID.

- The AICD is concerned that the public availability of beneficial ownership information on a register will give rise to unacceptable privacy risks for beneficial owners and heightened cyber security risks for entities, particularly if entities are required to maintain their own registers as contemplated in an initial phase. This is out of step with current Government and broader community expectations on the protection of personal information, and growing awareness of the risks associated with large amounts of potentially unnecessary data being held by entities. We strongly recommend the central registry maintain the beneficial ownership register from commencement of the regime and that publicly available information be limited to a beneficial owner's name, nationality and the nature of their interest.
- The AICD supports a listed company exemption from new beneficial ownership disclosure requirements due to existing requirements, such as the substantial holding and tracing notice regimes, which provide adequate disclosure of beneficial ownership information. To incentivise improved compliance with these regimes, particularly from foreign beneficial owners, we agree ASIC should have strengthened powers to restrain the disposal, acquisition, and exercise of rights attached to interests in listed entities where a person has, without reasonable excuse, failed to comply with the substantial notice or tracing notice regime requirements.

2. General comments

The AICD supports the policy objectives of introducing measures to ensure multinational enterprises pay a fair share of tax and to discourage the use of complex legal structures to avoid tax liabilities. However, the AICD has significant concerns that what is proposed in the Discussion Paper is misaligned and inconsistent with these policy objectives.

The Discussion Paper notes that a public register of beneficial ownership (**Register**) is 'intended to support stronger regulatory and law enforcement responses to tax and financial crime, assist foreign investment applications, and facilitate the enforcement of sanctions', complementing other Government initiatives to 'address the tax avoidance practices of multinational enterprises'. The AICD's strong view is that the scope of the proposed Register obligations, applying to up to three million entities, is unnecessarily broad and onerous if the Government's key policy concern is 'multinational tax integrity' and financial crime, such as money laundering or sanctions evasion. In particular, it is not apparent to the AICD the rationale for capturing all proprietary companies, for instance, when many are small-medium enterprises (**SMEs**) that are often owned by one individual or a small number of individuals, frequently family members. In our view, the regime must take a risk-based approach and be appropriately targeted and proportionate to the issue to be addressed.

The AICD notes that:

- Federal, State and Territory legislation already requires entities to collect and report to multiple government agencies a substantial amount of identity, financial and legal ownership information, for example, under: business and entity registration; revenue; land and property conveyancing; licensing schemes and existing Corporations Law;
- in the context of listed companies, the substantial holding notice and tracing notice regimes provides publicly accessible beneficial ownership information; and

- 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' (**KYC**) obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (**AML/CTF Act**) whenever a reportable transaction is contemplated.

Accordingly, while supportive of measures to improve beneficial ownership transparency, we consider these should dovetail into existing reporting and disclosure requirements rather than adding new and unduly onerous obligations on entities.

We have strong concerns, in particular, with the proposed 'phased approach' to implementation, requiring entities to maintain and disclose their own individual registers for an interim period until a single and central public register is established (as contemplated for a future phase). As acknowledged in the Discussion Paper, requiring three million entities to collect, verify and maintain the currency of information on their own registers, including requirements to issue 'warning notices' and impose restrictions on beneficial owners for failing to respond to information requests, will impose significant regulatory and compliance costs on these entities.

In our view, a way to minimise the costs and disruption caused by these regulatory changes is to design the new beneficial ownership disclosure regime using only a central public register. While this approach would still require regulated entities to collect and report beneficial ownership information for the purposes of disclosure on a central register, any verification and 'policing' obligations would appropriately sit with the central registry itself. We note that this is consistent with other jurisdictions' beneficial ownership disclosure regimes such as the UK and France which, as referenced in the Discussion Paper, are administered by their companies' registries.

In this regard, we encourage Government to consider integrating the proposed beneficial ownership disclosure regime with the new Australian Business Registry Services (**ABRS**). Once fully established, the ABRS will bring together more than 30 Australian Securities and Investments Commission (**ASIC**) registers and is currently more appropriately equipped and resourced to undertake activities such as verifying the integrity of information collected, pursuing unresponsive beneficial owners that have been identified and reported by entities, imposing sanctions, as well as facilitating public access to beneficial ownership information while better safeguarding the privacy of individuals.

