

17 March 2017

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Dear Ms Keall

Increasing Transparency of the Beneficial Ownership of Companies

Chartered Accountants Australia and New Zealand (**Chartered Accountants**) welcomes the opportunity to provide a submission regarding the consultation paper on increasing transparency of the beneficial ownership of companies.

Australia needs a new business register which should include data on associates

It is well known that Australia's aging ASIC registries need to be replaced and, now that a Government decision has been made not to privatise the ASIC registries, a multi-agency project is underway to determine how best to modernise the registries.

Chartered Accountants agrees that, on public policy grounds, a beneficial ownership register (**BOR**) as part of a modernised whole of government business registry will assist in the administration of tax and other laws.

There are many reasons for this view. For example, a BOR could reduce the ability of unscrupulous persons to operate 'phoenix companies', undertake money laundering, participate in terrorism financing, invest corrupt proceeds in Australia, and exploit a variety of Federal and State \ Territory laws (such as the laws relating to political donations).

It could also give Australian policy makers and regulators greater insights into who owns strategic assets in Australia and who is bidding for Government contracts.

Put simply, our community should not be blind-sided by opaque company ownership arrangements.

Let's sort out who will take the lead on Australia's new business registry


It seems to us that the Government is at a cross-roads in deciding the direction of whole of government initiatives such as the new business registry and, what we see as a sub-set of the new registry, the BOR.

It can either adopt the lower-cost route of modernising the existing ASIC registries (with current data coverage and functionality), or it can choose to make a *significant* investment in digital transformation of the regulation of entities, with new authentication procedures, enhanced cyber security safeguards and data collection functions which incorporate new policies such as the BOR.

There does not appear to be a middle road here. Any piecemeal (or layering) approach to such investment is likely to attract criticism from the business sector if, year-by-year, it is confronted with additional compliance costs as the functionality of the new registry gradually expands.

As we have said before in previous submissions, a whole of government approach to business modernisation is required, with Cabinet-level ministerial oversight and responsibility.

A Cabinet-level decision is also required as to which government agency should lead and co-ordinate (together with the Digital Transformation Agency) the business registry modernisation project. This is important to our organisation because of our strong desire to engage in the design, development and implementation stage.


	<p>Chartered Accountants recommends that the Government should update the business community, perhaps as part of the up-coming Federal Budget, on the project to replace ASIC's aging business registries.</p> <p>We would hope that the opportunity will be taken to announce that Australia will move to a whole of government business registry model which modernises and streamlines the way Australia does business.</p> <p>This new registry should include information on persons and entities associated with registrants to reflect the thinking behind the BOR proposal.</p> <p>The lead agency for implementing the new registry should also be identified so that appropriate consultations can commence with organisations such as ours.</p>
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The role of the accounting profession in Australia's new registry arrangements

For our members, the actual mechanics of how the new register and the BOR will operate is an important issue in terms of the role accountants might play in the future collection and maintenance of data regarded as highly accurate in the eyes of regulators.

Not only are accountants generally involved in the establishment of entities and know the identities of those individuals involved (i.e. they are sources of truth when it comes to authentication), they typically handle the *on-going* accounting and tax affairs of the entity and those in the ownership structure.

Chartered Accountants strongly believes that accountants, governed by strong ethical principles and with appropriate accreditation (if considered necessary) have a leading role to play in new registry arrangements, including a BOR.

	<p>In modernising the way Australia does business, the role of trusted intermediaries should be factored into the design of new systems.</p> <p>New, online systems may give the impression that compliance is easier, but the validity of data received by regulators remains a key concern.</p> <p>Professionals such as Chartered Accountants have an important continuing role to play in providing authentication and risk assurance to regulators in a wide range of topic areas, including the proposed BOR.</p>
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Better data usage first, more red tape second

Most (but not all) of the community benefits of a BOR involve identifying people whose conduct is corrupt, criminal or at the very least, dubious.

Such persons are unlikely to fully comply with any self-reporting requirements associated with a BOR. If they do “comply”, the reported ownership structure may include persons or opaque entities which are “fronts” for those who really pull the strings. As a consequence, the proposed ‘self-reporting’ regime for identifying beneficial ownership outlined in the consultation paper may not result in better law enforcement.

Traditional law enforcement strategies for dealing with those with little regard for the law have relied on the capture of data, the timely and efficient sharing of such data amongst relevant agencies, and robust data analytics monitored by well-trained and experienced individuals. Australia already has a variety of data sources on beneficial ownership and it is unclear to us how well these current arrangements are working, and whether they can be made to work better without imposing greater regulation on the community.

As we have said many times, Australia should follow New Zealand’s lead and publish the detailed research and thinking of government officials behind new policy proposals such as the BOR¹. Whilst we appreciate the background information in Treasury’s Consultation Paper, it lacks any detailed insights into what’s wrong with existing processes and why. The Q&A style in the Consultation Paper suggests a Policy in search of a Policy Rationale approach.

In the absence of any analysis of systemic failure in current data collection and sharing arrangements therefore, we believe that better data verification, usage and exchange between Government agencies could enable the creation of a central BOR which has the potential to be more effective, and less costly for legitimate Australian businesses, than the proposed self-reporting regime.


