

The Treasury

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14 March 2017

**Submission to ‘Increasing Transparency of the Beneficial Ownership of Companies’**

Publish What You Pay (PWYP) Australia welcomes the opportunity to provide this submission to The Treasury on its consultation paper ‘Increasing Transparency of the Beneficial Ownership of Companies’ as part of its commitment in Australia’s National Action Plan for the Open Government Partnership.

PWYP Australia is a coalition of humanitarian, faith-based, environmental, anti-corruption, research and union organisations campaigning for greater transparency and accountability in the extractive industries. PWYP Australia works with the global Publish What You Pay coalition, a network of over 800 member organisations in more than 60 countries around the world, united in their call for an open and accountable extractive sector, so that oil, gas and mining revenues improve the lives of women, men and youth in resource-rich countries. Globally, PWYP is asking for national governments, including Australia, to implement mandatory disclosure legislation requiring mining and oil and gas companies to publish what they pay to governments where they operate.

This submission focuses on providing information on the benefits of a publicly available register, which are not covered in the consultation paper. PWYP Australia would like to emphasise the importance of this factor in any discussion on the introduction of a beneficial ownership registry in Australia.

**Australia's global commitments to a publicly available Beneficial Ownership Register:**

PWYP Australia is encouraged by the Government initiative to address the opacity of beneficial ownership in Australia. Beneficial ownership information is crucial to fighting corruption and ending money laundering and tax evasion. Hidden ownership of companies negatively affects governments and business, and has a substantial fiscal impact globally and in Australia. The OECD estimates that corruption adds 10% to the cost of doing business globally and is equivalent to a 20% tax on foreign business<sup>1</sup>, while in Australia, The Australian Crime Commission report 'The Costs of Serious and Organised Crime in Australia 2013-14' found that 70% of Australia's Serious and Organised Crime threats were based offshore, or had 'strong offshore connections', and had cost Australia \$36 Billion AUD<sup>2</sup>. This has been occurring as Australia has continued to slide down the International Corruption Perception Index, dropping 6 positions since 2012 to its current ranking of 13<sup>3</sup>.

Access to beneficial ownership is increasingly seen as good business practice. 90% of respondents to the 2016 EY Global Fraud Survey believed it was important to know the ultimate beneficial ownership of the entities with which they do business<sup>4</sup>. As Director General of the UK Institute of Directors, Simon Walker, said "So-called 'anonymous companies', in which the corporate veil is used to conceal illegal activities, have no place in a modern economy and bring the entire business sector into disrepute."<sup>5</sup> We are also aware that countries where there is a lack of transparency around beneficial ownership are being used more frequently to house shell companies. In Canada they have named this 'snowwashing - the use of Canada's good reputation and economic stability as a cover to make suspicious transactions seem legitimate.'<sup>6</sup> It is therefore welcomed to see the Australian Government take action on this important global issue.

However, PWYP Australia is disappointed that the Government has continued to avoid committing to a beneficial ownership registry that is open to the Australian public. Australia is signatory to, or has made commitments within, numerous global mechanisms that are broadly aimed at increasing

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<sup>1</sup> OECD in <http://bteam.org/plan-b/ending-anonymous-companies-report-published/>

<sup>2</sup> <https://www.acic.gov.au/publications/intelligence-products/costs-serious-and-organised-crime-australia>

<sup>3</sup> <http://www.abc.net.au/news/2016-01-27/australia-perceived-as-more-corrupt/7118632>

<sup>4</sup> <http://www.ey.com/gl/en/services/assurance/fraud-investigation---dispute-services/ey-global-fraud-survey-2016>

<sup>5</sup> <http://bteam.org/plan-b/ending-anonymous-companies-report-published/>

<sup>6</sup> PWYP Canada - Submission to the Standing Committee on Industry, Science and Technology February 22nd, 2017 Re: Bill C-25 and Beneficial Ownership Transparency

