Law Council
OF AUSTRALIA

Multinational tax integrity: Public Beneficial Ownership Register

The Treasury

23 December 2022

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Acknowledgements

The Law Council's Business Law Section drafted this submission, which also takes into account input from the Charities and Not-for-profits Committee of the Law Council's Legal Practice Section.

The Law Council is very grateful to those who contributed to this submission.

Introduction

1. This submission has been prepared on behalf of the Law Council of Australia with input from leading practitioners from the Business Law Section's (**BLS**) Financial Services, Taxation and Corporations Committees, and the Legal Practice Section's Charities and Not-for-profits Committee (**Charities Committee**).

2. The submission is made in response to the consultation paper released by Treasury on 7 November 2022, which seeks comments on the design features for the first phase of a publicly available beneficial ownership register (**Consultation Paper**).

3. The Law Council's BLS makes a number of general observations in Section A and sets out a possible alternative model for consideration by Treasury and the Government in Section B. In Section C, the LPS Charities and Not-for-profits Committee sets out specific comments dealing with not-for-profit entities (**NFPs**). Responses to the specific questions posed by the Consultation Paper are in Section D.

4. For your information, in 2023 the Law Council will, through a Working Group convened for this and other purposes, develop policies to improve anti-money laundering and counter terrorism financing (**AML/CTF**) risk mitigation, and prepare submissions on AML/CTF issues as they relate to the legal profession.

Section A: General observations

Objectives of proposed measures

5. The BLS suggests that it would be helpful for Treasury to be clearer in the policy objectives it is seeking to achieve through these initiatives, how the disclosure of additional information would achieve those objectives, and which persons or regulators need access to the information to meet those objectives.

6. The Consultation Paper references a variety of objectives concerning tax and financial crime, assisting foreign investment applications, the enforcement of sanctions, preventing avoidance of legal requirements, and ensuring multinational enterprises pay a fairer share of tax. It is not clear to the BLS that the availability of beneficial ownership information on a public register will advance, or is relevant to, all of these listed objectives.

7. For example, the Consultation Paper is titled 'Multinational tax integrity', but it would be fair to say that the measures proposed appear to have very little to do with multinational tax integrity as such.

8. To impose public disclosure obligations of private and personal information on some 3 million Australian legal entities appears, in the BLS's view, to be an enormous overreach in the absence of a compelling rationale. While there may be a clearer policy objective relating to AML/CTF and sanctions measures, once again imposing public register requirements on 3 million entities bears little relationship to the policy problem apparently sought to be solved. Only a tiny fraction of those entities would have any relevance to AML/CTF or sanctions. Corporate transparency has also been mentioned as a justification, but there is no plausible suggestion that transparency of 'beneficial ownership' of the overwhelming majority of the 3 million (mostly small) entities will be of any additional benefit to the public whatsoever from this perspective compared to what is already publicly available as mentioned below.

9. Indeed, no evidence is presented of widespread concealment or obfuscation of the ownership or control of Australian businesses, large or small.[1] Further, for the most part, a typical Australian Securities and Investments Commission (**ASIC**) company search will provide information about the day-to-day controllers (the directors) and the shareholders, who will be either individuals or companies, and in the latter case (where shareholders are companies) a further company search will reveal the directors of such entities. This raises the question of exactly what benefit to 'corporate transparency' is expected to be realised in addition to information that is already readily available.

10. In that regard, the description of the perceived need for a proposed public register does not start from a full assessment of the effectiveness and availability of the following registers and information gathering rights that are already available in the Australian context:

- substantial holder notices concerning listed entities publicly available through ASX and other exchanges;
- share, option, debenture, and tracing notice responses (for listed entities) available to any person through register inspections under the *Corporations Act 2001* (Cth) ;
- public information concerning officers, registered holders and beneficial/non-beneficial ownership declarations through ASIC company searches;
- the recently established private register of foreign ownership of Australian assets (including interests in land) pursuant to Part 7A of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**); and
- the extensive private information gathering powers of Australian regulators, including ASIC, the Australian Taxation Office, and the Foreign Investment Review Board.

11. With respect, the BLS is of the view that the policy objectives sought to be achieved appear to be confused, and the measures proposed to be applied seem over-inclusive and unnecessarily heavy-handed. If legislation is implemented without addressing these issues, the BLS is concerned that the resulting regime will impose very significant compliance costs and obligations and yet will not be effective in meeting the apparent policy objectives.

12. The BLS strongly recommends that Treasury and the Government reconsider this approach and apply proportionate measures that are focussed on achieving the key policy objectives in the most effective and least costly way.