It is noted that the Financial Action Task Force (**FATF**) Recommendation 24² does not require companies to provide beneficial ownership information. Rather, it states that “countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a

¹ New Zealand calls these “Officials’ Papers”.

² http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

timely fashion by competent authorities”. In meeting this aim, the interpretative note to Recommendation 24 states that “countries should ensure that either:

- a) Information on the beneficial ownership of a company is obtained by that company and made available at a specified location in their country; **or**
- b) There are mechanisms in place so that the beneficial ownership of a company can be determined in a timely manner by a competent authority”³ and in doing this countries can use *existing information* such as information held by other competent authorities and stock exchanges⁴. [Emphasis added]

	<p>The introductory sections of the Treasury Consultation Paper, whilst helpful, do not in our view adequately address the need for a BOR.</p> <p>The various agencies which support the establishment of a BOR should be more transparent about any failings in the current data collection and analysis system and how these shortcomings hamper their work.</p>
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How can a beneficial ownership register be effective if it only applies to companies?

An informed discussion about the beneficial ownership of companies cannot occur without some consideration of trusts and other types of legal entities which can appear in a company’s ownership structure (some of which may not be recognised in an Australian legal context).

Failure to address this issue in the design of a BOR means that the policy intent could be easily frustrated by inserting a trust or other type of opaque entity in the ownership chain.

In saying this, we readily acknowledge the practical difficulties facing policy-makers here. For example, there are several different types of trusts and regulation of trusts occurs primarily at State and Territory level.

Nonetheless, Australia *already* collects information about certain types of trusts (e.g. closely-held trusts⁵) and participates in exchange of information programmes with a variety of countries. How such trust-related information could be integrated into the proposed BOR needs to be considered as part of the current consultation process.

As an alternative, there is also a question whether the ATO’s systems can better create beneficial ownership structures. We are aware from presentations by Inland Revenue in New Zealand that the tax administration software currently being installed by Fast Enterprises Inc (USA)⁶ includes associate-tracking functionality applicable to a range of entities, including trusts.


³ Paragraph 7 on page 87 of http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁴ Paragraph 8(c) on page 87 of http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁵ This information is collected from trust and beneficiary tax returns, as well as the ultimate (trustee) beneficiary reporting rules which came into effect on 1 July 2008. The ATO’s Private Groups and High Wealth Individual (PG\HWI) unit also collects information of the structures used by this segment of the taxpayer population.

⁶ https://www.fastenterprises.com/wp-content/uploads/2015/12/NZ_NBR-BusinessTransformation.pdf

Also, rather than focusing on the collection of trust-related BOR information, another long-standing (albeit complex) policy option would be to consider the existing tax collection mechanism for trusts⁷.

	<p>The proposed BOR will be ineffective in its current form as it focuses entirely on companies and does not address the impact of trusts and other entities in the ownership chain.</p> <p>Consideration should be given to how existing trust information (collected at Federal, State/Territory and international levels) could be integrated into the proposed BOR.</p>
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More preparatory work required

Before placing additional information demands on companies, Chartered Accountants thinks it would be worthwhile considering the opportunities (e.g. compliance cost savings) that could arise by:


- Aligning the definitions and methodologies used in the various beneficial ownership tests at all levels of Government. This does not necessarily mean alignment in the level of detail required, but rather uniform treatment, for ownership tracing purposes, of shares held by, say, a complying superannuation fund, a listed company or a charity⁸.
- Conducting a stocktake of existing data sources and considering the potential for better utilisation of data that already exists within government circles (Commonwealth and State / Territory).
- Actually constructing ownership chains through existing data as part of a project to identify where the real knowledge gaps of particular concern to regulators arise.
- Having key agencies analyse existing data to identify 'problem' structures or 'black-list' countries which do not share ownership data on request, then applying more detailed requirements to these whilst allowing relief from reporting (or a 'light touch') in other contexts to those entities which are generally considered to be highly compliant⁹.

⁷ Recommendation 36 in the Henry Tax Review was that: The current trust rules should be updated and rewritten to reduce complexity and uncertainty around their application.

http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/papers/Final_Report_Part_1/chapter_12.htm

⁸ Refer for example to the simplified rules for tracing the beneficial ownership of loss companies in Division 165 of the *Income Tax Assessment Act 1997*.


⁹ For example, consideration of the Panama Papers leaks might lead to a conclusion that a BOR is required for inbound investors from, say, a particular jurisdiction (as distinct from inbound investors from New Zealand where the ownership data is readily available because of existing trans-Tasman co-operative arrangements.)

	<p>Chartered Accountants recommends that:</p> <ol style="list-style-type: none"> 1. A review of the concept of beneficial ownership across both Federal and State legislation be undertaken with a view to standardising the definition and/or methodologies for determining beneficial ownership in order to minimise compliance costs and facilitate information exchange between government agencies. 2. Treasury publish a research paper (prepared in conjunction with relevant agencies) highlighting how Australia's inadequacies in existing data collection and analysis on beneficial ownership is hampering regulators. 3. Treasury identify what steps could be taken to better utilise existing data sources to establish a BOR.
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Listed companies

Given the substantial disclosure requirements already applicable to Australia's publicly listed companies and widely held companies, the practical difficulties company and share registry officials would encounter in gaining additional traced shareholding data beyond that already held, and the relatively low risk status of shareholdings in such companies in the eyes of regulators, we believe it is worth considering a carve-out for publicly listed and widely-held companies from any new BOR requirements.


