



Australian Government

Increasing Transparency of the Beneficial Ownership of Companies

Consultation Paper

February 2017

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CONSULTATION PROCESS

REQUEST FOR FEEDBACK AND COMMENTS

The Australian Government (the Government) welcomes feedback from all interested stakeholders on the issues outlined in this consultation paper.

The consultation paper contains several focus questions. Stakeholders are invited to address any issue raised in this paper and should not feel obliged to address every question. The information obtained through this process will inform the Government's approach to the way forward.

Closing date for submissions: 13 March 2017

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NOTES TO PARTICIPANTS

The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely seeking feedback to inform further policy development.

FOREWORD



Australia has a strong reputation for high levels of transparency and accountability in business practice. Internationally the Australian Government has been active (and in many cases a leader) in anti-corruption efforts and cooperation regarding tax evasion and tax transparency.

The development of the G20 High-Level Principles on Beneficial Ownership Transparency, subsequently endorsed by G20 Leaders at the 2014 Summit, was a key outcome for the Australian Presidency.

In May 2016 the Government announced at the UK Anti-Corruption Summit that it would explore, via public consultation, options for a beneficial ownership register for companies. The Government reaffirmed as part of the Open Government Partnership National Action Plan released on 7 December 2016 that it would consult publicly on the details, scope and implementation of a register.

Improving transparency around who owns, controls and benefits from companies will assist with preventing the misuse of companies for illicit activities including tax evasion, money laundering, bribery, corruption and terrorism financing.

This consultation paper seeks views on how to increase transparency of the beneficial ownership of companies for relevant authorities in order to combat illicit activities. The Government is seeking feedback on what information needs to be collected to achieve this objective and how it should be collected, stored and kept up to date. We also seek feedback on the expected compliance costs for affected parties.

The submissions to this consultation paper will inform the Government's decision about reforms to improve transparency of beneficial ownership of companies.

I encourage all those who have an interest in improving beneficial ownership transparency for companies to provide their feedback. The deadline for submissions is 13 March 2017.

A handwritten signature in black ink, appearing to read 'Kelly O'Dwyer', with a stylized flourish at the end.

The Hon Kelly O'Dwyer MP
Minister for Revenue and Financial Services

1. CONTEXT

Companies play an essential role in both the Australian and the global economy. They are a vehicle to facilitate private sector investment and growth.

At times these vehicles can be used to disguise the identity of those involved in illicit activities, including tax evasion, money laundering, bribery, corruption and terrorism financing. This is achieved through mechanisms such as the use of shell companies, the use of complex ownership and control structures, the use of bearer shares and share warrants and of nominee shareholders where the nominator is not disclosed. The exploitation of these vehicles results in gains for criminals and financial losses to the Australian economy.¹ It may also affect public confidence and the perceived legitimacy and validity of business and company regulatory processes and requirements.² It also risks confidence in the tax system.

To ensure compliance with the relevant laws against such illicit activities, relevant authorities (including law enforcement and prosecutorial authorities, supervisory authorities, tax authorities and financial intelligence unit) need to be able to identify the entities and individuals that can control and benefit from the financial activities of a company and how those individuals and entities are connected to each other. This objective is inhibited by deficient information collected on the beneficial ownership of companies, and as a result the individuals involved in such illicit activities are able to disguise the true source or use of funds or property behind company structures.

Improving the collection and utilisation of beneficial ownership information will significantly contribute to authorities' efforts to combat and prevent these activities. This, in turn, will promote greater integrity and transparency within the domestic and global financial system.

Internationally, there is a focus on increasing transparency of beneficial ownership information within the global financial system. International bodies such as the G20 view transparency as playing a key role in combating illegal activities such as money laundering, bribery and corruption, insider dealings, tax fraud and terrorism financing. This was reflected in the G20 High-Level Principles on Beneficial Ownership Transparency (the G20 Principles), the development of which was a key outcome for the Australian G20 Presidency in 2014. Other international organisations such as, the Financial Action Task Force (FATF),³ the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes and the World Bank also have a strong interest in progressing work towards increasing beneficial ownership transparency.

In 2016, international focus on the availability of beneficial ownership information of entities and legal arrangements (for example, trusts) increased following the leaks of incriminating data in April from a large law firm. In May 2016 beneficial ownership transparency was a key issue for discussion at the Anti-Corruption Summit in London, where several countries including Australia made commitments to increase the transparency of beneficial ownership.

1 Australian Crime Commission, Organised Crime in Australia 2015.

2 Ibid.

3 The FATF has set global standards for the transparency of legal arrangements and legal persons, and has a methodology for assessing compliance with these standards and the effectiveness of the measures.