International obligations

13. The BLS is strongly of the view that Australia's international obligations **do not** require the establishment of a **public** register of beneficial ownership. Moreover, as Treasury would be aware, last month the European Court of Justice decided that putting full 'beneficial ownership' information on a public register open to general

[1] There may be some examples of foreign investors such as private equity firms or hedge funds having investors whose identity is not obvious, but (1) where foreign investment approvals are made, full disclosure is required and (2) these entities would be a very small percentage of the 3 million entities referred to in the Consultation Paper.

public access was incompatible with the European Union (**EU**) right to protection of personal data.[2]

14. The BLS considers the following statements made by the European Court of Justice in Press Release No 188/22 issued on 22 November 2022 to be particularly pertinent:

> *The Court holds, however, that the interference entailed by that measure is **neither limited to what is strictly necessary nor proportionate to the objective pursued**. In addition to the fact that the provisions at issue allow for data to be made available to the public which are not sufficiently defined and identifiable, the regime introduced by the anti-money-laundering directive amounts to a **considerably more serious** interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter than the former regime (which provided, as well as access by the competent authorities and certain entities, for access by any person or organisation capable of demonstrating a legitimate interest), **without that increased interference being capable of being offset by any benefits which might result from the new regime as compared against the former regime, in terms of combating money laundering and terrorist financing**. In particular, the fact that it may be **difficult** to provide a **detailed** definition of the circumstances and conditions under which such a **legitimate interest** exists, relied upon by the Commission, is no reason for the EU legislature to provide for the general public to access the information in question. The Court adds that the optional provisions which allow Member States to **make information on beneficial ownership available on condition of online registration** and to **provide**, in exceptional circumstances, **for an exemption from access to that information by the general public**, respectively, are not, in themselves, **capable of demonstrating either a proper balance** between the objective of general interest pursued and the fundamental rights enshrined in Articles 7 and 8 of the Charter, **or the existence of sufficient safeguards** enabling data subjects to protect their personal data effectively against the risks of abuse.*[3]

15. European law is not Australian law. However, this decision underscores the privacy problem by emphasising that public disclosure of personal data is 'neither limited to what is strictly necessary nor proportionate to the objective pursued'. The BLS strongly encourages the Government to reconsider the proposal in light of this recent development (which occurred after the release of the Consultation Paper).

16. The BLS also notes that, following that decision, Finance Ministers of EU Member States have agreed to clarify the concept of beneficial ownership, by separating the two components of ownership and control.[4]

17. The decision of the European Court of Justice, and the announcement of the EU Finance Ministers, indicate that jurisdictions at the forefront of attempts to impose requirements to disclose beneficial ownership details are still grappling with the

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[2] Court of Justice of the European Union, *Joined Cases C-37/20 and C-601/20*, <https://curia.europa.eu/juris/document/document.jsf;jsessionid=18BFAD9956AF33CEB1C1A07FFD31D961?text=&docid=268842&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=45499>.
[3] Court of Justice of the European Union, Press Release No 188/22 (22 November 2022) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-11/cp220188en.pdf>.
[4] Council of the EU Press release 7 December 2022.

meaning of 'beneficial ownership' and with the tension between the media pressure for disclosure and the rights of individuals to privacy. The BLS is of the view that Australia may benefit substantially from waiting to see how these tensions are resolved by the EU and other jurisdictions.

18. The BLS considers that there are clear and significant privacy risks associated with unnecessary disclosure of personal information on a public register. The BLS submits that publication of personal information should be required only where such publication is absolutely required to meet important policy objectives and where the benefits of publication are proportionate to the costs and risks. In the view of the BLS that is clearly not the case here. As a matter of principle, while a register of 'beneficial ownership' may be warranted, a **public** register simply cannot be justified.

19. In this regard, if the Government nevertheless wants to pursue some form of public register of 'beneficial ownership', the BLS submits that it would be preferable to apply a public register requirement to a subset of entities, rather than all entities. For example, a 'large entity' subset and a 'foreign owned' entity subset could be subject to public register requirements, while other entities could be subject to a requirement to file information with a regulator (for example with a tax return or a form like the United States' Internal Revenue Service W-8BEN for foreign residents), or to keep an internal private register that would be available to regulators on request. The BLS considers that this would satisfy Australia's international obligations and would likely meet a 'corporate transparency' policy objective. However, it would not be over-inclusive and would not unnecessarily expose the personal information of Australian citizens. The BLS is of the view that a focus on larger entities and entities in which there is direct or indirect foreign ownership would be better aligned with the stated policy objectives. That said, in Section B of this submission the BLS sets out an alternative, more extensive, proposal for your consideration.