3. Entities subject to beneficial ownership disclosure requirements

We understand that Government is proposing to apply beneficial ownership disclosure requirements to a broad range of entities regulated under the *Corporations Act 2001 (Cth)* (**Corporations Act**), including Australian proprietary companies, unlisted Australian public companies, unlisted Australian registered managed investment schemes (**MISs**), and unlisted Corporate Collective Investment Vehicles (**CCIVs**).

As discussed above, the AICD is strongly of the view that this regime should only be administered via a central public register, as opposed to individually maintained registers by Regulated Entities. We are also concerned that if the broad range of entities contemplated by Government's proposal are required to either maintain their own individual beneficial ownership registers, or collect and report beneficial ownership information to a central register, this would impose significant administrative and cost burdens on these entities.

Further, while we are supportive of the definition of 'beneficial ownership' outlined in the Discussion Paper, the proposed threshold for registration is complex and may be difficult for many small proprietary companies to ascertain and apply in practice. In our view, the various limbs of the threshold test can be

more appropriately applied by larger, resourced entities that will understand the distinction between legal and beneficial ownership and be able to access appropriate legal and accounting advice in order to comply with the obligations.

Accordingly, we urge consideration of confining these requirements to only large proprietary companies and unlisted public companies that have the resources to comprehensively comply. This could be achieved by way of either an annual consolidated revenue threshold test, or alternatively specific exemptions for categories of companies (for example, small proprietary companies, charities and NFPs that are incorporated as companies limited by guarantee).

Exemption for listed entities

The AICD strongly supports the proposed listed company exemption from new beneficial ownership disclosure requirements due to existing listed entity disclosure requirements, such as the substantial holding and tracing notice regimes, as well as maintaining the share register.

We provide further comments on the substantial holding notice and tracing notice regimes in section 7.

4. Collecting and verifying the accuracy of beneficial ownership information

We understand that Government is proposing that entities be required to identify, collect and verify the identity of beneficial owners, as well as maintain the accuracy and currency of its individual beneficial ownership register. Again, we reiterate our comments above that this regime should only be administered via a central public register, as opposed to the phased approach requiring individually maintained registers by entities in the interim. However, regardless of whether a phased approach is pursued, the AICD is strongly of the view that a natural person should bear the onus of reporting their beneficial ownership (where it meets the proposed 20% threshold) to the entity - as is the case for the substantial holder notice requirements under the Corporations Act.

The obligations on an entity should be limited to collecting beneficial ownership information and reporting that information to the central register, including any changes, on a regular and timely basis. These obligations could be met by entities:

- disclosing beneficial ownership information at the time of incorporation/registration of an entity, not just whether shares are beneficially held;
- notifying the central register of any changes to beneficial ownership within 28 days of being made aware of those changes by the relevant natural person. In our view, this would place the onus appropriately on the natural person to update an entity of a change to their beneficial ownership in the first instance, albeit triggering a secondary obligation on the company to notify the central register. It would also align with existing requirements for a proprietary company to notify ASIC of a change of shareholding; and
- requesting annually that shareholders notify an entity if there have been any changes to beneficial ownership arrangements. Again, where an entity is notified of any changes, it should be required to notify the central register within 28 days.

Entities should not however be required to:

- verify the identity of beneficial owners, or the beneficial ownership information natural persons provide; or
- 'police' beneficial owners' compliance with the disclosure regime as proposed in section 7 of the Discussion Paper, including to issue 'warning' and 'restriction' notices to beneficial owners that do not respond to an entity's request for information.

The systems and processes required to meet these obligations would come at considerable cost, and would be beyond the capabilities and resources of the vast majority of entities proposed to be subject to the disclosure regime. In our view, these functions should sit with the central registry itself and we would encourage Government to consider integration with the ABRs platform.

As noted in the Discussion Paper, the ABRs is currently administering the Director ID regime and utilising myGovID to verify the identity of individuals. In this regard, we consider the design of the beneficial ownership verification requirements should draw on this existing 'self-verification service' infrastructure, which would be more cost-effective than requiring this process to be undertaken by entities individually. We also note that using intermediated 'self-verification services' mitigates to some degree the risks to privacy and data security where entities do not have to collect and store identity documentation themselves. We make further comments on the privacy implications associated with the proposed beneficial ownership disclosure regime below.