transparency, access to data, and ending corruption<sup>789</sup>. Acknowledgment of the interconnectedness of these initiatives is often missing from Government policy and initiatives and PWYP Australia feels that this is reflected in this consultation paper. This consultation paper is being released as part of the commitments the Australian Government has produced for our National Action Plan (NAP) to the Open Government Partnership (OGP). Commitments made in the NAP are not independent of each other, but rely on coordinated implementation for success. Not mentioned within this consultation paper is that commitment 2.2 in Australia's NAP 'Build and maintain public trust to address concerns about data sharing and release' includes a milestone that Australia will adopt the International Open Data Charter<sup>10</sup>. The International Open Data Charter has six principles, and while all are relevant, we make note here that the first principle is that data is 'open by default'<sup>11</sup>. This is a position that the Australian Government has also taken in its public data policy statement<sup>12</sup>. The OGP also encourages this position, and has incorporated the message into its published materials as 'Open by default, policy for the people, and accountability for results'<sup>13</sup>. PWYP Australia strongly believes that a beneficial ownership registry that is not publicly accessible would go against the spirit of the OGP and would not meet the principles of the Open Data Charter. Further, commitment 1.3 in Australia's NAP is implementing the Extractives Industries Transparency Initiative (EITI) for which Australia is currently in the process of preparing a candidacy application. The EITI contains a requirement for beneficial ownership information to be included within a country's EITI reports, which are publicly available, by 2020.

Numerous countries are in the process of implementing or exploring beneficial ownership registries, with the UK currently being the first to have done so, and to have also made publicly available. Rather than re-invent the wheel, PWYP Australia believes the Government should look to the UK as the standard on how a publicly available register could be modelled. This would also contribute to global interoperability as beneficial ownership disclosure becomes the global standard of reporting.

The Government can also look to the UK as a guide to challenging any arguments that arise against a publicly available registry, as these arguments have already been debated and answered abroad.

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<sup>7</sup> <https://www.ministerjustice.gov.au/Mediareleases/Pages/2016/SecondQuarter/UK-Anti-Corruption-Summit.aspx>

<sup>8</sup> <http://www.oecd.org/australia/australia-oecdanti-briberyconvention.htm>

<sup>9</sup> <http://dfat.gov.au/international-relations/themes/corruption/international-anti-corruption-efforts/Pages/united-nations-convention-against-corruption.aspx>

<sup>10</sup> <http://ogpau.pmc.gov.au/australias-first-open-government-national-action-plan-2016-18/commitments/ii-open-data-and-digital-1>

<sup>11</sup> <http://opendatacharter.net/principles/>

<sup>12</sup> [https://www.dpmc.gov.au/sites/default/files/publications/aust\\_govt\\_public\\_data\\_policy\\_statement\\_1.pdf](https://www.dpmc.gov.au/sites/default/files/publications/aust_govt_public_data_policy_statement_1.pdf)

<sup>13</sup> [http://www.opengovpartnership.org/sites/default/files/091116\\_OGP\\_Booklet\\_digital.pdf](http://www.opengovpartnership.org/sites/default/files/091116_OGP_Booklet_digital.pdf)

During the consultation process for the UK registry, government submissions highlighted the numerous benefits of an open registry, a selection of which are noted below as being applicable within the Australian context:

Transparency International United Kingdom<sup>14</sup>

- Enable civic scrutiny.
- If a register of beneficial ownership were not made public, then - without substantial investigative capacity being provided to Companies House to ensure compliance and accuracy in reporting - the utility of the register will be dramatically reduced.
- By making the register public, scrutiny will be enabled from across civic society, the media, businesses due diligence, and financial institutions conducting KYC and AML procedures.
- As a crime where there is no immediate 'victim report', corruption is notoriously difficult for police to investigate and civic scrutiny of illicit finance and stolen assets through transparent information can be essential to start investigations.
- A public register would reduce the cost of businesses' and financial institutions' due diligence,
- An open registry would enable cross-border investigations – often required for money laundering investigations - to progress, and progress at a much faster speed.

Global Witness<sup>15</sup>:

- Provide businesses with important information on their partners, investors, suppliers and customers.
- Ensure that law enforcement and tax authorities, including those from outside the UK, have quick and guaranteed access to beneficial ownership information.
- Allow citizens, journalists and others to hold companies to account.
- Give financial institutions a good starting point when it comes to identifying their customers for anti-money laundering purposes.