Definitional issues

20. The BLS does not understand why it is felt necessary to adopt the United Kingdom definition of 'interest' contained in Part 21A and Schedule 1A of the Companies Act 2006 (UK) (**UK Companies Act**) to define 'beneficial ownership.' The BLS considers the expression 'beneficial ownership' to be significantly misleading in the Australian context because the concepts applied overseas and the proposals in the Consultation Paper bear almost no relevance to the colloquial meaning of 'beneficial owner', or the Australian legal meaning of the term, except by coincidence.

21. Australia already has well understood definitions of interest for these purposes as used in the Corporations Act (relevant interest and control), the FATA (interest) and sector-specific legislation such as the *Financial Sector (Shareholdings) Act 1998* (Cth). In the opinion of the BLS, the expanded definition of interest as used in Schedule 1A of the UK Companies Act offers no greater penetration of the control or ownership of legal entities than that already provided through the well understood definitions used in existing domestic legislation. To introduce a new fourth definition of interest seems excessive and unnecessary.

22. Further, the complex reporting regime of registrable and non-registrable legal entities provided for in Part 21A of the UK Companies Act offers no advantage of regulatory design over simpler models that impose a disclosure obligation on an ultimate controller as used in existing domestic models of legislation.

23. While it may be the case that models of regulation that define an interest by reference to control might not always uncover disguised ownership (as noted recently by the EU Finance Ministers referenced above), in most cases there is a commercial imperative that a significant degree of ownership is coupled with control. In any event, as noted above, Schedule 1A of the UK Companies Act offers no greater extension of concepts of ownership than is provided by the existing domestic models of legislation.

Enforcement

24. The Consultation Paper proposes an unusual and untested method of enforcement, namely that the regulated entities will be required to take enforcement action which may have the effect of preventing a shareholder from being able to transact in or benefit from their shares.[5] The BLS is concerned that outsourcing responsibility and discretion for enforcement challenges basic rule of law principles, and may well have difficulties from a Constitutional law viewpoint. This raises a few questions: will regulated entities have immunity from suit for taking enforcement action that is viewed as incorrect with hindsight? If yes, how wide would such an immunity be drawn? If no, the legislation would expose regulated entities to liability for applying in good faith uncertain legal tests (the expression 'significant influence' is unknown to Australian law) to limited information—for example, relating to alleged control or influence that may (or may not) have been exercised (or could be exercised but has not) through informal and undocumented arrangements. Absent powers to compulsorily obtain information, and resources and expertise to apply legal tests to information obtained, the BLS considers that enforcement provisions are unlikely to operate effectively. Will there be the possibility of judicial review of enforcement decisions?

25. Moreover, if it is accepted that ASIC has limited power to impose sanctions and penalties (compare the infringement notice regimes in the Corporations Act) how can it be that private entities would have a greater ability than ASIC to impose sanctions?

26. The BLS urges Treasury and the Government to reconsider outsourcing enforcement in the way contemplated. Even if the justification is that Government may have insufficient resources to administer the proposed legislation, the solution should not be to force the regulated entities to become a de facto police force in the service of the State. Rather, the legislation should be designed in a way that makes enforcement by agencies of the State manageable.

Identity verification

27. The Consultation Paper proposes that regulated entities will be required to verify the identity of 'beneficial holders'.[6] This verification of identity (**VOI**) requirement is a novel, far reaching, and (in the BLS's view) an unreasonable requirement. Current VOI and 'know your customer' requirements are generally targeted and proportionate, and for the most part the organisations required to perform VOI can be assumed to be able to take proper care of the identity information obtained.

28. In comparison, at least the Director ID requirement could be satisfied for most Australian citizens by using the MyGovID system. Perhaps some sort of equivalent identity verification system could be considered.

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[5] Section 7.
[6] Section 6.

29. While the BLS acknowledges that the Consultation Paper suggests the use of third-party identity verification, this may be quite costly and, based on some experience, requests for copies of identity documents will be made routinely by regulated entities (this has been the case for UK VOI requirements, for example).

30. This will create a veritable gold mine of copies of identity documents many (perhaps most) of which will be stored in an insecure way from a cybersecurity viewpoint. If major organisations cannot keep their cyber perimeters secure, what hope have small regulated entities? Moreover, since much company administration is done by small accounting firms, the BLS is gravely concerned that IT systems of such small firms will become honeypots for hackers, providing a huge amount of targeted personal information. There is a significant potential for damage to individuals if these proposals were implemented.