Such a carve-out has already been considered appropriate in the tracing of beneficial ownership tests applicable to tax loss companies in this segment of the taxpayer population.

	<p>Australia's listed and widely held companies should not be required to contribute to the BOR any information in addition to that which they currently provide to regulators. This existing information should be placed on the BOR as part of the establishment of Australia's new business registry.</p>
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Closely-held companies

For private, closely held companies, we again point to the availability of existing sources of data to establish the BOR. Opportunities should then be provided to entities in the ownership structure to update or correct this data as part of an annual, streamlined reporting process.

In terms of "carrot" and "stick" approaches to the maintenance of such data, we have already discussed with ATO Deputy Commissioner Michael Cranston (Private Groups and High Wealth Individuals) the role which this segment of the taxpayer population and their professional advisers can play in voluntarily keeping such data up to date in return for a lower ATO risk rating under the Risk Differentiation Framework.


	<p>The new business registry should include facilities for closely-held companies to update existing data on beneficial ownership arrangements to the extent that such information is reasonably known to company shareholder / directors.</p> <p>Companies which keep their details up to day would receive a lower risk rating from regulators.</p>
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The offshore problem

It seems to us that the key concern with beneficial ownership involves closely-held companies whose ownership structure extends offshore. Apart from the point (already made) about the use of trusts and other entities to obfuscate the ultimate beneficial owners, the key policy objective here should be to enhance Australia's international exchange of information arrangements as part of the current world-wide trend towards greater cross-jurisdiction information sharing and the demise of tax secrecy jurisdictions¹⁰.

Of itself, a BOR maintained in Australia will do little to address the offshore problem.

Not only that, Australian companies required to incur additional compliance costs associated with the new BOR will rightly point to the fact that, once again, predominantly compliant domestic entities are being targeted so that the odds of a regulator catching-out the occasional offshore tax evader etc have somehow been enhanced.

	<p>Australia should continue to take a lead role in OECD efforts to convince those remaining secrecy jurisdictions to change their domestic tax secrecy laws and collaborate with other nations to share tax-related information.</p> <p>In terms of our own bilateral arrangements, Australia should progress implementation of new Tax Information Exchange Agreements with those countries with whom we do not have a double tax agreement.</p>
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Data: public or private?

The consultation paper indicates that most immediate (basic) beneficial ownership data is already currently available publicly – albeit at a small cost¹¹. The consultation paper is silent as to whether the proposed BOR will be made public.

We understand the desire for increased transparency which emanates from some journalists, media organisations, researchers and organisations who feel that it is necessary to shine a light on the tax affairs of large companies and high wealth individuals. However,


¹⁰ There are many drivers here as noted in the Treasury Consultation Paper. For example, there is the OECD's work on BEPS, the FATF standards, and the United Kingdom's initiative for the systematic sharing of beneficial ownership information.

¹¹ Some advocates of greater transparency have pointed out that this small cost escalates substantially where the initial ASIC search necessitates extending the search to each associated entity. We understand that ASIC has costs to cover, but perhaps in this electronic age and with a modernised business registry, consideration could be given to a single search fee which covers a corporate group, not each individual entity in that group.

Chartered Accountants is already on the record in stating our opposition to the domestic transparency rules applicable to Australia's large private companies¹².

We believe that the demands of transparency advocates needs to be balanced against individual privacy rights (i.e. the shareholders of private companies), the need for commercial confidentiality, and maintaining Australia's business friendly reputation.

Overall therefore, we think it is appropriate that the BOR for private company groups should only be accessible by government agencies unless the relevant entity has granted written authorisation for the information to be released¹³.

	<p>Chartered Accountants recommends that the central BOR for private companies be kept confidential unless an entity has authorised the release of information.</p>
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Further parts of our submission

- **Appendix A** contains our responses to some of the particular questions posed in the consultation paper.
- **Appendix B** outlines how the tax law deals with beneficial ownership and tracing issues.
- **Appendix C** lists some recommendations by the Senate Economics Reference Committee inquiry into Insolvency in the Australian Construction Industry regarding verification and enforcement of information by ASIC.
- **Appendix D** provides information about Chartered Accountants Australia and New Zealand.

I would be happy to discuss any aspects of our submission with you. I can be contacted on (02) 9290 5609 or by email at michael.croker@charteredaccountantsanz.com.

Yours faithfully,



Michael Croker
Tax Leader Australia
Chartered Accountants Australia and New Zealand

¹² We refer here to the transparency reporting rules requiring the ATO to annually disclose very basic (we would say misleading) tax and financial information about Australian-owned resident private companies with total income of \$200 million or more. Refer Section 3C *Taxation Administration Act 1953*.