2. THE CURRENT FRAMEWORK

2.1. MEANING OF BENEFICIAL OWNERSHIP

The meaning of the term ‘beneficial ownership’ and the tests for determining which persons are ‘beneficial owners’ is not broadly and consistently applied in the different contexts where it arises in Australia. There is also variation at the international level between the approaches taken by different countries.

Internationally, the first of the G20 Principles recommends that countries have a definition of ‘beneficial owner’ that captures the natural person(s) who ultimately owns or controls the legal person⁴ or legal arrangement.⁵

The peak body for guidance on beneficial ownership transparency standards, the FATF (see Part 4.1 for more information on the FATF) defines beneficial ownership as follows:

Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.

Reference to “ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

In Australia, a definition of beneficial owner which focuses on ownership and control has been developed as part of the Anti-Money Laundering legal framework (see further Part 2.4). There is no general definition within the *Corporations Act 2001* of ‘beneficial owner’ although beneficial ownership information is often picked up by the concept of a ‘relevant interest’ which is used to define various rights and obligations under the Act relating to takeovers and the disclosure of interests by persons with influence over a company’s affairs.⁶

4 The G20 Principles borrow terms used by the FATF such as ‘legal person’ which the FATF defines as natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property. For example: companies, bodies corporate, foundations, partnerships or associations. This could include non-profit organisations (NPOs) or cooperative societies.

5 The FATF defines ‘legal arrangements’ as express trusts or other similar legal arrangements. Examples of other similar arrangements (for AML/CFT purposes) include fiducie, treuhand and fideicomiso.

6 This is discussed further Parts 2.2 and 2.3 of this paper. See also ASIC Regulatory Guide 5 Relevant interests and substantial holding notices (RG 5) at RG 5.6 – RG 5.17.

In Australia, shares may be held in two ways – beneficially and non-beneficially. If shares are beneficially held, the legal owner of the shares derives the benefits of ownership directly. They are both the legal and beneficial owner of the shares. An example of the benefits they receive could be dividend payments. Shares held by a person⁷ as trustee, nominee or on account of another person are non-beneficially held (that is, the registered member holds the share for the benefit of someone else). The person who receives the benefit is the beneficial owner rather than the legal owner.

In considering potential reforms to increase the transparency of the beneficial ownership of companies, the concept of beneficial owner could be a broad one which includes:

- The natural person(s) who have a controlling ownership interest; or
- The natural person(s) who can exercise control of a company through other means; or
- The natural person(s) who controls the activities of a company by virtue of their position in that company.

The precise way in which beneficial owners are defined and identified is explored more fully in Chapters 4 and 5. The Government seeks your views on these questions.

2.2. LEGAL AND BENEFICIAL OWNERSHIP INFORMATION FOR COMPANIES WHICH IS CURRENTLY AVAILABLE

Australian companies currently collect some legal and beneficial ownership information, with much of it provided to the Australian Securities and Investments Commission (ASIC). There is, however, scope to increase the transparency of beneficial ownership, because while shares are often held non-beneficially in Australia there is no legal obligation for all companies to collect and report shares held in this manner or the identity of the beneficial owners to ASIC. The following section discusses how information on legal ownership and beneficial ownership is currently recorded and disclosed in Australia.

A company's share register

Under the *Corporations Act 2001* (the Corporations Act), companies are required to establish and maintain a register of members. The register of company members must record for each member the member's name and address, the date on which the entry of the member's name in the register is made, and if a company has share capital, the specific details of the shares held by each member. All companies other than listed companies must record if shares are beneficially held or not. The identity of the beneficial owner is not required to be recorded.

The register must be kept within Australia – either at the company's registered office, its principal place of business or another place approved by ASIC.

⁷ Any reference to 'person' in this consultation paper is a reference to a legal person (unless otherwise stated) which may be either a company or a natural person.

A member of the public can access this register either by:

- inspecting it at the company's registered office (or other place it is kept); or
- making an application to be given a copy of the register or part of the register.

A fee may apply for both types of access. In applying for a copy of the register the applicant must state each purpose for which they are accessing a copy and access will not be permitted where it is for an improper purpose.⁸

Information given to ASIC and kept on the ASIC register

Although the details of company members must be lodged with ASIC by all companies on registration of the company only proprietary companies must report to ASIC any subsequent changes to member details. If a proprietary company has more than 20 members the company must inform ASIC of changes affecting the top 20 members in each class of share, including any change as to whether the shares are held beneficially by the legal owner or not. If the shares are non-beneficially held, there is no requirement to disclose the beneficial owner to ASIC.

These documents which have been lodged with ASIC are then stored on the ASIC register. A company extract setting out current and historical information on membership, and each separate document notifying of changes, may be obtained by the public for a fee.