31. The alternative is that the responsibility should be placed on the 'beneficial owners', and the regulated entity should be entitled to rely on information provided by the 'beneficial owners'. No VOI requirement should be imposed, unless and until a very high degree of confidence can be obtained that VOI can be performed in a way that does not create or exacerbate cybersecurity risks or impose an unreasonable cost burden.

32. VOI requirements should also not be necessary for closely held entities such as single-director, single-shareholder proprietary companies, or self-managed superannuation funds of individuals. There is nothing to be gained by asking individuals to verify their own identity.

Discretionary trusts

33. The Consultation Paper asks a question about discretionary trusts[7] (see the specific response below). The BLS notes overseas experience with 'beneficial ownership' registers is of limited relevance to the Australian situation in respect of discretionary trusts. There are close to one million trusts in use in Australia, a per capita rate some 20 times the per capita rate of use of trusts in the UK. Trusts are rarely used in the US and are not known in civil law countries. Against that background, the BLS submits that there need to be particular rules for companies who have shares held by trustees of discretionary trusts, recognising that it is the controllers of the trust who should be disclosed, if anyone, rather than discretionary objects who may have absolutely nothing to do with the control of the trust or its assets, and who may never benefit from trust assets. Generally speaking, as a matter of law, a beneficiary or object of a discretionary trust has no interest in the assets of, and certainly no control over, the trust but only has a right to be considered by a trustee exercising its powers.

34. In the experience of BLS members, typical discretionary family trust deeds define classes of beneficiaries by reference to one or more individuals and their family members, and may include companies and superannuation funds in which such family members have an interest, as well as a large class of charities or deductible gift recipients. The BLS's view is that disclosing such information, rather than information concerning the persons who are the controllers of the trust, would not achieve the objectives of the register and would constitute overreach disproportionate to the privacy concerns it would create.

35. The role of the settlor in Australian trusts is unique and unlike many other jurisdictions. The settlor has no control over the administration of the trust or the

[7] Question 11.

trust property. The standard practice for establishing a discretionary or family trust in Australia is for the professional adviser assisting the client to be the settlor of the trust and to settle a nominal sum, say $10, to create the trust. The settlor then steps out of the picture completely and has absolutely no ongoing involvement with the trust or its assets.

36. The terms of the trust will provide that the settlor is expressly prohibited from being a beneficiary or otherwise receiving any benefit from the trust, and the settlor has no powers (or duties) under the trust deed. The management and control of the trust is performed only by the trustee, and the designated appointor has various powers including the power to remove or appoint the trustee.

37. For this reason, it is sufficient to achieve the transparency objectives of the proposed regime simply to provide the name of the trust and the identity of the trustee or trustees, or (where appropriate) the public officer of the trust estate.[8] Where the trustee is itself a company, then the names and details of the directors will already be publicly available. This would be consistent with the intention of the measures: to identify the real controllers of companies.

Section B: An alternative proposal

38. In this Section, the BLS sets out an alternative proposal for the consideration of Treasury and the Government.

A suggested simpler and lower cost regime for companies

39. The BLS appreciates that it is important that Australia adopt regulatory measures that meet the consensus requirements of the transnational organisations of which it is a member, and as recommended by bodies such as the Financial Action Task Force. If the purpose of the initiatives contained in the Consultation Paper is to meet those narrower objectives, the BLS would like to suggest a simpler regime for companies for consideration by Treasury that would involve significantly lower compliance costs. The BLS considers that this alternative would fully meet Australia's international transparency commitments. The regulatory design is summarised below.

    - An individual who has an Indirect Control Interest in an Australian Company, registered Managed Investment Scheme (**MIS**) or registered Corporate Collective Investment Vehicle (**CCIV**) (each a Controlled Entity) must disclose that Indirect Control Interest by notice to the Controlled Entity within 10 Business Days of acquiring that Indirect Control Interest.[9] For these purposes a Controlled Entity does not include an entity that is a Listed Disclosing Entity (as defined in the Corporations Act) or an entity that is part of the Consolidated Entity (as defined in the Corporations Act) of a Listed Disclosing Entity.[10]
    - An Indirect Control Interest is Control (within the meaning of section 50AA of the Corporations Act) and/or a Relevant Interest (as defined in Chapter 6 of the Corporations Act) in more than 20% of the voting shares of the Controlled Entity.[11] An Indirect Control Interest will exclude circumstances where the

[8] Section 252A of the *Income Tax Assessment Act 1936* (Cth).
[9] The logical place to incorporate the provisions described are in a new Part 2C.3 of the Corporations Act, with consequential changes to other provisions of the Corporations Act.
[10] Chapter 6C of the Corporations Act already provides for comprehensive disclosure in this situation.
[11] With modifications similar to section 604 for a registered MIS or CCIV.

