Submission on discussion document: *Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships*

## Your name and organisation

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| **Name** | Henry Brandts-Giesen and Nicholas Beresford |
| **Organisation** | Kensington Swan (the views expressed are personal and not necessarily reflective of the firm's position on all aspects of the discussion) |

## Please select if your submission contains confidential information:

☐I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons for this for consideration by MBIE.

## Responses to discussion document questions

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| 1 | Do you agree with the nature of the problem? Do you have any views on the size of the problem? Do you have any evidence to support these views? |
| | Whilst agreeing in principle with the idea of a beneficial ownership register and its usefulness to law enforcement (please see our further comments at sections 4 – 6 below) we do not necessarily believe it will completely prevent abuse of New Zealand corporate entities. Rather, it should be seen as an additional tool in the armoury of law enforcement agencies. |
| 2 | What do you think are the benefits from increased transparency of beneficial ownership information? |
| | A central register should allow law enforcement agencies to obtain beneficial ownership information instantaneously, without tipping off the subjects of an investigation.<br>We are strongly opposed to public access to beneficial ownership information for the reasons set out at section 5. |
| 3 | Do you have any information on your organisation's current compliance costs to supply or collect beneficial ownership information?<br>Do you think your compliance costs would increase, decrease or stay the same under the different options? Would the change be significant? |
| | Kensington Swan has a limited corporate secretarial practice. We expect that compliance costs would slightly increase if a register of beneficial ownership was introduced. However, following Phase 2 of the AML/CFT regime being implemented, we do not expect the change to have a material impact on our firm. On the other hand the impact on some of our clients could be significant. |
| 4 | What impact do you think the options would have on businesses deciding whether to register as a company or limited partnership? |
| | We consider that options 1 and 2 would have a limited impact on decisions to register as a company or limited partnership where New Zealand residents are involved. As the Discussion |

Document correctly identifies, New Zealand is a nation of small businesses, with over 97% of all firms employing 20 persons or less. It is unlikely small business owners would be dissuaded from incorporating as a result of any of the options set out in the Discussion Document. For many small businesses it will be obvious to the outside world who the beneficial owner is.

The impact is less clear where non-New Zealand residents are involved. Collecting beneficial ownership information of limited partnerships in particular is likely to place New Zealand out of step with other jurisdictions. Given the limited partnership regime was established to attract foreign venture capital to New Zealand, the implications should be carefully considered to ensure New Zealand continues to be seen as an attractive jurisdiction to do business.

We consider that option 3 is likely to have a material and adverse impact on the use of companies and limited partnerships, by non-New Zealand residents in particular. We discuss our concerns with option 3 in the next section.

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| 5 | Do you have any comments on our preliminary assessment of the options? |

We consider that option 1 would meet policy objectives of reducing money laundering, corruption and terrorist financing (which we collectively term "**financial crime**"). The lack of a central register with "on-demand" access only may lead to tipping off criminals. As the Discussion Document states, regulators of reporting entities already have on-demand access to beneficial ownership information under existing legislation.

We have significant concerns regarding option 3. Public access to beneficial ownership registers would constitute a significant change to the New Zealand regulatory landscape, and we are concerned the implications for personal privacy have not been properly considered by MBIE.

Although the majority of companies and limited partnerships are used for business activities, a sizeable minority are used for private family or investment activities. In addition, beneficial ownership registers by their very nature are required to contain sensitive personal information. For these reasons, careful regard needs to be given to personal privacy concerns.

It is helpful to consider international developments in this area. The Discussion Document correctly notes (at Annex 1) that the European Union ("**EU**") has amended the existing 4th Anti-Money Laundering Directive ("**4AMLD**") so that existing registers of beneficial ownership of corporate entities be made freely available to the public. However, this aspect of 4AMLD has been met with significant opposition from stakeholders on the grounds that public access to what is essentially private information infringes basic rights to privacy and data protection contained in the European Convention on Human Rights ("**ECHR**"). The EU's own data protection regulator issued an opinion on 2 February 2017[1] which was highly critical of these aspects of the amendments to 4AMLD.

At an EU level, the argument against public access to beneficial ownership information is, essentially, that public access is a disproportionate measure in the fight against financial crime and is therefore in breach of EU law. In other words, a register available to law enforcement agencies only would provide sufficient tools to combat financial crime and there is no legitimate interest in making what is private information available to the general public.