Listed Companies

Certain disclosure obligations apply to beneficial owners of shares in listed companies under Chapter 6C of the Corporations Act.

A person must notify a listed company if the person has, or ceases to have, a 'substantial holding' in the company, and any change in their substantial holding of more than 1 per cent. This means they or their associates have a relevant interest in 5 per cent or more of the total number of votes attached to voting shares in the body. The concept of 'association' is used to group together interests which are aligned and should be treated as forming a single voting bloc.

A person or their associates who holds a relevant interest can be:

- holders of securities; or
- persons with the power to exercise, or control the exercise of, a right to vote attached to the securities; or
- persons with the power to dispose of, or control the exercise of a power to dispose of, the securities.

⁸ As per regulation 2C.1.03, improper purposes are: (a) soliciting a donation from a member of a company; (b) soliciting a member of a company by a person who is authorised to assume or use the word stockbroker or sharebroker in accordance with section 923B of the Act; (c) gathering information about the personal wealth of a member of a company; (d) making an offer that satisfies paragraphs 1019D(1)(a) to (d) of the Act; (e) making an invitation that, were it an offer to purchase a financial product, would be an offer that satisfies paragraphs 1019D(1)(a) to (d) of the Act.

For the purpose of identifying which persons have relevant interests, 'power to exercise' and 'control the exercise of' include where the power or control is indirect, or can be exercised as a result of a trust, agreement or practice.⁹ The concept is discussed in further detail in ASIC Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5).

The person(s) with the substantial holding must also give the relevant information to each relevant financial market operator, such as the ASX. In the case of ASX, this form is made publicly available through the market announcements platform and can be accessed on the ASX's public website. This information is also provided to ASIC and is available to the public from the ASIC register for a fee.

Under the ASX listing rules, companies must also include in an annual report which they provide to the ASX information about the substantial holdings of the company as disclosed in substantial holding notices given to the company. This provides an account of all of the substantial holders of the company as at the date of the annual report and is also available to the general public at no cost via the ASX website.

2.3. OPERATION OF TRACING PROVISIONS FOR LISTED COMPANIES

For listed companies there is an additional process which can increase the transparency of ownership information. ASIC has the power to trace ownership information for listed companies by issuing a person with a tracing notice. Listed companies themselves can also issue tracing notices. This notice requires the person who receives it to disclose details about the 'relevant interest' they have in certain securities, the relevant interests of any other persons as well as details of persons who have given them instructions in relation to the holding. Notices can be issued either to a registered member of the company or a person who has been named in a prior tracing notice relating to those shares.

The current tracing notice regime requires disclosure of all relevant interests, whether or not the beneficial owner has a holding of five per cent or more.

Disclosure in response to a tracing notice must be made within two days. Where a listed company receives beneficial ownership information in response to a tracing notice they are required to include those details in a register maintained by the company which is available and accessible to the general public (a fee may apply). A member of the public can either inspect the register where it is held or request a copy.

This information is not stored on the ASIC register.

⁹ For determining relevant interests in a corporate group see section 608(3) of the Corporations Act.

2.4. OTHER REQUIREMENTS TO COLLECT BENEFICIAL OWNERSHIP INFORMATION

Anti-Money Laundering and Counter-Terrorism Rules

Under Australia's Anti-Money Laundering and Counter-Terrorism Financing legal framework¹⁰ reporting entities must collect and take reasonable measures to verify beneficial ownership information in relation to certain customers as part of their customer due diligence obligations, unless certain exemptions apply.¹¹ Reporting entities are financial, remittance, gaming and bullion businesses that provide designated services as prescribed in the legislation. These obligations could potentially apply to all types of Australian companies.

The beneficial owner of a customer is an individual who ultimately owns or controls (directly or indirectly) the customer. Ownership will only be made out where more than 25 per cent of that customer is owned by the individual.¹² This information can be requested by AUSTRAC, law enforcement and regulatory agencies.

These requirements contribute towards Australia's implementation of Principle 7 of the G20 Principles and FATF Recommendation 10¹³ which relates to countries requiring financial institutions to identify and take reasonable measures to verify the beneficial ownership of their customers.

Common Reporting Standard (CRS)

The CRS is a single global standard for the automatic exchange of financial account information (including beneficial ownership information) on account holders who are foreign tax residents. It includes requirements for reporting of that information to the financial institution's tax authorities and the exchange of that information with the foreign residents' home tax authorities.

The beneficial ownership information required to be collected includes the name, address, jurisdiction(s) of residence, tax identification number (for jurisdictions that allow tax identification numbers to be collected) and date and place of birth of each foreign resident controlling person (beneficial owner).