individual is the registered holder of the shares or interests that are the sole circumstances that cause that Indirect Control Interest to exist.[12]

- The notice (**Initial Notice**) to the Controlled Entity must disclose:

  (a) the individual's:

    (i) name;

    (ii) address;

    (iii) date and place of birth;

    (iv) personal identification information;[13] and

  (b) the Relevant Interest of the individual in voting shares of the Controlled Entity; and

  (c) details of the manner by which the Indirect Control Interest is held sufficient to describe the material circumstances by which that Control or Relevant Interest arises.[14]

- The individual must disclose by notice to the Controlled Entity within 10 Business Days:

  (a) a change to any matter disclosed in the Initial Notice (or a subsequent notice); or

  (b) where the individual ceases to hold an Indirect Control Interest.

- Notices given under these provisions will be a register for the purposes of Chapter 2C of the Corporations Act and may be inspected by any person in accordance with Chapter 2C.[15]
- The Controlled Entity must disclose in its initial and annual filings with ASIC, and in its change of governance filings with ASIC, the name and address of each individual who has a disclosed Indirect Control Interest.[16]
- A contravention of these provisions by an individual who has an obligation to provide a notice or by an accessory to that contravention[17] will be an offence. The Court will have the power to make Remedial Orders[18] if there is a contravention of these provisions.

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[12] As that Indirect Control Interest will already be apparent from the register of members and it is unnecessary that disclosure be made twice in this relatively straightforward ownership situation.
[13] Being passport details and/ or other personal identification information. This feature is not currently required for directors and registered shareholders but is intended to satisfy the verification of identity of controller features that have been introduced or proposed in other regimes.
[14] For example disclosure of the identity and jurisdiction of incorporation of all intermediate companies or other investment vehicles by which that control is exercised.
[15] Excluding passport and personal identification information that may be withheld from general public inspection for privacy reasons (for the avoidance of doubt that personal excluded information must be included in the register and be available for production to regulators).
[16] ASIC forms to be modified to accommodate this disclosure in the same way as for directors and registered members. As a result, a public ASIC search will disclose the identity of any individual who has an Indirect Control Interest.
[17] An officer of the Controlled Entity may be an accessory if they have knowledge of the essential facts concerning the contravention and they do not facilitate compliance with these requirements.
[18] By expansion of section 1325A of the Corporations Act.

General comments on alternative structure

40. The BLS makes the following further observations concerning the rationale for suggesting this alternative structure.

    - The disclosure regime requires disclosure of ultimate controller ownership by individuals. That approach is consistent with Chapter III of EU Directive 2015/849 (as amended by Directive 2018/843) and US Financial Crimes Enforcement Network final rule 31 CFR Part 1010.
    - The obligation is imposed on the ultimate controller, rather than on the company in question and its officers. This is consistent with the regulatory design of the substantial holding provisions of Part 6C.1 of the Corporations Act and the approach adopted in the US regulatory model. This approach avoids the needless complexity of Part 21A of the *Companies Act 2006* (UK), and reduces the verification and compliance cost concerns articulated above. Sanctions for non-compliance are similar to those applicable to the substantial holding provisions of the Corporations Act.
    - The alternative structure uses existing concepts of control and relevant interest that are well known in the Australian context. To the extent there is compliance cost associated with applying these concepts that cost is imposed on the ultimate controller who has chosen to structure their affairs in this way rather than the other shareholders of the relevant entity.
    - The alternative structure uses public disclosure through the ASIC database to identify the existence of controllers and the existing company register inspection entitlement to access further information in a way that integrates with existing arrangements, and better addresses the privacy and data protection concerns articulated above.

41. The BLS would be happy to elaborate on any aspect of the alternative approach outlined above if that would be of assistance to Treasury.

Section C: Specific comments concerning NFPs

42. The Charities Committee notes that income tax exempt NFPs, including charities registered with the ACNC, should be excluded from the proposed beneficial ownership regime.

43. Other than in question 8, the Consultation Paper does not deal with NFPs at all but assumes all companies and enterprises are for profit. In response to question 8, the Charities Committee submits that there should be no requirements for the application of the proposed beneficial ownership requirements for NFPs.

44. The policy objective of the proposed beneficial ownership requirements is to 'record who ultimately owns, controls, and receives benefits from a company or legal vehicle operating in Australia…to discourage the use of complex structures that avoid legal requirements and obscure tax liabilities. The reform is a key element of the government's commitment to ensuring multinational enterprises pay a fairer share of tax.' This policy objective does not to apply to NFPs which are not subject to income tax and do not have 'beneficial owners' of the kind described in the Consultation Paper.