¹³ Allow an entity to authorise service provider (known as a reporting entity under the anti-money laundering legislation) to authorise the release of specified information by BOR to the service provider.

Appendix A - Specific questions

Public companies

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?**

Given that the consultation paper does not propose any particular new requirements to report on beneficial ownership, it is a little difficult to respond to the first question.

That said, it appears from reading the consultation paper that there may be the following concerns:

- Listed companies do not have to record in their register of shareholders whether or not shares are beneficially held¹⁴; and
- Listed companies (and other public companies) do not have to report the same level of shareholder changes to ASIC as do private companies¹⁵. That said, a person must notify a listed company if the person has, or ceases to have, a 'substantial holding' in the company as well as ASIC (or other relevant regulator). In addition, both ASIC and listed companies have the power to issue a tracing notice which requires disclosure of all relevant interests within two days

The mutual evaluation report of Australia by FATF noted that Australia's National Threat Assessment "made a distinction between corporate entities that can be used to conceal crime wealth and ownership, and public companies where shares can be purchased using proceeds of crime. The first scenario was given a high threat rating, the second a medium threat rating."¹⁶

If the purpose of the BOR is to assist in reducing the ability of undesirable persons influencing companies to undertake money laundering and terrorist financing, it is hard to imagine situations where a shareholder - who is not already known to government entities through a perusal of the significant shareholder information - in a publicly listed company on the ASX could influence the public listed company.

If the purpose of the BOR is to assist in identifying assets where the proceeds of money laundering are stored, then it appears that the existing tracing provision may already address this issue.¹⁷

¹⁴ The consultation paper notes on page 3 that: "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....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."

¹⁵ At page 4 of the consultation paper it is noted that: "only proprietary companies must report to ASIC any subsequent changes in member details...[but] 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". At page 5 it is noted that the public company must also make this information available to the Australian Stock Exchange and in its annual report.

¹⁶ Page 108 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

¹⁷ It is also noted that if identifying assets that are the proceeds of money laundering is the aim then attention may be better focused on the ultimate beneficial owners of land in Australia. The FATF evaluation of Australia noted that "Australia is seen as an attractive destination for foreign proceeds, particularly corruption-related proceeds flowing into real estate from the Asian Pacific region" - refer page 7 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

If the purpose of the BOR is to identify those shareholders who indirectly hold taxable Australian property then we would have thought that ATO's existing data on a company's underlying assets (i.e. whether the company is "land rich") and foreign shareholder profile would give a fairly good idea of which companies to monitor.

In short, it is difficult to envisage what benefits would arise from imposing further reporting requirements on Australian publicly listed companies.

Also, requiring listed public companies to have higher tracing levels for all beneficial owners could be difficult and costly to implement.

Finally, we note that:

- Project Mercury (a sub-project of Project Wickenby) found that approximately 40% of the ASX market was owned by foreign entities and that approximately 47% of the ASX market was held by Custodial Service Providers (CSP) and nominee companies.¹⁸ Our calculations indicate that approximately 30% of the ASX listed companies are owned by Australian superannuation funds.¹⁹ A number of highly regulated foreign pension funds also invest in ASX listed companies. The combination of highly regulated Australian and foreign superannuation funds would account for a substantial proportion of the nominee and CSP holdings. As such, it does not appear to be an area that is at high risk and worthy of further regulation.
- The income tax law already recognises that companies listed on an approved stock exchange are worthy of a lighter touch in terms of monitoring ownership.²⁰

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

Relevant government agencies are best placed to comment.

Beneficial owner

3. How should a beneficial owner who has a controlling ownership interest in a company be defined?

The discussion of beneficial ownership and in particular the mechanics for determining beneficial ownership should try to integrate and streamline provisions across a range of Federal and State / Territory legislation.

The income tax legislation already requires the identification of beneficial owners in a variety of situations and has addressed a number of issues that arise when tracing beneficial ownership. We see benefit in Government leveraging this tax framework so that there is a consistent understanding across legislation about how the Government would apply beneficial ownership in the creation of its own data base. **Appendix B** outlines those tests and how various tracing issues are resolved.

¹⁸ Page 107 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

¹⁹ ASX total market at 30 June 2016 was \$1.619tr. APRA regulated funds had \$1.292tr in assets on same date with \$309bn in ASX listed equities. SMSFs had (ATO estimate) \$621bn of which \$187bn was ASX listed equities. So Australian super funds own about 30% of ASX. Or to put it another way constitute at least 64% of the nominee and CSP shareholding of ASX listed companies.

²⁰ Approved stock exchange has defined in section 995-1 ITAA 1997 by reference to regulations. The regulations list various stock exchanges by country.

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?

See response to Question 3.

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?***

Identification and enforcement in this scenario is highly problematic, as evidenced by various attempts in the income tax law. There are practical limits on what an entity (or their adviser) actually knows about *actual* beneficial ownership, let alone indirect control, especially where the ownership trail leads offshore.

We suspect the best that can be achieved here is self-reporting, supported perhaps by a mandatory disclosure regime where specified information about indirect control or ownership comes to the attention of the entity (or their adviser).

The ATO would have grappled with this issue in undertaking its investigations and we urge Treasury to seek ATO input.