10 The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and associated Rules made under that Act (see further Part 3.4 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 No.1).

11 See paragraph 4.12.2 of the AML/CTF rules for exemptions from this requirement.

12 If the assessed ML/TF risk is high, the reporting entity may go to a threshold below 25%.

13 This outlines customer due diligence and record-keeping obligations for financial institutions.

3. THE INTERNATIONAL CONTEXT

3.1. AUSTRALIA'S INTERNATIONAL COMMITMENTS

G20 Principles

Australia has committed to the G20 Principles. The Principles state that countries should ensure that competent authorities (including law enforcement and prosecutorial authorities, supervisory authorities, tax authorities and financial intelligence units) have timely access to adequate, accurate and current information regarding the beneficial ownership of legal persons (companies).

Financial Action Task Force Standards

As a founding member of the FATF, Australia has also committed to implementing the FATF's recommendations, which are recognised as the international standards for combating of money laundering and the financing of terrorism. The FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorism financing and the financing of the proliferation of weapons of mass destruction.

Australia has committed to fully and effectively implementing two recommendations on transparency of the beneficial ownership of legal persons (companies) and legal arrangements (trusts). In an Australian context, companies would be covered by the FATF Recommendation 24 on 'legal persons'.¹⁴

The FATF standards require countries to ensure that adequate and accurate information on the beneficial ownership and control of legal persons and trusts can be obtained or accessed in a timely fashion by competent authorities (see Part 2.1 of this paper for the FATF definition of beneficial ownership).

The FATF guidance states that implementing Recommendation 24 involves obtaining and making available to competent authorities information only on the natural persons who *ultimately have a controlling ownership interest* in the company, not on all the natural persons who receive a benefit from or control shares in a company.

From the FATF's perspective, increasing beneficial ownership information is about understanding who the beneficial owners are who have the power to exert a sufficient level of influence or control over the decisions and actions of a company in relation to its involvement in illicit activities. These beneficial owners can be identified through a range of potential tests, such as applying a threshold as to percentage ownership of shares or exercise of voting rights.

¹⁴ Other entities used in Australia such as partnerships may come within the FATF definition of legal persons but are not being considered as part of this consultation paper.

The FATF acknowledges that countries need flexibility in choosing the most effective mechanism (or combination of mechanisms) for ensuring the availability of beneficial ownership information. Accordingly, the FATF suggests that in implementing Recommendation 24 countries should use one or more of the following methods:

- Requiring companies or company registries to obtain and hold accurate and up to date information on beneficial ownership.
- Requiring companies to take reasonable measures to obtain and hold up-to-date information on the companies' beneficial ownership.
- Using existing information, including information obtained by financial institutions and other professional service providers required to undertake customer due diligence; information obtained by tax authorities or other regulatory authorities and information on companies listed on a stock exchange.

Beneficial Ownership of Trusts

The FATF recommends that countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries that can be obtained or accessed in a timely fashion by competent authorities.

This consultation paper, however, only deals with FATF Recommendation 24 on companies.

3.2. THE UK'S REGISTER OF PEOPLE WITH SIGNIFICANT CONTROL

The UK is one country which has established a register of people with relevant beneficial interests in a company as part of its implementation of FATF standards. Having regard to the FATF guidance the UK has developed the concept of People with Significant Control (PSC) as those beneficial owners who may ultimately have a controlling ownership interest in the company.

A PSC has been defined as individuals who meet one or more of the following five conditions:

- (i) Directly or indirectly holds more than 25% of shares in the company
- (ii) Directly or indirectly holds more than 25% of voting rights in the company
- (iii) Directly or indirectly holds the right to appoint or remove a majority of the directors of the company
- (iv) Has the right to exercise, or actually exercises, significant influence or control over the company
- (v) Where a trust or firm would satisfy one of the first four conditions if it were an individual, any individual holding the right to exercise, or actually exercising, significant influence or control over the activities of that trust or firm. This is not limited to the trustee of the trust.

Although the obligations to file information apply to all UK companies and Limited Liability Partnerships, there is an exemption for listed companies trading on certain 'regulated markets' based on the fact they are subject to other transparency rules which require them to make regular disclosures to the public regarding major shareholdings. These transparency rules are similar to those applying to Australian listed companies, as outlined in Chapter 2.

Since April 2016 companies have been required to maintain their own PSC register. Companies must keep their PSC register accessible – it can be kept at the company's registered office or at another location which has been notified to the UK Companies House.¹⁵ Anyone with a proper purpose may have access to information on the register (except for a PSC's usual residential address) free of charge.

Since 30 June 2016, companies have been required to annually file relevant information from their PSC register with the UK Companies House and this information is then searchable by the public free of charge. Typically companies file on the date of the anniversary of their incorporation.