45. In particular, it is important to note:

- Members of companies limited by guarantee (**CLGs**) that are NFPs are not 'beneficial owners' of the company or its assets. The members have some rights (e.g. the right to remove directors and approve changes to the constitution), but this is generally the extent of their influence and 'control'.
- Directors of CLGs that are NFPs control the application of funds and assets only to carry out the purpose of the NFP as stated in the constitution, which cannot be for the private benefit of the directors or members.
- Specifically, in order to be income tax exempt, most of these NFPs exist for the benefit of the community and the public, and cannot provide private benefits.

46. These proposed measures would place an unjustified compliance and administrative burden on NFPs, particularly unnecessary for Charities. To ensure Charities are able to utilise their limited resources for the largest benefit, it is important that they are not subject to unnecessary red tape.

47. The policy objective is to reduce the opportunity for concealment of ownership of assets. There are already restrictions on the use of NFP assets and reporting requirements. The assets must only be used in furtherance of the NFP's purpose; neither the members nor the directors can decide to use the assets for the private benefit of the members or directors. In these circumstances, the disclosure of a member's 'beneficial ownership' in an NFP is unwarranted. It is important that the collection, use and public disclosure of personal data is required *only* where justified and warranted.

48. The proposed approach to thresholds also does not work for CLGs as each member generally has only one vote. For the 20% threshold, all members would need to be disclosed for a CLG with between 1 and 5 members. However, for CLGs that have 6 or more members, there would be no disclosure requirement.

49. These specific comments respond only to income tax exempt NFPs and do not consider the position of taxable CLGs. The Charities Committee's general position is that, where the entity is precluded, in its constituent documents, from making distributions to its members either while operating or upon winding up or deregistration, then it is unnecessary to be included in the measures contemplated by the Consultation Paper.

Section D: Responses to specific consultation questions

Set out in this Section are responses to the specific questions posed in the Consultation Paper. However, they should be read together with the general observations in Sections A and C, and the alternative proposal in Section B.

Consultation Questions	Extracts (for reference)	Comments
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?		No. This question assumes that 'true beneficial owners' are not already captured. However, given the width of the substantial holder and tracing notice provisions, (including the breadth of the concepts of 'relevant interest' in s 608 and 'association' in s 12 of the Corporations Act) this is unlikely to be the case. If the proposed new beneficial ownership register concept were to introduce additional concepts to 'relevant interest', there would beno disclosure or other real benefit in making the substantial holding notices (**SHN**) provisions capture additional consistent information relative to the new beneficial ownership register (**BOR**) provisions. In fact, it is submitted that, in addition to imposing an additional (unnecessary) regulatory burden, such a change would confuse, rather than inform, the market. The concepts used in Part 6C.1 of the Corporations Act (which is the Part dealing with SHNs) are well understood by the market—having been developed, used, and interpreted by the Courts, ASIC and (since 2000) the Takeovers Panel over more than 50 years. In other words, the existing SHN disclosure requirements in Part 6C.1 must be retained (without any new beneficial ownership matters being an additional disclosure requirement). It is very important to note that the existing concepts and disclosure requirements in Part 6C.1 are inextricably linked to the operation of the takeover regime in Chapter 6 of the Corporations Act. and, for this reason, the current retain must be retained No one would want to see the smooth-running operation of the (well-functioning) Australian takeover regime upset by any new beneficial ownership regime.

Consultation Questions	Extracts (for reference)	Comments
2. Should the tracing notice and substantial holding notice regimes be fully aligned so responses to each notice capture the same information?		No. The tracing notice and substantial holding provisions have somewhat different purposes, so alignment is not necessary. For example, the SHNs are interested in persons with 'voting power' of 5% or more whereas tracing notices are intended to uncover holders of relevant interest and persons who have given relevant instructions at any level. If the proposed new beneficial ownership register concept is to be introduced there would be no disclosure or other real benefit in aligning both sets of provisions with the BOR requirements by requiring the disclosure of **additional** information. In short, the existing disclosure requirements in the tracing notice and substantial holding provisions are working well, are well understood by the market, the Courts, ASIC and the Takeovers Panel and should be retained.
3. As is the case for tracing notices, should listed entities be required to maintain a register of information collected by substantial holding notices?		No. All SHN information for ASX listed companies is readily publicly available from the ASX website (free of charge) so this is not required and would add an unnecessary compliance burden (and cost) on ASX listed entities for no corresponding regulatory or policy gain.
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?		There is no reason to think that current users such as investors and regulators require any greater accessibility than currently exists under Part 6C.2. It is, however, anomalous that a person has to wait up to 21 days to access the tracing notice register (see s 672DA(8))—an inordinate amount of time - whereas a person can have access to the members' register within 7 days (s 173(3)). The BLS recommends that both periods should be aligned to 7 days.