5. Maintaining a public register of beneficial ownership information

The AICD is concerned that the public register requirements proposed in the Discussion Paper will give rise to unacceptable privacy risks for beneficial owners and heightened cyber security risks for Regulated Entities. Currently there is intense public focus on data governance and management practices due to high profile data breaches. This has given momentum to Government reforms of the *Privacy Act 1988* (Cth) (**Privacy Act**), and most recently a strengthening of the penalty regime where an entity fails to adequately secure the personal information of individuals.¹ Separately the Government has signalled that an ongoing review of the Privacy Act will likely make recommendations to enhance the obligations on Australian businesses in collecting, storing and disposing of personal information.

Our strong view is that what is proposed in the Discussion Paper is inconsistent with broader public expectations on the protection of personal information and crucially the Government's policy focus on enhancing the Privacy Act. Our concerns are focused in two areas:

1. requiring entities to maintain a register containing personal information of beneficial owners that is publicly available; and
2. a register containing personal information of beneficial owners that is publicly available.

Privacy risks with regulated entities maintaining an individual public register

We are concerned that the proposed obligations for Regulated Entities to maintain beneficial ownership information on individual registers that are publicly available will unnecessarily create privacy and cyber security risks for beneficial owners and entities alike.

¹ Penalties for serious or repeated interferences with privacy have been increased under the Privacy Act from \$2.22 million to whichever is the greater of: \$50 million, three times the value of any benefit obtained through the misuse of information; or 30% of a company's adjusted turnover for the relevant period.

As discussed above, there will be a vast number of SMEs and NFPs that will be captured under the obligations. Many smaller entities, and the advisors they often rely on, are likely to have limited capabilities and resources in place to ensure there is the necessary cyber resilience to protect the beneficial ownership information. The AICD in developing the recent Cyber Security Governance Principles (the **Principles**), in collaboration with the Cyber Security Cooperative Research Centre (**CSCRC**), observed that while SME and NFP directors are highly motivated to the build cyber resilience and data protection practices they are often time poor and face resource constraints that are not shared by large entities.² Concerns about the cyber resilience of SMEs and NFPs is also shared by Australian Cyber Security Centre (**ACSC**).³ The most recent ACSC *Cyber Threat Report* notes that 'malicious state actors continue to seek sensitive information, including by targeting Australian small businesses and individuals.'⁴

The AICD's considers that requiring small regulated entities to store sensitive beneficial ownership information in the context of identified challenges with cyber resilience and data management is, in our view, an unnecessary obligation that would only heighten the risk that these entities will be a target from cyber threat actors.

While the use of an identity verification service provider may mitigate this risk to a degree, it will not remove it entirely, as under the current proposal, a Regulated Entity will still be required to maintain publicly available records of beneficial owners in order to meet their obligations.

As set out above, the AICD's strong view is that there should be a central register from the commencement of the regime and that the scope of the register should be limited to large entities with the resources to comply. This approach would be an important step in limiting the privacy and cyber security risks associated with the proposed register.

Privacy risks with publicly available register of beneficial ownership

The AICD has significant concerns with the beneficial owner information that is proposed to be made public on a register as set out at Table 5.1 of the Discussion Paper.

While the Discussion Paper notes why a particular data item is needed for collection (e.g. identification) it provides no rationale for why a particular item should be publicly available. The AICD is unable to identify a public interest basis to publish a beneficial owner's residential or electronic address for communication or the month and year of the owner's date of birth. We are very concerned that the publication of this information will give rise to a significant risk of identify theft, cyber crime focused on the individual and spam communications. Our understanding of the UK Register of Overseas Entities is that information on date of birth and communication addresses is automatically excluded from this register.⁵ In addition, an individual can have their identify suppressed via an application to the regulator.

We further note that a public register of beneficial ownership information will enable inferences to be drawn about certain individuals' personal wealth and assets. This type of disclosure will invariably expose these individuals to a greater risk of fraud and investment scams.

² AICD CSCRC Cyber Security Governance Principles, October 2022, available [here](#).

³ ACSC, Cyber Security and Australian Small Businesses - Results from the Australian Cyber Security Centre Small Business Survey, November 2020, available [here](#).

⁴ ACSC, Annual Cyber Threat Report (July 2021 – June 2022), November 2022, Chapter 2, available [here](#).