Both companies and PSCs themselves have obligations under the UK regime. Companies must take reasonable steps to identify their PSCs and must give a notice requiring the disclosure of beneficial ownership information to any person they have reasonable cause to believe is a PSC. Persons who are PSCs have a separate obligation to inform the company. Companies must keep information on their PSC register up-to-date. Companies must at least annually check the PSC information held on the central public register at Companies House is accurate and lodge any necessary changes. In each case, failure to do so is a criminal offence.

Where a PSC has been identified, the following information must be entered on the company's PSC register:

- Name
- Date of birth
- Nationality
- Country, state or part of the UK where the PSC usually lives
- Service address
- Usual residential address
- The date when the individual became a PSC
- Which of the five conditions for being a PSC the individual meets, with quantification of the interest where relevant

¹⁵ The UK Companies House incorporates and dissolves limited companies, registers the information companies are legally required to supply, and makes that information available to the public.

If shares or rights a company are held by a nominee they should be treated as if they were held by the person for whom the nominee is acting. If this person is a PSC a company must enter their details on the register.

All information held by Companies House is available to law enforcement agencies. The public however, is only able to access some information from the central register at Companies House. The information that has been excluded for reasons of privacy and security is as follows:

- The PSC's usual residential address, and
- The day of the PSC's date of birth.

3.3. EUROPEAN APPROACHES

In April 2016 the UK along with the other 'Euro 5' countries (Germany, France, Spain and Italy) committed to establishing registers or other mechanisms for identifying and making available to tax and other authorities beneficial ownership information for companies, trusts, foundations and other relevant entities and arrangements.

EU member countries are subject to proposed changes to the EU 4th Anti-Money Laundering Directive, which would require public registers of both companies and trusts engaged in commercial or business-like activities.

International cooperation to exchange information between competent authorities is a part of FATF Recommendation 24. The Euro 5 is leading an initiative to develop a system for the automatic exchange of beneficial ownership information between countries who sign up to the initiative. The initiative is currently in the early stages and the model for how exchange would occur has not yet been developed. Australia has not committed to this automatic exchange initiative. This consultation paper seeks feedback on whether beneficial ownership information should be exchanged with relevant authorities in other jurisdictions.

4. INCREASING THE TRANSPARENCY OF BENEFICIAL OWNERSHIP OF AUSTRALIAN COMPANIES

4.1. WHICH COMPANIES ARE IN SCOPE?

As set out in Chapter 2, listed companies are already subject to requirements under the corporations law which result in the market, including the general public, being informed as to the persons who have a significant level of control or ownership of such companies.

In the UK companies which are comparable to Australian listed companies are excluded from the obligations to report on people of significant control because of other transparency requirements which applied to them already.

QUESTIONS

1. Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exemption apply to companies listed on all exchanges or only to specific exchanges?
2. Does the existing ownership information collected for listed companies allow for timely access to adequate and accurate information by relevant authorities?

4.2. WHAT BENEFICIAL OWNERSHIP INFORMATION SHOULD BE CAPTURED?

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

A key part of determining what beneficial ownership information should be collected to meet the objectives outlined in the beginning of this paper is identifying the natural person/s who have ultimate control of a company that allows it to be misused to engage in illicit activities.

A fundamental aspect of increasing transparency of beneficial ownership is determining the tests to guide companies in identifying the beneficial owners about which they may need to collect and report information. Useful in this context are the three categories in the FATF guidance below regarding the natural persons who could be considered as beneficial owners on the basis that they have a controlling ownership interest in a company.

- (a) Natural persons who may control the legal person through ownership interests

This kind of beneficial owner could be identified in the following ways:

- Identifying the natural person(s) who directly or indirectly holds a minimum percentage of ownership interest in the legal person (the threshold approach);

- Identifying the shareholders who exercise control alone or together with other shareholders, including through any contract, understanding, relationship, intermediary; or
- Tiered entity (a majority interest approach).

(b) Natural persons who may control the legal person through other means:

The natural person(s) who exerts control of a legal person through other means such as personal connections to persons in positions described above or that possess ownership.

The natural person(s) who exerts control without ownership by participating in the financing of the enterprise, or because of close and intimate family relationships, historical or contractual associations, or if a company defaults on certain payments.

(c) Natural persons who may exercise control through positions held within a legal person:

The natural person(s) responsible for strategic decisions that fundamentally affect the business practices or general direction of the legal person.

The natural person(s) who exercises executive control over the daily or regular affairs of the legal person through a senior management position.

Consideration of the above three categories add to the basic FATF definition of beneficial owner as:

...the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.