Consultation Questions	Extracts (for reference)	Comments
Definition of beneficial ownership		
5. Are there any elements missing from the proposed definition of beneficial ownership?		See the BLS observations in Section A above.
6. Are there any potential unintended consequences which could result from adopting a 20 per cent threshold for beneficial ownership?	The first and second limbs of this test establish a 20 per cent minimum threshold. While this is lower than the United Kingdom, it is consistent with existing corporate control and takeover thresholds in Australia, and would leverage an existing body of guidance and stakeholder understanding.	There is no basis for using 20% except for consistency with existing disclosure regimes, but in each case the threshold is applied for a different purpose. In Chapter 6 of the Corporations Act, 20% is applied as a prophylactic: it would be rare for 20% to confer control in a private or public setting. It is a trigger point. In contrast, in the UK, 30% is used as a presumed level in a widely held public context where control would have likely passed.
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)?		Logically, any entity in which there is a (real) risk of the kind with which the Consultation Paper is concerned should be subject to the regime by amendment to the legislation by which it is created.

Consultation Questions	Extracts (for reference)	Comments
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?		Income tax exempt not-for-profit entities (**NFPs**), including charities registered with the ACNC (**Charities**), should be excluded from the proposed beneficial ownership regime. Please refer to detailed comments in Section C concerning NFPs. There, the Charities Committee sets out three key points: • Members of companies limited by guarantee (**CLGs**) which are NFPs are not 'beneficial owners' of the company or its assets. The members have some rights, e.g. the right to remove directors and approve changes to the constitution, but this is generally the extent of their influence and 'control'. • Directors of CLGs which are NFPs control the application of funds and assets only to carry out the purpose of the NFP as stated in the constitution which cannot be for the private benefit of the directors or members. • Specifically in order to be income tax exempt, most of these NFPs exist for the benefit of the community and the public and cannot provide private benefits.
9. What factors would be relevant to determining whether a regulated entity has taken reasonable steps to identify its beneficial owners?		The entity should in most circumstances be able to rely on information provided rather than having to exercise reasonable steps. The obligation to verify identity will open a Pandora's Box. Instead an accessory model of regulation (as extensively used in the Corporations Act) should apply.

Consultation Questions	Extracts (for reference)	Comments
Recording requirements		
10. What, issues, if any, may arise with the proposed recording requirements?	For the avoidance of doubt, a regulated entity's register would not disclose the beneficial owners of another regulated entity or any listed entity in its beneficial ownership chain. The beneficial owners of the second regulated entity would be identified on the register maintained by that entity. Ownership interests in the listed entity would be disclosed as part of the substantial holder and tracing notice regimes. In the first phase, identifying the ultimate beneficial owners of a particular regulated entity may require examining the registers of multiple regulated entities and public filings of listed entities	A regime based on Part 21A of the UK Companies Act would be unnecessarily complex as compared with a simpler structure that imposes a disclosure obligation on the ultimate controller.
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?		The only information recorded should be the true controllers, not a list of objects who have at best a passive involvement and at worst have no involvement whatsoever apart from being 'named' as part of a described class of beneficiaries. The proposals suggest that the regulated entities would have an obligation to take reasonable steps to identify 'all of the trust's beneficiaries'. This is problematic when it comes to discretionary trusts.

Consultation Questions	Extracts (for reference)	Comments
		It is also not at all clear why registrable superannuation entities should be exempt. That they are subject to prudential regulation is not to the point.
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?		The BLS is of the view that the case for public access has not been clearly made.
13. What other information should be collected on the beneficial ownership register?		None.
14. Should any of the proposed beneficial ownership information not be collected?		See the comments of the BLS in Section A.
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?		The BLS is of the view that there is no justification for making the information public in the first place. There are clear and present privacy and cybersecurity dangers that would be increased materially by the BOR proposals for no benefit (compared with the same information being available to regulators on request).
16. Are there any potential unintended consequences which could result from adopting the proposed approach to protect some beneficial owners' information from public disclosure?		It is essential that private information is protected wherever possible.

