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T +61 2 9223 5744 F +61 2 9232 7174

E info@governanceinstitute.com.au

Level 11, 10 Carrington Street,

Sydney NSW 2000

GPO Box 1594, Sydney NSW 2001

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

By email: BeneficialOwnership@treasury.gov.au

Dear Sir,

Multinational tax integrity: Public Beneficial Ownership Register Consultation Paper

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of more than 43,000 governance and risk management professionals from the listed, unlisted, public, and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates, and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Many of our members have governance roles in organisations of all sizes which would be required to maintain registers under the scheme proposed by the Consultation Paper (Consultation Paper). In preparing this submission, we have drawn on their experience and expertise.

In this Submission we have not responded to each of the Consultation Questions set out in the Consultation Paper but have addressed the key issues of concern to our members.

Preliminary comments

The Consultation Paper refers to the proposed reforms as 'a key element of the Government's commitment to ensuring multi-national enterprises (MNE's) pay a fairer share of tax'. However, the proposals will have a significant impact on a very large number of entities whose activities have no connection with the tax avoidance practices of MNEs. The proposals will disproportionately impose regulatory and compliance burdens on a vast number of small entities with no appreciable benefit. Our members consider that it would be preferable to consider more targeted reforms that are more likely to achieve the desired outcome. The Consultation Paper also refers to Australia lagging behind overseas jurisdictions on the collection and disclosure of

beneficial ownership information. The assumption being that regimes in overseas jurisdictions are superior and should be adopted in Australia.

Our members who have experience with overseas beneficial ownership reporting regimes observe that these regimes are burdensome and time-consuming and seem to provide little value to the public. In their experience the cost and time spent complying with these regimes outweigh the benefit of greater transparency. Anecdotally, they find that it does not appear that the public makes much use of any information disclosed.

They also report that in complex, multi-jurisdictional company structures, it can be very challenging to obtain information. In their experience entities in other jurisdictions will not respond to a company's request for further information and there is no recourse available to the company to compel the overseas entity to respond.

We also understand that in November this year, Luxembourg and the Netherlands closed their public beneficial ownership registers following a ruling from the Court of Justice of the European Union, which invalidated public access. According to the Court press release, its judgment found that 'the general public's access to information on beneficial ownership constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data'.¹ This decision may represent the beginning of a shift away from disclosure of information that can identify individuals to the general public in overseas jurisdictions.

There are many aspects of the proposals which touch on areas already covered by other legislative regimes and other regulators. For example, AUSTRAC administers the Anti-money Laundering and Counter-terrorism Financing Act (AML/CTF). A key aspect of an entity's AML/CTF program will involve Know Your Customer (KYC) activities, focused on identifying reporting entities' customers and beneficial owners. AUSTRAC also requires reporting entities under the AML/CTF legislation to identify the beneficial owners of their customers. In addition, the ATO interacts with trusts. Our members consider that before progressing the proposals further there needs to be active consultation between the relevant regulators and an examination of the provisions of the various pieces of legislation with a view to identifying where there are gaps which would necessitate additional legislation.

Governance Institute recommends that there be:

- consideration of more targeted reforms that are more likely to achieve the desired outcome of ensuring multi-national enterprises pay a fairer share of tax
- consideration of the latest overseas developments in relation to disclosure of information that can identify individuals to the general public, and
- active consultation between the regulators such as ASIC, AUSTRAC and the ATO and an examination of the provisions of the various pieces of legislation relating to beneficial ownership for which they are responsible with a view to identifying where there are gaps which require enactment of additional legislation.

Key issues

Phased approach and scope of proposals

The Consultation Paper refers to the Government's intention to adopt a 'phased approach' to the introduction of the proposals, noting that a regime currently exists for collection and disclosure of beneficial ownership information for listed entities.

The Consultation Paper notes the proposed requirements will apply to **all** proprietary companies, unlisted public companies, unlisted MISs and unlisted Corporate Collective

¹ See [Press Release 188/22](#) of Court of Justice of the European Union 22 November 2022.

Investment Vehicles. This is a very large group of entities, approximately 3 million on some estimates, and, if the proposals are implemented, it would seem preferable to focus on a discrete and identifiable cohort of entities in the first instance.

The scope and timeline for the Project are ambitious and our members question whether this is realistic given the large number of entities involved. We have recently seen the considerable difficulties encountered in communicating about and processing the very large number of applications for director IDs following the introduction of this requirement for approximately 2.5 million directors of Australian companies. Given the large number of entities within the scope of the proposals our members consider there is the potential for similar difficulties. There is no indication in the Consultation Paper of whether there has been any consideration given to taking a risk-based approach to the entities to which the proposals apply. The reforms are noted to be 'a key element of the Government's commitment to ensuring multinational enterprises pay a fairer share of tax'. A preferable approach may be to carry out analysis with assistance from the ATO to identify entities of particular concern and focus on these entities with more targeted proposals in the first instance.