Regard could also be had to existing concepts of control which occur as part of the current legal framework in Australia as outlined in Chapter 2. For example, the concepts of associates, relevant interests and substantial shareholders currently used in the Corporations Act could be applied with appropriate changes.

QUESTIONS

3. How should a beneficial owner who has a controlling ownership interest in a company be defined?
4. In light of these examples given by the FATF, the tests adopted by the UK (see Part 3.2 above) and the tests applied under the AML/CTF framework and the Corporations Act, what tests or threshold do you think Australia should adopt to determine which beneficial owners have controlling ownership interest in a company such that information needs to be collected to meet the Government's objective?
 - a. Should there be a test based on ownership of, or otherwise having (together with any associates) a 'relevant interest' in a certain percentage of shares? What percentage would be appropriate?
 - b. Alternative to the percentage ownership test, or in addition to, should there be tests based on control that is exerted via means other than owning or having interests in shares, or by a position held in the company? If so, how would those types of control be defined?
5. How would the natural persons exercising indirect control or ownership (that is, not through share ownership or voting rights) be identified (other than through self-reporting) and how could such an obligation be enforced?
6. Should the process for identification of beneficial owners operate in such a way that reporting must occur on all entities through to and including the ultimate beneficial owner?
7. Do there need to be special provisions regarding instances where the relevant information on a beneficial owner is held by an individual who is overseas or in the records of an overseas company and cannot be identified or obtained?
8. Should there be exemptions from beneficial ownership requirements in some circumstances? What should those circumstances be and why?

Details of beneficial owners to be collected

Under the current law, individual registers of company members must record each member's name and address and the date on which the entry of the member's name in the register is made.

A person responding to a tracing notice must disclose: the full details of their own interest in the shares and the circumstances giving rise to that interest. They must also disclose the name and address of every other person with a relevant interest in those shares and the nature of their interest, as well as the name and address of any person who has given them certain types of instruction about the shares.

Regarding company directors, the information provided to ASIC is as follows: present given and family name, residential address, all former given and family names and the date and place of birth. Some of the information is provided to the Australian Business Register (ABR) and includes both public and non-public data.

QUESTIONS

9. What details should be collected and reported for each natural person identified as a beneficial owner who has a controlling ownership interest in a company?
10. What details should be collected and reported for each other legal persons identified as such beneficial owners?
11. In the case of foreign individuals and bodies corporate, what information is necessary to enable these persons to be appropriately identified by users of the information?

4.3. HOW AND WHERE TO RECORD BENEFICIAL OWNERSHIP INFORMATION?

How should this information be collected and stored?

Companies may not be currently aware of who their beneficial owners are. That information will most readily lie with the actual beneficial owners. Consideration needs to be given to the obligation on each of the company and the beneficial owner to obtain that information and provide it to the company.

Consideration also needs to be given to what sort of companies register or registers will most efficiently and effectively improve beneficial ownership transparency to provide relevant authorities with timely access to adequate and accurate information.

One option would be for authorities to rely on registers maintained by each company. This option is likely to impose lower compliance costs for affected companies.

Another option would be the UK model of a central register and the requirement for companies to maintain their own registers. A central register may enhance the adequacy and accuracy of the information, and may better facilitate timely and efficient access to that information by relevant authorities. Compliance monitoring and enforcement may also be enhanced by the centralisation of the registry.

QUESTIONS

12. What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?
13. Should each company maintain their own register?
14. How could individual registers being maintained by each company provide relevant authorities with timely access to adequate and accurate information? What would be an appropriate time period in which companies would have to comply with a request from a relevant authority to provide information?
15. Should a central register of beneficial ownership information also be established?

QUESTIONS (CONTINUED)

16. What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?
17. In particular, what do you see as the relative compliance impact costs of the two options?

Operation of a central register

If a central register was to be established, there would be different options as to which entity would be the operator of such a register. Such a register could be operated by ASIC in addition to or as part of the register of company information which it already operates and maintains. It could also be operated by a different government entity which is already involved in maintaining registers of information, such as the Australian Business Register. Alternatively, such a register could be privately operated.

QUESTIONS

18. Who would be best placed to operate and maintain a central register of beneficial ownership? Why?
19. What should the scope of the register operator's role be (collect, verify, ensure information is up to date)?

If a central register of beneficial ownership information is established, consideration will need to be given to the most appropriate reporting mechanism/s.

This information could be provided at time of registration for new companies. There would also need to be a mechanism through which existing companies, and/or relevant beneficial owners, collect and report such information.

QUESTIONS

20. Who should have an obligation to report information to the central register? Should it be the company only or also the persons who meet the test of being a relevant 'beneficial owner'?
21. Should new companies provide this information to a central registry operator as part of their application to register their company?
22. Through what mechanism should existing companies, and/or relevant beneficial owners, report?