In a recent development, leading UK law firm Mishcon de Reya has commenced legal proceedings in London claiming that the beneficial ownership reporting aspects of 4AMLD breach the fundamental rights to privacy and data protection enshrined in the ECHR and the

[1] European Data Protection Supervisor Opinion 1/2017.

EU's recently enacted General Data Protection Regulation. Notably, France pre-empted 4AMLD by introducing a public register of trusts and trust-like entities in 2016, only for this to be struck down in its entirety on privacy grounds.[2]

Given the above developments, there is a real possibility that the amendments to 4AMLD allowing public access to the beneficial ownership registers in the EU will be abandoned before the commencement date.

There is no specific statutory right to privacy in New Zealand. However, the Privacy Act and the Privacy Bill (which is currently before Parliament) do set out a number of "**Privacy Principles**". It is doubtful whether public beneficial ownership registers would be fully compliant with the Privacy Principles.

We have a specific concern regarding paragraph 84 of the Discussion Document, which states:

> More broadly than the AML/CFT system, option 3 would also enable other businesses access to the information, which may help with their due diligence processes. **It would give NGOs and journalists access to information to support their investigations, which would further increase transparency.**
>
> (emphasis added)**.**

We consider this statement loses sight of the policy objectives of increased access to beneficial ownership information, which is the fight against financial crime. We do not think there is a legitimate interest in making beneficial ownership information available to the NGOs, journalists and the wider public in addition to law enforcement agencies. Law enforcement agencies are clearly best placed to detect and investigate financial crime.

Media stories on an individual's wealth may sell newspapers but, in our view, the legitimate public interest absent any wrongdoing is low. The public interest in such stories certainly should not outweigh the rights to privacy of the individual concerned.

To summarise, we consider that option 3 is disproportionate, does more than is necessary to combat financial crime, and risks infringing rights to personal privacy.

| 6 | What is your preferred option? |
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Option 1.

In the alternative, option 1 for AML/CFT reporting entities and option 2 for non-reporting entities. We consider that this approach would provide law enforcement agencies with sufficient tools to detect and investigate financial crime in a robust and timely fashion, whilst still preserving the right to individual privacy.

| 7 | What are your views on who should be captured as a beneficial owner of a corporate entity? |
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We are broadly in agreement with aligning the definition of beneficial owner with the current definition for AML/CFT purposes.

Further consideration should be given to the common situation where a corporate entity is owned by a trustee (such as where a corporate trustee of a family trust is the sole shareholder of a trading company). There is some tension between the two possible approaches:

1. following the UK's example of the Persons of Significant Control Register ("**PSCR**") where, broadly, the persons who control the corporate trustee would be registrable,

[2] Conseil Constitutionnel Décision no.2016-591 QPC du 21 octobre 2016 3/3

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| | along with any other persons who exercise effective control over the trust; and<br>2. following a broader approach such as that contained in 4AMLD, where all parties to the trust are registrable, including the settlors, the corporate trustee, protectors (if any), actual and contingent beneficiaries, and any other persons who exercise effective control over the trust.<br><br>Option 1 would require less disclosure than option 2 and would therefore give a less detailed view of the persons connected to the trust. This may reduce its effectiveness to law enforcement agencies.<br><br>Option 2 provides increased disclosure compared with option 1 and a more detailed picture of the persons who are associated to, and stand to benefit from, the trust.<br><br>However, option 2 would essentially be introducing a beneficial ownership register of all trusts which have an interest in a New Zealand corporate entity. A register of trusts is inconsistent with the Discussion Document and the approach of successive Governments to trust law reform generally. It would also bring a significant number of New Zealand family trusts within the scope of a complex and relatively intrusive reporting regime which is not appropriate in a New Zealand context where trusts are used very differently to other countries and have few (if any) tax advantages. |
| 8 | What information do you think should be collected about beneficial owners? |
| | We are in agreement with the proposals contained in paragraph 111 of the Discussion Document.<br><br>One additional requirement could be to collect the nationality of beneficial owners. This may assist in case of an information request from a foreign law enforcement agency and is a requirement of the UK's PSCR and FATCA. |
| 9 | What information about beneficial owners do you think should not be publicly available, and in what circumstances? |
| | Per sections 5 and 6 above, we do not consider that any beneficial ownership information should be publicly available under any circumstances. |
| 10 | What are your thoughts on the obligations that should be placed on beneficial owners? Do you have any views on how these obligations should be enforced? |
| | We are in agreement with a general requirement for beneficial owners to provide necessary information to the corporate entity on request. We agree that corporate entities should be able to take appropriate steps to ensure compliance, such as delaying an allotment or transfer of shares or restricting voting rights pending the receipt of necessary information.<br><br>Pecuniary penalties could be introduced for beneficial owners who refuse to supply information to the corporate entity. |
| 11 | When do you think corporate entities should update the beneficial ownership information that they hold? |
| | In our view, beneficial owners should be required to report changes in beneficial ownership to the corporate entity. Imposing an obligation on corporate entities to periodically contact beneficial owners may lead to unnecessary compliance costs. |
| 12 | What are your views on the enforcement mechanisms that should be available to the |