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?***

The majority of the information currently collected by ASIC and the ATO relates to the immediate (first tier) ownership of entities.

There are good, practical reasons for this (i.e. entities should not be asked for information they cannot obtain, or could only obtain if they received remarkable levels of co-operation from shareholders).

Given the Government's emphasis on reducing red tape, digitally transforming government (particularly through the better use of existing data), and the fact that criminals etc will not self-report appropriately, it appears to us that the Government should focus on enhancing existing data and improving its analytics capability rather than imposing more burdens on legitimate businesses.

This approach would need to be supported by data sharing with other jurisdictions which have themselves embraced a BOR. Note however that, as soon as Australia seeks to extend its data collection rules offshore, there still remain a small number of jurisdictions

where details of beneficial ownership cannot legally be revealed, or disclosure is prevented for other reasons such as claims for legal professional privilege.

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?

We note that, where information is held overseas, Australia already has exchange of tax information provisions in its double tax treaties which encompass beneficial ownership information. Australia also has [Tax Information Exchange Agreements](#) with a number of non-treaty countries.

In the latest evaluation of Australia by the [G20 Forum on Transparency and Exchange of Information](#), Australia was rated “compliant”²¹. ASIC also has a number of international exchange of information agreements²². Of concern however is that whilst Australia may be compliant, the vast majority of countries were rated only largely compliant.

From *informal* discussions with ATO officials, we understand that the inability to get information from *certain* overseas jurisdictions is a real issue. This was also noted in the FATF review of Australia where: “it was acknowledged that authorities have encountered difficulties, in particular, to access information on foreign trusts established in jurisdictions such as the Cook Islands, Jersey and Panama, and other off-shore trust jurisdictions.”²³

We therefore reiterate our earlier comments about the need for published position papers on the extent of current problems being experienced in establishing beneficial ownership, particularly in the context of information held overseas. For example, the ATO has yet to issue a detailed report on its work on the Panama Papers leaks, work which we understand has taken ATO officials to jurisdictions such as Hong Kong.

One policy option to explore in this context is a “black-list” approach to the design of any new legislation, depriving entities with links to such jurisdictions from eligibility for Australian tax or commercial entitlements.

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

As noted earlier, listed and widely-held companies pose little risk and should be considered for exemption for beneficial ownership reporting requirements. Similar comments apply to shares held by Australian superannuation funds, offshore pension funds, Australian charities and mutual associations.

²¹ 22 countries out of 113 countries was rated compliance - <http://www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings/#d.en.342263>

²² 7.37. ASIC can exchange information with 102 foreign counterparts under the International Organisation of Securities Commissions (IOSCO) Multilateral Memoranda of Understanding (MMOU) Concerning Consultation and Cooperation and the Exchange of Information (enforcement). ASIC can exchange information with 64 foreign counterparts under an additional 80 bilateral MOUs covering supervision and enforcement. ASIC’s MOUs and the MMOU allow for the exchange of information recorded in ASIC’s registers. ASIC can exchange information recorded in ASIC registers with foreign counterparts and other agencies, including law enforcement agencies, whether or not there is an MOU. This includes publicly available information. If the information is not publicly available on ASIC’s registers but is held by ASIC in relation to its registry function, ASIC can release the information pursuant to section 127(4) of the ASIC Act and, if an MOU exists, pursuant to the terms of the MOU. <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

²³ Page 108 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>

Inbound investors which claim sovereign immunity pose special issues when considering BOR exemptions because claims for such immunity are generally handled through a confidential, private ruling process managed within the ATO²⁴. The establishment of a BOR could provide a welcome opportunity to make such sovereign immunity decisions more transparent to the Australian community.

Details of Beneficial owner

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?***

Australia's dividend imputation and TFN mechanism already provides substantial levels of assurance about existing shareholder data. We would have thought that existing ASIC data would also provide information about controlling interests.

Refer to earlier comments about situations where the shareholding trail leads offshore.

Rather than requiring entities to collate and report detailed information about individual shareholders (i.e. full name, TFN, address), data that is already held by government should be collated and cross referenced (see earlier comments about the possibility of increased government investment in an improved business register). If this information is then efficiently data-matched to income flows by the ATO and cash flows by AUSTRAC and the overall data expertly analysed, then it raises a legitimate question as to whether a BOR needs to issue information requests.

Collection and storage

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. ***What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?***
16. ***What do you see as the advantages and/or disadvantages of a central register compared with individual registers being maintained by companies?***
17. ***Should a central register of beneficial ownership information also be established?***

²⁴ <https://www.ato.gov.au/General/ATO-advice-and-guidance/In-detail/Private-rulings/Supporting-documents/Sovereign-Immunity/>

18. *In particular, what do you see as the relative compliance impact costs of the two options?*

Companies should not be compulsorily required to individually maintain beneficial ownership information. If a central BOR is to be established, it should be built on currently available data, with closely-held entities able to correct the register for any errors or omissions.

Operation of a central register

19. *Who would be best placed to operate and maintain a central register of beneficial ownership? Why?*

It is unclear to us whether a new or existing Government organisation would need to establish and maintain a central BOR. Much depends on whether any existing agency has the expertise and/or technological capacity to undertake the task of integrating the current vast and disparate information sets.