Ensuring information is accurate and current

For beneficial ownership information to be useful to authorities it is fundamental that the information collected is kept accurate and up to date. Firstly, the information should be current and accurate at the time the company is created. Secondly, the information must be kept accurate, and as current as possible meaning that, when changes occur, the information is updated promptly.

Currently companies are required to notify ASIC within specified timeframes (generally 28 days or less) about a change of registered office, principal place of business, its member register, its share structure, directors or secretaries, including their personal details.

In addition, ASIC sends each company their annual statement for checking every year and the company must notify ASIC within 28 days after the issue date if any changes need to be made.

QUESTIONS

23. Within what time period (how many days) should any changes to previously submitted beneficial ownership information have to be reported to a company (where registers are maintained by each company) or the registry operator (where there is a central register)?
24. If reporting to a central register is required, should this information be included in the annual statement which ASIC sends to companies for confirmation with an obligation to review and update it annually?
25. What steps should be undertaken to verify the information provided to a central register by companies or their relevant beneficial owners? Who should have responsibility for undertaking such steps?

Exchange of information between authorities

The Government is committed to taking action to fulfil its international commitments around access for domestic and international 'relevant authorities' to beneficial ownership information: law enforcement bodies, regulators and other government agencies. Increasing the beneficial ownership information available to relevant authorities will enhance their ability to combat and prevent illicit activities such as tax evasion, money laundering and terrorism financing.

Mindful of the compliance costs for affected parties, consideration will be given to whether reporting entities and persons could provide the information to a single authority for all required Government purposes.

As indicated in Part 3.3, there is also currently an initiative for the automatic exchange of beneficial ownership information between the authorities of different countries.

QUESTIONS

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

4.4. OTHER IMPLEMENTATION AND ADMINISTRATION ISSUES

Sanctions

Australia's corporate law currently provides a range of criminal, civil penalty and civil sanctions for non-compliance with obligations and requirements under that law. This reflects the need for corporate law to provide appropriate incentives for compliance in light the negative impacts of non-compliance on the economy and the community at large.

The FATF guidance views a fundamental aspect of Recommendation 24 having in place 'effective, proportionate and dissuasive' sanctions for failures to comply with the mechanisms in place to implement recommendation 24.

Currently the following sanctions apply for failure to notify ASIC about changes to company details: a fine of 60 penalty units (AUD 10,800) and/or one year imprisonment.

In relation to listed companies, failing to respond to a tracing notice is a strict liability offence with penalty up to 25 penalty units (AUD 4,500) and/or six months imprisonment. Where it can be established that a person has failed to respond to a tracing notice ASIC or certain affected parties may seek a court order, (or in some circumstances a remedial order from the Takeovers Panel) placing restrictions on the relevant shares. A common court order which is made is for shares to be vested in ASIC until disclosure is made or the shares are otherwise sold by ASIC.

Under the UK system, a failure to comply with obligations to provide accurate information on the PSC register and failure to comply with notices requiring someone to provide information are criminal offences and may result in a fine and or a prison sentence of up to two years.

Additionally, in the UK where a person does not respond to a notice from a company requiring them to provide information, and also does not respond to a subsequent warning notice, the company can apply restrictions to the relevant shares or interests which effectively 'freeze' them so that that they cannot be sold or transferred and associated rights such as voting cannot be exercised. The company can apply restrictions without a court order.

QUESTION

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

Transitional arrangements

Companies and other persons with new reporting requirements would require transitional arrangements in order to have sufficient time put in place the requisite IT, administrative and other systems to comply with their obligations.

QUESTION

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

Impact on affected companies and stakeholders

The Government understands that increasing the record-keeping and reporting requirements of companies will increase the compliance costs which companies face, detracting from their ability to run their business.

The Government also acknowledges the compliance costs which are already incurred by many of these stakeholders in relation to reporting beneficial ownership information under AML/CTF obligations.

The Government seeks your views on the foreseeable impacts that increasing transparency will have for businesses and practical impediments to collecting and reporting the information.

QUESTIONS

30. Do you foresee any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?
31. What types of compliance costs would your business incur in meeting any new requirements for record-keeping and reporting of beneficial ownership information?
32. If you are already required to comply with AML/CTF obligations, how do you see any new requirements to collect beneficial ownership interacting with those existing obligations?
33. If companies had access to the additional beneficial ownership information collected, could this reduce companies' compliance costs by making it easier for them to comply with other existing reporting obligations such as those under the AML/CTF legal framework?
34. Could any changes be made to streamline or merge existing reporting requirements in order to reduce the compliance costs for businesses?