The Consultation Paper states that future phases of the proposals will involve the centralisation of information on individually maintained beneficial ownership registers in a single public register. The Modernising Business Registers (MBR) Project involving the consolidation and modernisation of 34 ASIC registers and the Australian Business Register into a single register under the ATO Australian Business Registry Services (ABRS) is currently in progress. The design for the new register is under way although the release of the companies' register is now delayed. Given that the Project to create the ABRS is now in progress we consider it would make sense to consolidate these two initiatives rather than embarking on an additional stream of work. Governance Institute has been actively involved in the Business Advisory Group for the MBR Project. We recommend consultation with the MBR Project Team to better understand the potential issues and complexities involved in creating a single register of beneficial ownership and how the two workstreams might be consolidated.

Governance Institute recommends:

- giving consideration to a risk-based approach to the scope of the proposals with the benefit of assistance from the ATO to identify entities of particular concern and focusing on these entities with more targeted proposals in the first instance, and
- any form of public beneficial ownership register involve consolidation of the central register contemplated under the proposals with the ABRS, and
- consultation with the MBR Project Team to better understand the potential issues and complexities involved in creating a single register of beneficial ownership.

Current beneficial ownership disclosure provisions

Our members consider that the current regime for reporting beneficial ownership information known as the 'substantial shareholder notice' (SSN) regime, is not working as intended and report the following difficulties:

- information provided to listed entities about beneficial ownership can be inaccurate and sometimes out of date
- section 671B (2) of the Corporations Act requires substantial holders to notify an entity if there is a movement of at least one per cent in their holding from the percentage last disclosed. In our members' experience these notifications sometimes do not align with the share register of the entity which creates an administrative burden on the entity
- although the Act sets out the information required, in practice no two shareholders provide information in the same format, and it would assist if shareholders were required to provide information in a consistent format
- the quality of information provided to listed entities in SSNs has declined over time, and
- enforcement action in relation to the SSN provisions is rare.

The Consultation Paper contemplates extension of the SSN provisions to unlisted entities on the basis of a 'gaps in regulatory coverage'. As noted above this is a large group of entities. Our members would welcome further information about whether entities or sectors of particular concern have been identified to justify the considerable administrative burden of extending these provisions to such a large group of entities.

Governance Institute recommends:

- information provided under SSNs should be in a consistent format to enable entities to make better use of the information
- increasing enforcement activity in relation to the existing SSN provisions, and
- given the large number of entities affected by the proposals there should be further analysis of whether there are entities or sectors of particular concern.

Definition of beneficial ownership

Governance Institute supports the proposed 20 per cent minimum threshold for registration on a beneficial ownership register on the basis that it is consistent with existing corporate control and takeover thresholds in Australia and would leverage the existing body of guidance and stakeholder understanding.

Entities subject to beneficial ownership disclosure requirements

The Consultation Paper states that the introduction of a public register of beneficial ownership is intended to 'record who ultimately owns, controls, and receives benefits from a company or legal vehicle operating in Australia'. Our members consider there are two particular areas where this objective may not be met by the proposals. The first relates to public unlisted companies and the second to corporate groups.

The most significant type of unlisted public company is a company limited by guarantee (CLG). CLGs are generally charities and not-for-profits and do not have 'owners', rather they have members who will have voting rights but no 'ownership' in the entity and also cannot receive benefits from the entity. Most CLGs are registered as charities with the Australian Charities and Not-for-profits Commission (ACNC). Our members recommend against including CLGs in the proposed regime and strongly recommend consultation with the ACNC about the potential impact on the charitable sector before progressing the proposals further.

Our members also consider that the objective of identifying ownership, control and the receipt of benefits is not met when considering the proposed approach in the context of a corporate group. For example, in most groups, group companies are ultimately owned and controlled by the ultimate parent company, but this is not what would be displayed on the individual 'regulated entities' registers. Rather, the registers would simply disclose the immediate parent, and then the immediate parent's beneficial ownership register would disclose their immediate parent and all the way up to the ultimate parent company. Our members consider that it will create a substantial administrative burden, for little benefit especially given the immediate shareholder is already on the public record for proprietary companies. In light of the administrative effort involved in the maintenance of these registers, our members consider there should be a carve out to allow controlled entities in a corporate group to simply disclose the ultimate beneficial owner rather than their immediate parent.

Governance Institute recommends:

- against including companies limited by guarantee in the scope of the proposals and strongly recommends consultation with the ACNC about the potential impact on the charitable sector before progressing the proposals further, and
- there should be a carve out to allow controlled entities in a corporate group to simply disclose the ultimate beneficial owner rather than their immediate parent

Recording requirements

Governance Institute supports not introducing a requirement for a regulated entity's register to disclose the beneficial ownership owners of another or any listed entity in its beneficial ownership chain, subject to issues noted above in relation to controlled entities in a corporate group.

Content and availability of beneficial ownership register

As noted above there have been recent European developments around the general public's access to information about beneficial ownership. A review of the Privacy Act 2018 is also under way and is likely to have a significant impact on the current requirements around the disclosure and retention of personally identifiable information. Significantly increased penalties for breaches of the Australian Privacy Principles have also recently been enacted. There is a strong public appetite for stricter privacy requirements and harsher consequences for entities that fail to comply. Any proposals in connection with beneficial ownership registers should take into account the review of the Privacy Act.