ASIC may not be the appropriate entity to hold the central BOR (its [remit](#) is limited to companies) if the Government decides that an *effective* BOR needs to encompass a range of types of legal entities. ASIC clearly has a role to play however, in verifying corporate information which it would supply to the operator of the registry.

Perhaps the most logical choice for operating and maintaining the registry is the ATO, leveraging off the Commissioner of Taxation's "other" role as the Australian Business Registrar ([ABR](#))²⁵. This would fit with our vision for a modernised whole of government business registration system.

Also, the ATO already possesses vast amounts of beneficial ownership and other relevant data although we are not in a position to comment on how *effectively* that data is used. The legislation underpinning the current ABR needs to be modernised in various ways (e.g. by enabling the collection of BOR and associate data, cyber security safeguards, conditional registration powers, and better identity authentication processes for applicants).

There is also the significant issue of expertise to consider. For example, the ATO was identified in 2013 as a lead agency for the Centre of Excellence in Data Analytics and since at least 2011 has built a substantial "Smarter Data" unit under the leadership of Deputy Commissioner Greg Williams. ASIC no doubt would claim similar levels of expertise.

AUSTRAC may be able to fulfil the BOR role as it already collects and collates financial intelligence to help fight serious and organised crime and terrorism financing. However AUSTRAC was not set up as a central registry and it would seem to us that substantial changes in process, objectives, and resources would be required to manage and maintain the BOR.

²⁵ Note however that there could be merit in separating the Commissioner's roles such that the new BOR is seen as independent from the ATO. We would be happy to further consider the pros and cons of this. For example, the ATO's current digital transformation plans may mean that its resources would be stretched too far if it was also required to create and maintain the central BOR (others might argue that the new BOR would complement and enhance the ATO's abilities). Having the ATO hold the new BOR may also raise privacy concerns in some quarters.

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

The central register operator should be empowered to verify (through whole of government authentication procedures), cross-check data and initiate 'audit' inquiries.

Whilst we acknowledge the self-interest aspect, we have put to the ATO many times the central role that trusted intermediaries (accountants for example) can play in identity authentication, reporting and maintenance of data to government agencies. Chartered Accountants would be happy to discuss this further, including what can be done from an ethical and accreditation standards viewpoint to help regulators feel confident about the veracity of the BOR and other data received from our profession.

21. 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'?

Refer earlier comments.

Government entities which already have the data should report information to the central BOR. For closely-held entities, the most practical approach would be for the company to report along with its other statutory reporting and tax filing obligations (e.g. lodgement of the annual income tax return).

22. Should new companies provide this information to a central registry operator as part of their application to register their company?

See response to Question 20.

We would have thought that ASIC (or any new operator of a revamped national business register to replace the old ASIC registries) would be providing this data to the BOR as an automatic flow-on from the initial registration process.

23. Through what mechanism should existing companies, and/or relevant beneficial owners, report?

See response to Question 20.

Ensuring accurate and current information

24. 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)?

We recommend that any reporting obligation be aligned with existing annual reporting and tax filing procedures and timeframes. If there was to be an exception to this, any additional reporting should be triggered by an exceptional event impacting the companies share register (e.g. modelled on the *corporate change events in Division 166 of the ITAA 1997).

25. 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?

See response to Question 21.

26. 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?

See earlier comments (Question 20) about the role which trusted intermediaries can play here.

In keeping with existing tax policy, a self-assessment (or in this case, self-notification) process should apply. Beneficial ownership information so provided to the central BOR would then be verified by cross checking data between various government agencies (both domestically and internationally).

Any discrepancies would result in contact from the BOR to the shareholder/directors of the closely-held entity. Sanctions would need to apply to the provision of false or misleading information to the BOR.

27. 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.

Yes – see above.

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

There is a strong case for having robust exchange of beneficial ownership information between countries. As noted elsewhere in our submission, the ATO (and other relevant agencies) should publish its research on whether *current* information exchange arrangements are working satisfactorily.

Now is certainly an opportune time for addressing any gaps in Australia's Tax Information Exchange Agreements, with a number of "secrecy jurisdictions" coming on board with the OECD – G20 push in recent months²⁶.

In relation to Australia's State or Territory jurisdictions, we envisage that these jurisdictions would automatically stream data about beneficial ownership to the central BOR and have corresponding automatic access. We appreciate that this requires Commonwealth – State/Territory collaboration, but note the substantial mutual benefits which would flow from this exercise (e.g. for the States and Territories, in establishing payroll tax groups, eligibility for corporate reconstruction stamp duty relief etc).

²⁶ For example, the Cayman Islands recently passed legislation to create a centralized platform for sharing beneficial ownership information on Cayman companies with UK authorities. The Financial Services and the Treasury Bureau recently issued a paper for public consultation on its proposal to introduce a regime under the Companies Ordinance requiring Hong Kong incorporated companies to keep a register of people having significant control over a company.