5. OTHER BENEFICIAL OWNERSHIP TRANSPARENCY ISSUES

5.1. IDENTIFYING THOSE WHO CAN CONTROL LISTED COMPANIES

If we propose exempting listed companies on the basis of their existing disclosure obligations, we need to be confident that this current disclosure provides sufficient information to achieve the aim of providing relevant authorities with timely access to adequate and accurate information about those persons who control these companies.

The 'substantial holding' provisions require disclosure of persons or their associates who hold a relevant interest in 5% or more of the total number of votes attached to voting shares in the company. An association can be inferred by the existence of a shared goal or purpose. It includes those persons who enter into agreements, arrangements or understandings, or act together in a way, which may result in them controlling or influencing the affairs of a company. In this situation those persons should be grouped together in determining interests which are aligned and which shares should be treated as forming a single block.

There are aspects of the current Corporations Act tracing provisions which impact the accuracy and currency of the beneficial ownership information which they produce.

The recipient of a tracing notice only has to disclose the required information to the extent it is *known to them*. There is currently no obligation which mandates that they make reasonable inquiries to ascertain the information. This means that a notice may produce the name of only the next person in the chain, and the issue of one or more further notices will then be required. The person or persons who ultimately control the votes attached to the shares can therefore adopt a strategy of avoiding or delaying disclosure through a chain of nominee or other entities.

The information which is provided in response to tracing notices will be current at the time it is provided, but there is no requirement for that information to be updated on the company's register if there is subsequently a change. There is also no requirement to disclose information as at a time prior to the response being given, meaning that historical information cannot be ascertained through the use of a tracing notice.

QUESTIONS

35. Are the current substantial holding disclosure provisions sufficient to identify associates which may have the ability to influence or control the affairs of a company? What changes could be made to improve their operation?
36. Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies?
37. In your experience, are there issues or obstacles (specific to obtaining ownership information) which currently arise when using tracing notices? If so, what are those issues or obstacles?

QUESTIONS (continued)

38. In order to improve and incentivise compliance with the tracing notice regime should ASIC have the ability to make an order imposing restrictions on shares the subject of a notice until the notice has been complied with?
39. What other changes could be made to improve the operation of these provisions?

5.2. OTHER ASPECTS OF IMPLEMENTING RECOMMENDATION 24: NOMINEE SHAREHOLDERS AND BEARER SHARE WARRANTS

Nominee shareholders and bearer shares (and share warrants) can be mechanisms through which company ownership is disguised in order to further illicit purposes being pursued by a company. Both the FATF guidance and the G20 Principles state that countries should implement measures in order to prevent the misuse of bearer shares and bearer share warrants and the misuse of nominee shares and nominee directors.

The current position in Australia regarding nominee shareholders is that a shareholder may hold shares for the benefit of another person (including a legal person) either as trustee or nominee or otherwise on behalf of, or on account of, another person. The shareholder of such shares must advise the company that they are holding those shares 'non-beneficially' and the company must indicate in the share register that those shares are not held beneficially. Failure to comply with this requirement is an offence. For listed companies, tracing provisions also exist.

Nominee shareholding arrangements are used in Australia for a variety of purposes, including:

- Facilitating the investment by foreign persons in Australian companies;
- Facilitating the investment by Australian persons in foreign companies;
- Conducting the administration and management of shareholdings, such as participation in corporate actions.

Bearer shares are not permitted under Australian law but bearer share warrants may still be issued (though it is understood that they are used infrequently). A bearer share describes a type of share where the owner of that share is whichever person is in possession of the bearer share certificate, which means that there is a lack of transparency around ownership. A share warrant is similar to an option and gives you the right to buy a share(s) at a set price on or before a date in the future.

In its 2015 Mutual Evaluation Report of Australia, the FATF raised the following two concerns:

- (a) There is no requirement for automatic disclosure by nominee shareholders of the beneficial owners on whose behalf they hold those shares; and
- (b) Bearer share warrants may still be issued.

QUESTIONS

40. Who uses nominee shareholding arrangements, and for what purpose?
41. How often are nominee shareholding arrangements used?
42. What do you see as the benefits of nominee shareholding arrangements? Are there any negative aspects of their use?
43. Should further obligations be introduced in order to increase the transparency of the beneficial owners of shares held by nominee shareholders?
44. Are you aware of practical obstacles which would make increased reporting in respect of shares held by nominee shareholders problematic?
45. Who uses bearer share warrants, and for what purpose?
46. How often are bearer share warrants used?
47. What do you see as the benefits of bearer share warrants? Are there any negative aspects of their use?
48. Should a ban be introduced on bearer share warrants?