Save the Children UK<sup>16</sup>:

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<sup>14</sup> TRANSPARENCY & TRUST: ENHANCING THE TRANSPARENCY OF UK COMPANY OWNERSHIP AND INCREASING TRUST IN UK BUSINESS UK Department for Business Discussion Paper Submission by Transparency International UK (TI-UK) Sept 2013

<sup>15</sup> What an effective beneficial ownership registry looks like November 2013

<sup>16</sup> Response to the consultation on enhancing transparency of UK company ownership Save the Children UK 16 September 2013

- Public data enables civil society, journalists and others to hold companies and governments to account. The principle of public accountability for corporate actions is enshrined in the UN Guiding Principles on Business and Human Rights. Public transparency of this information is also important as governments, particularly in developing countries, may not have the capacity or the incentives to investigate cases of tax evasion or corruption. The 'many eyes' principle should increase the likelihood of journalists and civil society identifying malfeasance.
- Public data provides tax authorities in developing countries access to beneficial ownership information. The G8, G20, and OECD have taken welcome steps towards automatic information exchange - the gold standard in information exchange between this is a long term process. However, in the interim, most developing countries do not have access to quick and easily accessible information on companies operating internationally which may be evading taxes.
- Quality control of the data. If the information is open to the public, there will be 'many eyes' looking at the information, increasing the chance that errors are spotted and fixed. If provided in an open data format, this information can be cross referenced with other data sets increasing the likelihood of errors being spotted.

Criticisms levelled at a public registry reported in the media primarily revolve around the issue of privacy, or potential risks to individuals<sup>17</sup>, arguments that were also debated in the UK. However the Court of Justice of the European Union found that 'the right to protect personal data is not absolute. Rather, this right must be considered in relation to its function in society and be balanced with other fundamental rights, in accordance with the principle of proportionality. In other words, the right of people to keep their financial affairs secret must be balanced against the need of society to prevent financial crimes.'<sup>18</sup> Germany is currently having the same discussion at a national level. Civil Society there also stresses the point that we cannot let 'personal security' be the bait and switch for public accountability<sup>19</sup> while also highlighting that the UK data has shown that in 90% of the cases, the data being made public was already publicly available in another form.

The UK allowed for exemptions in cases of extreme security concerns. Initial research has indicated that even with an enormous number of beneficial owners being identified through the registry in the UK (in excess of 1 million); only 30 have been successfully granted the right to have their names

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<sup>17</sup> <http://www.afr.com/news/public-register-of-shell-companies-gross-overreaction-20160422-gocwa7#ixzz4ZHvFtD3>

<sup>18</sup> Open Society Foundations <https://financialtransparency.org/reports/terrorism-inc-how-shell-companies-aid-terrorism-crime-and-corruption/> October 28th, 2013

<sup>19</sup> <https://blog.opencorporates.com/2017/02/28/germany-do-not-let-personal-security-be-the-bait-and-switch-for-public-accountability/>

concealed due to security concerns<sup>20</sup> demonstrating that the realistic security issues stemming from a public registry would not be as numerous as they have been argued in the media. PWYP Australia believes that by following the UK example of how they have addressed these issues, Australia could negate any concerns and pursue a register that was open.

While it is still early days in the UK for reporting, Global Witness has already demonstrated the power and usefulness of a public beneficial ownership registry. A concern raised during the UK process was that companies would struggle to identify their beneficial owners; however Global Witness research showed that this was not the reality, and only 2% of companies struggled to identify all owners or find the information required for reporting<sup>21</sup>. Further, and more importantly, their initial findings suggested that 19 senior politicians (known as politically exposed persons), 76 people from the U.S. sanctions list and 267 disqualified directors were listed as beneficial owners.<sup>22</sup> They also found that almost 3,000 companies listed their beneficial owner as a company with a tax haven address, which is disallowed under the UK rules<sup>23</sup>. This was all discovered from data that had only been published in the period June to November 2016.

## **EITI**

Australia is in the process of preparing an application to be accepted as candidate country in the EITI. Briefly, the EITI is a domestic and voluntary reporting mechanism for the extractives industries. Once a country is accepted as a candidate, it must fulfil the various requirements of the EITI standard<sup>24</sup> to be found 'compliant'. There are currently 51 implementing countries in the EITI.

In 2016, the EITI released a new standard that included a requirement on beneficial ownership reporting.<sup>25</sup> This requirement means that by 2020, all implementing countries must ensure that all oil, gas and mining companies that bid for, operate or invest in extractive projects in their countries publish the names of their real owners.