Sanctions

- 29. 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?**

As reflected in earlier comments, we do not support a “stick” approach to the establishment of a new BOR. Rather, we support the collation of existing data held by government agencies and streamlined annual processes for closely-held companies to correct the record.

Sanctions should apply to those obliged to supply information to the BOR but who fail to do so.

Transitional period

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

Refer response to Question 12-18.

Impact on companies and shareholders

- 31. Do you foresee any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?**
- 32. What types of compliance costs would your business incur in meeting any new requirements for record-keeping and reporting of beneficial ownership information?**
- 33. 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?**
- 34. 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?**
- 35. Could any changes be made to streamline or merge existing reporting requirements in order to reduce the compliance costs for businesses?**

As outlined in our covering letter, the compliance costs for legitimate businesses (especially Australian-owned companies) are potentially substantial if the BOR concept is implemented without careful consideration of the current risks, existing data sources and the use made of it by Government agencies, the costs and benefits.

Tracing notices

36. ***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?***
37. ***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?***
38. ***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? What other changes could be made to improve the operation of these provisions?***
39. ***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?***
40. ***What other changes could be made to improve the operation of these provisions?***

See earlier comments.

Nominee shareholders

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

See earlier comments.

The commercial rationale for nominee shareholding arrangements is generally well understood. Secrecy is no doubt one reason which concerns regulators.

The extension of beneficial ownership disclosure requirements to offshore nominee shareholding arrangements would be particularly problematic and needs to be addressed by the enhanced international exchange of information arrangements referred to earlier.

The practical obstacles associated with tracing through nominee shareholding arrangements have already been identified in the design of existing tax laws such as the tracing of the beneficial ownership of loss companies. Nominee arrangements have also been recognised in the context of dividend flow-through treatment (i.e. under the former inter-corporate dividend rebate provisions and the current franked dividend regime). It would be a strange outcome indeed if these current legislative approaches were countervailed by the introduction of more stringent BOR data collection and disclosure requirements.

Bearer share warrants

- 46. *Who uses bearers share warrants, and for what purpose?***
- 47. *How often are bearer share warrants used?***
- 48. *What do you see as the benefits of bearer share warrants? Are there any negative aspects of their use?***
- 49. *Should a ban be introduced on bearer share warrants?***

Similar comments to nominee shareholders (see above).

Appendix B – Tax beneficial ownership tests

The tax law in Australia has a number of provisions that require entities to prove ultimate beneficial ownership. These provisions include:

- Carry forward of revenue and capital losses by companies (Division 165D ITAA 1997)
- Carry forward of revenue and capital losses by trusts (Schedule 2F ITAA 1936)
- Companies deducting bad debts (165-120 ITAA 1997)
- Controlled foreign corporation (CFC) provisions
- Exemption for gains from the disposal pre-capital gains tax (CGT) assets
- Trustee beneficiary non-disclosure tax rules²⁷
- There are also provisions to do with proving ownership, such as the 40 day holding rule for access to franking credits²⁸.

Certain provisions in Australia's double tax agreements also require beneficial ownership to be established²⁹.

A discussion of some of these ownership tests is provided below.

Companies carrying forward revenue and capital losses

[Section 165-10](#) of the Income Tax Assessment Act 1997 (ITAA 1997) states that a company cannot deduct a tax loss unless it satisfies the conditions in section 165-12 ITAA, which about continuity of ownership or section 165-13 ITAA which is about continuity of business.

[Section 165-12](#) of the Income Tax Assessment Act 1997 broadly requires that, during the relevant time period, the same person(s) hold more than 50% of the voting rights, rights to dividends, and rights to dividends. In determining this reference is to be had to sections [165-150](#), [165-155](#) and [165-160](#) ITAA all of which make reference to 'beneficially own'.

The tax act then explores a variety of scenarios that have arisen in applying this beneficial ownership test. For example:

- Share splitting – sub-section [165-165\(2\)](#) ITAA 1997
- Unit splitting – sub section [165-165\(3\)](#) ITAA 1997
- Consolidation of shares – sub section [165-165\(4\)](#) ITAA 1997
- Consolidation of units – sub section [165-165\(5\)](#) ITAA 1997
- Arrangements relating to beneficial ownership to avoid tax liabilities e.g. redeemable shares – section [165-180](#) ITAA 1997
- Shares that stop carrying rights – section [165-185](#) ITAA 1997
- Shares that start carrying rights – section [165-190](#) ITAA 1997
- Shares held by government entities, charities, complying superannuation funds and management investment schemes – section [165-202](#) ITAA 1997
- Companies where no shares have been issued – section [165-203](#) ITAA 1997
- Death of a share owner – section [165-205](#) ITAA 1997
- Trustees of family trusts – section [165-207](#) ITAA 1997

²⁷ Refer Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 2) 2007 and trustee beneficiary reporting rules contained in Schedule 4, Tax Laws Amendment (2007 Measures No. 4) Act 2007.

²⁸ Refer Division 1A of Part IIIAA of the ITAA 1936.