Consultation Questions	Extracts (for reference)	Comments
17. In what other circumstances should beneficial ownership information be protected from disclosure? What should be the scope of the protection in those circumstances?		Private information should not be required to be disclosed publicly.
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)?		To reiterate, there is no benefit to public disclosure so none of these risks is justified. The alternative structure described in Section B proposes a graduated structure for consideration.
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?		The main consequence is imposing liability (which may include criminal and will almost certainly include civil penalty liability) to be satisfied of something based on (1) vague criteria and (2) limited and potentially uncertain factual information. The primary compliance obligation should be placed on the beneficial owner not the regulated entity. An accessory model of regulation should be considered for other persons involved in a contravention. There is also the generation of VOI related information that may facilitate identity theft.

Consultation Questions	Extracts (for reference)	Comments
20. Are there other methods, procedures, and approaches to verifying the information on beneficial ownership registers?		First, regulated entities should be able to rely on information provided by 'beneficial owners'. Second, an independent verification service such as MyGovID or DirectorIDs could be made available.
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?		Impacts on other obligations such as the reporting regimes under the *Taxation Administration Act 1953* (Cth) in relation to the US Foreign Account Tax Compliance Act and the Common Reporting Standard need to be considered. Further, there should be consideration of relaxed standards for closely held companies and trusts. A two member family company should not be faced with significant possible sanctions for failing to promptly report a change of address (or a change in beneficial ownership caused by the death of a spouse), and it is submitted that a simple annual return would be a more appropriate and proportionate measure. A pre-populated annual return could be sent to entities, and the entity could then either: - confirm that the information provided is correct (and this could be the default if no response is provided by the entity); or - amend the pre-populated form to reflect any changes to relevant information recorded in the register that have occurred in the past 12 months.
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?		Collection of identity document copies for no good purpose by millions of entities with inadequate cybersecurity. The BLS considers this to be an unacceptable risk which should therefore be avoided rather than mitigated.

Consultation Questions	Extracts (for reference)	Comments
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?		No. There is no evidence that these additional powers are required. ASIC already has the ability to apply to the Court or the Takeovers Panel for breaches of the substantial holder notice and / or tracing notice regimes (as to do listed companies). There is no reason to think these powers are inadequate. Court supervision is appropriate from a rule of law perspective. In other words, giving a regulator unnecessary and less supervised powers is unwarranted. In any event, ASIC should not have any role in getting involved in matters relating to taxation compliance.
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?		The BLS considers that the proposed enforcement regime would be inappropriate for a number of reasons. It is contrary to rule of law principles to co-opt private entities to carry out the State's enforcement responsibilities. The BLS also queries whether conferring such powers would be constitutional, and that the exercise of such powers will almost certainly be challenged. Will the regulated entity be exercising judicial power? Can it exercise executive power? These considerations did not arise in the UK model given different constitutional considerations. The BLS is concerned that regulated entities will be placed in an invidious position, because they may be legally liable for errors made in enforcement, absent wide immunities.
25. What other enforcement, incentive or penalty options could be introduced to encourage greater compliance with the proposed beneficial ownership register requirements?		Wherever possible, make it simple and have bright line tests and safe harbours. Reward good faith efforts to comply. Place burdens on those best placed to discharge them (i.e. the beneficial owners). Given the intention to affect large numbers of small family companies and trusts, ensure that the new measure is very widely publicised and provide for small and realistic penalties for such companies and trusts.

Consultation Questions	Extracts (for reference)	Comments
		The alternative proposal described in Section B suggests a simpler enforcement structure based on existing mechanisms.
Regulatory costs and benefits		
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?		The Law Council is not in possession of the relevant data and therefore is not able to comment on this.
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?		The Law Council is unable to give a reliable estimate, but its best guess is a range of hundreds of dollars for simple entities to many thousands for larger and more complex ones. The total compliance cost could be billions of dollars, which seems disproportionate to the benefit, when compared to a more targeted regime.
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?		It is not clear what material additional benefits would be provided compared to corporate information that is already available. There are concerns that compliance costs will divert resources from more productive uses.

Consultation Questions	Extracts (for reference)	Comments
29. What other information is relevant to assessing the costs and benefits and regulatory burden of introducing the proposals outlined in this paper?		It is unclear how much will it actually save regulators or facilitate investigations compared with a more targeted regime. Also, distinguishing between cases where beneficial ownership needs to be known and those where ultimate control is sought to be identified is important. Whilst ownership often confers control that is not always the case and may even be irrelevant: e.g. in the case of NFPs.
30. What transitional arrangements would be necessary to enable regulated entities and listed entities to meet the proposed new requirements?		Regulated entities need substantial advance notice of the regime and the precise details in order to adequately plan for and resource the implementation of the new regime. There have been other examples where substantial parts of a new legislative regime have been included in regulations that have been provided with only a very short period of consultation and that is not desirable.