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<sup>20</sup> Global witness Blog / Nov. 22, 2016 WHAT DOES THE UK BENEFICIAL OWNERSHIP DATA SHOW US?  
<https://www.globalwitness.org/en/blog/what-does-uk-beneficial-ownership-data-show-us/>

<sup>21</sup> ibid

<sup>22</sup> ibid

<sup>23</sup> ibid

<sup>24</sup> <https://eiti.org/document/standard>

<sup>25</sup> <https://eiti.org/document/standard#r2-5>

The EITI requires that this 'is publicly accessible, be it through national registers or through other means.'<sup>26</sup> The rationale for this being that 'public accessibility to BO information is crucial not only to build public trust, but also to enable stakeholders beyond government authorities to use and monitor the information, which will help increase reliability of the data and support efforts to crack down on any dodgy activities... Anything less than public access to the most basic BO data could lead to missed opportunities for fighting illicit behaviour and undermine other global efforts for public access to beneficial ownership data.'<sup>27</sup> As of February 2017, 45 Countries have published their roadmap of how they will fulfil the beneficial ownership requirement.<sup>28</sup> Of the 45, analysis by Open Ownership<sup>29</sup> has shown that 20 countries have committed to making these a publicly open registry.

It is expected that Australia will be admitted as a candidate country to the EITI in late 2017. The EITI Multi Stakeholder Group will then have to develop as part of its work plan a roadmap for how Australia will report on beneficial ownership and how it will be made available. Australia will then be required to have publicly available beneficial ownership information for extractive industry companies, be that in a register or published in the annual EITI reports.

For Australia to be publishing beneficial ownership information for one industry, when there is no intention to make a national register publicly available sends a confusing message to the business sector, the Australian community, and on the global stage. It indicates a misalignment in Government objectives and also has resource implications with a requirement to make available beneficial ownership information while concurrently exploring and implementing a private registry. PWYP Australia also strongly agrees with the extractives industries position that global reporting standards are crucial to reducing burden on companies and to increase global operability. BHP Billiton has long expressed its support for a 'globally consistent disclosure framework that includes formal equivalency agreements between jurisdictions'<sup>30</sup> on reporting payments to government. As beneficial ownership reporting increases globally, it is reasonable to assume that companies will want the same for their beneficial ownership reporting requirements. For only one sector in Australia to have to publicly report their beneficial ownership information not only risks decreasing

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<sup>26</sup> <https://eiti.org/blog/beneficial-ownership-transparency-what-eiti-requires-lessons-learnt-for-eu>

<sup>27</sup> Ibid

<sup>28</sup> <https://eiti.org/beneficial-ownership>

<sup>29</sup> <http://openownership.org/>

<sup>30</sup> <https://eiti.org/supporter/bhp-billiton>

company participation in the Australian EITI, it creates an uneven reporting environment domestically between sectors.

There is already a global initiative to establish an open and global beneficial ownership registry, driven by leading anti-corruption and transparency civil society organisations – Open Ownership<sup>31</sup> - with the aim to provide a registry that also allows for clear and consistent global reporting mechanisms. The movement towards beneficial ownership registries is towards open and accessible information. A closed registry demonstrates a lack of leadership by Australia in the region, puts us out of step with the global community, and threatens the success and sustainability of the numerous global initiatives Australia has committed itself to.

PWYP Australia recommends that the Treasury implement a register that meets the commitments Australia has made globally, is aligned with the emerging global standard, and is open to the Australian people.

Yours sincerely



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<sup>31</sup> <http://openownership.org/>

### **Background to Publish What You Pay Australia**

Publish What You Pay is a global campaign for transparency and accountability in the mining and oil and gas industries. In Australia, the campaign is supported by a coalition of organisations that are committed to promoting good governance in resource-rich countries to ensure that citizens benefit equitably from their natural wealth, including through advocacy for the mandatory disclosure of all payments made between extractive industry companies and governments on a country-by-country and project-by-project basis.

The current members of Publish What You Pay Australia are:

- Action Aid Australia
- Aid Watch
- Australian Conservation Foundation
- Australian Council for International Development
- A Billion Little Stones
- Burma Campaign Australia
- Caritas Australia
- Catholic Mission
- ChildFund Australia
- Columban Mission Institute
- Conservation Council of Western Australia
- CFMEU – Mining and Energy
- CAER – Corporate Analysis. Enhanced Responsibility
- Economists at Large
- Friends of the Earth Australia
- Global Poverty Project
- Greenpeace Australia Pacific
- Human Rights Law Centre
- Jubilee Australia
- Mineral Policy Institute
- Oaktree Foundation
- Oxfam Australia
- Search Foundation
- SJ Around The Bay
- Tear Australia
- Transparency International Australia
- Union Aid Abroad – APHEDA
- Uniting Church in Australia – Synod of Victoria and Tasmania
- World Vision Australia