²⁹ Refer OECD Model tax convention and the 2012 proposed revisions to the meaning of "Beneficial Owner" in Articles 10, 11 and 12. <http://www.oecd.org/ctp/treaties/Beneficialownership.pdf>

Appendix B – Tax beneficial ownership tests

- Companies in liquidation – section [165-208](#) and 165-250 ITAA 1997
- Dual listed companies – section [165-209](#) ITAA 1997
- Shares held by fixed trusts – Subdivision [165-F](#) ITAA 1997

Bad debt provisions for companies

These broadly reflect the tax loss provisions for companies. Section [165-120](#) ITAA 1997 states a company cannot deduct a bad debt unless it meets the conditions in section [165-123](#) ITAA³⁰, which in turn, refers to the same persons during the relevant period having more than 50% of the voting rights, rights to dividends, and rights to dividends. Again, in determining this reference is to be had to sections 165-150, 165-155 and 165-160 ITAA all of which make reference to ‘beneficially own’ as has been discussed above.

Trusts carrying forward revenue and capital losses

[Schedule 2F](#) of the Income Tax Assessment Act 1936 (ITAA 1936) restricts the extent that a trust can claim previous years losses as a deduction against current year income. The rules are designed to ensure that the person(s) who bore the economic loss are the same person(s) that are benefiting from utilising the loss.

The design of these rules distinguishes between fixed trusts, non-fixed trusts and excepted trusts (broadly family trusts, complying superannuation funds and deceased estates). Fixed trusts are then further divided between ordinary fixed trusts, listed widely held trusts, unlisted widely held trusts, unlisted very widely held trusts, and wholesale widely held trusts.

All fixed trusts (and non-fixed trusts which have certain fixed entitlements) face a 50% stake test. Fixed trust is defined at section 272-65 ITAA 1936 as where persons have fixed entitlements to all of the income and capital of the trust (i.e. vested and indefeasible). The 50% stake test is broadly satisfied where the same individuals beneficially hold between them more than 50% of the income and capital entitlements at the relevant times (section 269-50 and 269-55 ITAA 1936). Division 272 then specifies what are fixed entitlements.

Non fixed trusts generally face a pattern of distribution test (Subdivision 269-D of Schedule 2F on the ITAA 1936). There are rules dealing with:

- When an individual receives different percentages – section 269-70 ITAA 1936
- Incomplete distributions – section 269-75
- Death or breakdown of marriage – section 269-80
- Arrangements to pass the distribution test – section 369-85

In addition to this there are also rules about what constitutes control of a non-fixed trust – section 269-95.

Family trusts face a family trust distribution tax if distributions are made outside of the designated family group. A [family trust election](#) and/or an [interposed entity election](#) may need to be made and lodged with the ATO as part of this process.

³⁰ There is also a choice of claiming a bad debt deduction through claiming satisfaction of the same business test or satisfying the Commissioner that it would be reasonable to grant such a deduction.

Appendix B – Tax beneficial ownership tests

Controlled foreign corporation provisions

The controlled foreign corporation (CFC) provisions require Australian taxpayers to include in their taxable income, their share of certain income earned by foreign companies that they control even though it has not been distributed to them. Section 340 ITAA 1936 broadly defines a controlled foreign company as a company where:

- A group of 5 or fewer Australian holds or is entitled to acquire 50% or more of the interests in the company; or
- There is a single Australian resident whose direct and indirect interests in the company is not less than 40% as long as the company is not controlled by a group of entities not including the subject Australian resident or any of its associates; or
- The company is in fact controlled by a group of 5 or fewer Australian residents either alone or together with their associates.

Complex tracing rules through controlled entities (including controlled foreign trusts) apply.

Appendix C – Recommendations re ASIC

The Senate Economics Reference Committee in its report on Insolvency in the Australian construction industry³¹

Recommendation 17

7.38 The committee recommends that ASIC look closely at its record on enforcement and identify if there is scope for improvement, and if legislative changes are required to advise government.

Recommendation 18

7.39 The committee recommends that the government ensure that ASIC is adequately resourced to carry out its investigation and enforcement functions effectively.

Recommendation 34

11.39 The committee recommends that automated cross-agency data sharing should trigger an alert when an individual: declares bankruptcy; is convicted of fraud; is disqualified as a director; or liquidates a company. This alert should require the relevant state or territory regulator to satisfy itself that the licence holder remains a fit and proper person.

Recommendation 35

12.37 The committee recommends that the government, through the work of the Legislative and Governance Forum for Corporations establish a beneficial owners' register.

Recommendation 36

12.38 The committee recommends that section 117 of the *Corporations Act 2001* (C'th) be amended to require that, at the time of company registration, directors must also provide a Director Identification Number.

Recommendation 37

12.39 The committee recommends that a Director Identification Number should be obtained from ASIC after an individual proves their identity in line with the National Identity Proofing Guidelines.

Recommendation 38

12.40 The committee recommends that the *Australian Securities and Investment Commission Act 2001* (C'th) be amended to require ASIC to verify company information.

Recommendation 39

12.41 The committee recommends that ASIC and Australian Financial Security Authority company records be available online without payment of a fee.

31

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report

Appendix D – Who we are

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations.

We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international markets.

We are a member of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance and Chartered Accountants Worldwide which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents 788,000 current and next generation accounting professionals across 181 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications to students and business.