⁵ UK Department for Business, Energy and Industrial Strategy, *Guidance for the Registration of Overseas Entities on the UK Register of Overseas Entities*, August 2022, available [here](#).

The AICD strongly recommends that the beneficial owner information that would be made public on the register be significantly reduced from what it is proposed under Table 5.1. The information should be limited to a minimum set of details, including a beneficial owner's name, nationality and nature of control. Separately the regime should include a suppression regime where an individual can in a timely fashion have their details taken off the register or not be published in the first instance. There will be cases where publishing even limited details of an individual may result in harm, for example where there is a risk of blackmail, intimidation or domestic violence.

6. Penalties and enforcement

The AICD is strongly opposed to the application of penalties against the three million regulated entities and their officers for non-compliance with the beneficial ownership disclosure regime proposed in the Discussion Paper. We reiterate our view that entities should not be required to maintain individual registers of beneficial ownership information for the reasons outlined above in this submission, and that a central register only should be used from the commencement of the regime.

However, we recognise that there must be an appropriate incentive to increase transparency of beneficial ownership information in support of the proposed regime. In this regard, provided beneficial ownership disclosure is only required via a central register and confined to a cohort of large entities with the resources to comply, we would support sanctions that are consistent with those currently imposed by the Corporations Act with respect to similar matters – for example, the failure to report a change of company details, or a failure to update a member register.⁶ Similarly, in the case of beneficial owners, we would support sanctions that are in line with those imposed on substantial shareholders who fail to disclose their interests as required under the Corporations Act.⁷

As noted above in section 4, we do not consider that entities should be required to 'police' beneficial owners' compliance with the disclosure regime, including to issue 'warning' and 'restriction' notices to beneficial owners that do not respond to an entity's request for information. For the reasons set out above, these activities would be more appropriately undertaken by a central registry.

7. Substantial holding notice and tracing notice regimes

The AICD supports the proposed listed company exemption from new beneficial ownership disclosure requirements. We note that:

- the existing substantial holding notice regime allows for timely access to share ownership information by relevant authorities. The information captured by this mechanism is adequate because it reveals the holders of legal and beneficial interests of 5 per cent or more of the voting power of listed company shares. Notices must also be provided for movements of at least 1 per cent in these holdings. Importantly, relevant authorities (and members of the public) can access substantial holding information without charge; and
- listed companies must keep a register recording the "relevant interests" information received in response to tracing notices issued under Part 6C.2 of Corporations Act. The beneficial ownership information on a tracing notice register and legal ownership information on a listed company's share register can be accessed by the public and relevant authorities. Regulators, such as ASIC,

⁶ Sections 168, 1312 of the Corporations Act.

⁷ Sections 671, 1325 of the Corporations Act.

also have significant powers, including the power to compel the production of books or the examination of witnesses, which assist in their collection of corporate ownership information.

However, we recognise that there are certain limitations with the efficiency of the tracing notice regime, in particular where:

- multiple and sequential tracing notices are required to be issued in order to identify an ultimate beneficial owner;
- responses are slow or not forthcoming, particularly from foreign beneficial owners who may not be familiar with the tracing notice regime.

Accordingly, we support the Government's proposal to strengthen ASIC's powers to make orders restraining the disposal, acquisition, and exercise of rights attached to interests in listed companies or listed MISs where a person has, without reasonable excuse, failed to comply with the substantial notice or tracing notice regime requirements. In our view, these measures are more appropriately targeted to the problem that a beneficial ownership disclosure regime is aimed at addressing – that is principally, tax avoidance practices of multinational enterprises.

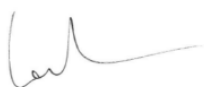
8. Other comments

The AICD agrees with the proposed definition of beneficial ownership as outlined in the Discussion Paper. In previous submissions to Government on increasing transparency of beneficial ownership, we have suggested that any definition be based on existing legal concepts and definitions in the Corporations Act, and that a sensible source to draw upon would be Australia's takeover rules.⁸

9. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Laura Bacon, Senior Policy Adviser (lbacon@aicd.com.au), or Simon Mitchell, Senior Policy Adviser (smitchell@aicd.com.au).

Yours sincerely,



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⁸ AICD submission, Increasing transparency of the beneficial ownership of companies, 17 March 2017 (available [here](#)).