Over the last two years there has been an exponential increase in the number of cyber-attacks and most agree it is not a question of whether but when organisations and government agencies are the subject of a cyber-attack. For these reasons our members have significant concerns about some aspects of the proposals relating to the disclosure of information which can identify individuals.

For some years Governance Institute has advocated that directors' and other officers' personal details, particularly dates of birth and residential addresses should not be publicly available.² We note that one of the fields identified for public disclosure of information relating to natural persons is month and year of birth. This is on the basis that the UK register publishes this information. The UK legislation pre-dates the current heightened level of cyber threat. Our members consider that in the current environment public disclosure of these details provides an opportunity for persons with criminal intent. Birthdates have become an increasingly common form of identity check. There is no issue with this information being available to regulated entities, regulators or law enforcement agencies but it should not be publicly available.

One of the issues canvassed in the Consultation Paper is how public access to regulated entities' registers should be facilitated. Our members consider the information should be available on request in a similar manner to requests for access to share registers. Regulated entities should not have to publish registers on their websites.

The Consultation Paper also proposes exemption of beneficial owners' residential addresses from public disclosure based on an application for this exemption. Residential addresses would still be available to government authorities. The Paper refers to one of the grounds on which such an exemption could be sought, being the production of a domestic violence order. Our members consider this information should not be publicly available in the first instance and beneficial owners should not have to go through the process of demonstrating they are at a greater risk than other individuals. In an environment of heightened cyber risk beneficial owners should not have to take additional steps to have their residential addresses withheld from a public register.

² See for example Governance Institute's [submission](#) *Corporations (Director Identification Numbers - Transitional Application Period) Instrument 2021 Corporations (Aboriginal and Torres Strait Islander) (Transitional) Director Identification Number Extended Application Period 2021 Corporations (Transitional) Director Identification Number Extended Application Period 2021 (Instruments)*, 16 April 2021.

Governance Institute:

- **recommends** any proposals in connection with beneficial ownership registers should take into account the review of the Privacy Act
- **opposes** the inclusion of both month and year of birth in the information publicly available on a beneficial ownership register
- **recommends** public access to regulated entities' beneficial ownership registers be available on request in a similar manner to requests for access to share registers. Regulated entities should not have to publish registers on their websites, and
- **opposes** public disclosure of beneficial owners' residential addresses and requiring beneficial owners to apply for an exemption from public disclosure. This information should not be publicly available.

Accuracy and currency of beneficial ownership registers

While our members acknowledge it is important that information included on a beneficial ownership register is accurate, they consider extending a requirement to identify individuals to a broad group of entities unfamiliar with processes such as KYC to be problematic. Any requirements to verify the identity of beneficial owners should take into account privacy and data security risks associated with the collection and storage of sensitive personal data. As the recent high-profile Medibank and Optus data breaches have illustrated all too clearly retention of personal information represents a significant risk to entities, particularly given the heavy fines.

The Consultation Paper refers to the new director identification number provisions in the Corporations Act as an approach to identity verification. The director ID regime is still in its infancy and director ID numbers are not currently publicly available. Our members caution against relying on the director ID as a viable means of identifying individuals in the short term.

Our members support a principles-based approach to what constitutes regulated entities being reasonably assured of the identity of beneficial owners. Where a beneficial owner is known to the regulated entity creating additional processes to 'verify' the identity of beneficial owners creates an unnecessary burden.

Our members also suggest that it may be preferable to align the proposed time frame for issuing notices to persons identified or suspected to have had a change in control and for updating beneficial ownership registers to the 28-day time frame for notifying ASIC of a transfer of shares.

Governance Institute:

- **recommends** any requirements to verify the identity of beneficial owners should take into account privacy and data security risks associated with the collection and storage of sensitive personal data
- **cautions against** relying on the director ID as a viable means of identifying individuals in the short term
- **supports** a principles-based approach to what constitutes regulated entities being reasonably assured of the identity of beneficial owners
- **recommends** aligning the proposed time frame for issuing notices to persons identified or suspected to have had a change in control and for updating beneficial ownership registers to the 28-day time frame for notifying ASIC of a transfer of shares.

Enforcement and penalties

The proposed enforcement mechanism is to require entities to in effect act as outsourced regulators and to impose penalties to regulated entities, their officers and beneficial owners for non-compliance with the regime. Our members consider that the proposal is likely to create a significant compliance burden, particularly for the large number of small entities which will be caught up by the regime, for no gain that could be connected to the stated policy intent of

ensuring MNEs pay a fairer share of tax. On this basis our members recommend that there be further consideration of the design of the proposed enforcement regime to achieve a result that is more likely to achieve the stated policy intent.

Governance Institute recommends that there be further consideration of the design of the proposed enforcement regime to achieve a result that is more likely to achieve the stated policy intent.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'M. Motto', written in a cursive style.

Megan Motto
CEO