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| | Registrar? |
| | Pecuniary penalties should apply to repeated or deliberate non-compliance, with criminal penalties being considered for supplying false information. |
| 13 | Do you think there are any types of corporate entities that should be excluded from the options? |
| | Publicly held companies and entities controlled by the Crown or local government should be exempted. We consider that further specified exemptions for so-called "low-risk" entities may lead to unnecessary complexity relative to the additional compliance burden on such entities. |
| 14 | What are your thoughts on how frequently, and in what circumstances, the registers should be updated? |
| | We consider that corporate entities should be obliged to update the register annually with the Companies Office to align with the requirement to file annual returns. A more regular requirement would in our view lead to excessive compliance costs. An annual filing requirement may mean the register is out of date from time to time. |
| 15 | What are your views on what verification should be undertaken? |
| | We agree with the proposal for a risk-based approach to verification, carried out by the Companies Office. |
| 16 | What are your views on having a unique identification number for beneficial owners? |
| | We consider this requirement adds unnecessary additional complexity to the administration of companies. |
| 17 | Do you have any views on whether any changes are needed to the requirements for company share registers? |
| | We do not consider that any changes to the requirements for company share registers are required, and the existing requirements to maintain share registers should continue to apply. This is primarily because a company's shareholders will not always be the same persons as that company's beneficial owners, and so share registers should continue to be maintained in the normal way.<br><br>Consider the hypothetical example of 123 Limited, which is is 100% owned by ABC Limited as trustee of the ABC Trust. In this case, 123 Limited has a sole shareholder, being ABC Limited. However, depending on the finer details of the end proposals) the beneficial owners of 123 Limited would potentially include:<br>• ABC Limited (as the sole shareholder);<br>• The persons who hold the power to appoint and remove trustees of the ABC Trust;<br>• The protector of the ABC Trust (if any), depending on their powers under the trust deed; and<br>• Any other person with effective control over the ABC Trust. |
| 18 | Are there any other factors that MBIE should consider? |

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| | Not that we can currently identify. |
| 19 | Do you have any thoughts on any additional measures that could be taken to combat the misuse of corporate entities? |
| | Not at this stage. |
| 20 | Are there legitimate purposes for using a nominee director? What would the implications be if nominee directors were expressly prohibited? |
| | There are no legitimate purposes for using a so called nominee director. We consider them to be essentially a legal fiction. On the other hand, properly appointed alternate directors and attorneys have many legitimate purposes in a commercial context. We do not consider nominee directors to pose a material problem. In any case, it would be very difficult to regulate the use of nominee directors. |
| 21 | Do you have any information about problems with companies or limited partnerships on the overseas registers? |
| | These are well documented in the media. |
| 22 | Do you think there should be obligations on companies and limited partnerships on the overseas registers to provide information about their beneficial owners? |
| | It logically follows that entities on the overseas companies register should be required to register their beneficial ownership information. Per our comments above, we consider this information should only be accessible by law enforcement agencies. Each jurisdiction should be entitled to take whatever steps are appropriate to manage the risk of abuse. To do otherwise would be an affront to sovereignty. A global standard is not necessary or appropriate. |
| 23 | Do you have any information about problems related to TCSPs? |
| | No. |
| 24 | Are there any other areas of concern? |
| | Given the sensitive nature of the information contained on any future register, it will be essential for appropriate data protection and cyber-security measures to be maintained by MBIE. There have been several high-profile data breaches in other jurisdictions which has placed individuals at risk of identity theft. |

## Other comments