Discussion paper - *Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships*

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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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

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?
	We agree with the summation of the issue that the existing tools to access beneficial ownership information may be insufficient in themselves to effectively combat the global issue of money-laundering through corporate entities. We agree with the observation that New Zealand is at risk of undermining its reputation of trustworthiness and low rates of corruption if it does not make a concerted effort towards increasing transparency of New Zealand corporate entities. This observation can be substantiated through a comparison with Australia. As noted in the Cabinet paper introducing the proposal to release for public consultation this discussion document, Australia was recently downgraded by the Financial Action Task Force (FATF) from "largely compliant" to "partly compliant" following evaluation of their compliance with the FATF recommendations.[1] This is a concern for New Zealand as both jurisdictions have a similar set of tools for combating money laundering.[2]
2	What do you think are the benefits from increased transparency of beneficial ownership information?
	We agree with the benefits identified in the discussion document.

[1] Cabinet paper at [21].

[2] See the Australian Government's Consultation Paper 'Increasing Transparency of the Beneficial Ownership of Companies' (February 2017) at 2.2 – 2.4.

3	Do you have any information on your organisation's current compliance costs to supply or collect beneficial ownership information? Do you think your compliance costs would increase, decrease or stay the same under the different options? Would the change be significant?
	No comments provided.
4	What impact do you think the options would have on businesses deciding whether to register as a company or limited partnership?
	Our view of the impact on businesses deciding whether to register as a company is largely dependent on the definition of 'beneficial owner' that is adopted (see our response to Question 7 below). This will determine how onerous the disclosure obligations will be for businesses and whether this may negatively impact on the favourability of these business structures. Our view is that any option will have a negative impact on businesses deciding to register as a limited partnership because each option represents a significant departure from the current requirements and standards for limited partnerships. Currently, under section 57(2) of the Limited Partnerships Act 2008 (LP Act), the full name, residential address, date of birth, or place of birth of: • a general partner (if natural person); or • a director, partner or general partner of a general partner (if natural person); or • a limited partner (natural person or not) must not be available to the public. Our view is that, even though limited partnerships have been included in this discussion document, the proposal is ill-suited to a limited partnership. A major concern (as discussed further at Question 7 below) is how 'beneficial owners' will be defined in relation to limited partnerships.
5	Do you have any comments on our preliminary assessment of the options?
	We agree that Option 1 would not materially change the current status quo, for either companies or limited partnerships. It would be difficult to keep track of whether companies are complying with their obligation to identify and record their beneficial owners. It would also not assist in supporting New Zealand's international obligations of combatting money-laundering as the relevant law enforcement agencies would not have ready access to this information. We believe that this Option should not be pursued. If Options 2 and 3 are compared with approaches taken in other jurisdictions, Option 2 is reminiscent of the approach taken in Singapore, Hong Kong, and (for now) the Republic of Ireland. Option 3 is the approach in place in the United Kingdom, and, by the end of 2019, in all Member States of the European Union and the Republic of Ireland.
6	What is your preferred option?
	We prefer either Option 2 or Option 3. Our preference is dependent on whether we are considering companies or limited partnerships.

The identifiable positives of Option 2 are:

- it respects the privacy of the relevant individuals which, depending on the adopted definition of 'beneficial owner' (see our response to Question 7 below), could be a large pool of people whose details were previously not public knowledge;
- it would not significantly affect the attractiveness of setting up a business as a company/limited partnership as the requirements are not too onerous, all things considered; and
- it is likely to be viewed as being compliant with recommendation 24 of the Financial Action Task Force (FATF) in its current form.

The identifiable positives of Option 3 are:

- it appears to be the general international trend to require central public registers, particularly by the end of 2019. Given the expected timeframe for making an amendment of this nature to the Companies Act, it may not come into effect until very near this date and so it would be beneficial, for administrative purposes, to anticipate the trend;
- it could greatly support New Zealand government entities in fulfilling the country's international obligations to assist in combating the global issue of money-laundering;[3]
- it would satisfy the commitment made by New Zealand at the Anti-Corruption Summit in London, 2016 to "exploring the establishment of a public central register of company beneficial ownership information"; and
- it is likely to be viewed as being compliant with recommendation 24 of the FATF in its current form.

For companies, which are already subject to disclosure obligations in relation to directors, shareholders and ultimate holding companies, Option 3 would be preferable. For limited partnerships, we believe that Option 2 is preferable as it is a less drastic change from the status quo than Option 3 would be.

It is suggested in the discussion document that having a central public register of beneficial owners under Option 3 will assist reporting entities in fulfilling their due diligence obligations under the Anti-Money Laundering and Counter Financing of Terrorism Act 2009 (AML/CFT Act). However, it is also noted that reporting entities will "still need to undertake their own verification of the information."[4] Our opinion on this is dependent on the position that the reporting entities' supervisors[5] take on the quality of information available under Option 3. If the supervisors confirm to the reporting entities that they may rely on this information for the purposes of fulfilling their AML/CFT due diligence obligations, a central public register of beneficial owners would be materially beneficial. If reporting entities are required to 'verify' this information through a parallel exercise of determining beneficial ownership, to the same extent as currently required without this information available on a public register, this would not be materially beneficial.

[3] Such as the International Anti-Corruption Coordination Centre (IACC).
[4] Discussion document at [83].
[5] the FMA and Reserve Bank for financial services entities and the Ministry of Internal Affairs for legal entities.

7	What are your views on who should be captured as a beneficial owner of a corporate entity?

Whilst we agree that there ought to be consistency across legislation on the definition of 'beneficial owner' we can foresee considerable issues with adopting the definition from the AML/CFT Act. Under section 5 of the AML/CFT Act, a beneficial owner is an individual who:

- has effective control of the company/limited partnership; or
- on whose behalf a person is acting in a transaction; or
- owns a prescribed threshold of the customer or person on whose behalf a transaction is conducted (being more than 25%).[6]

MBIE's expressed preferred option in the discussion document is Option 3, where companies/limited partnerships disclose the details of their 'beneficial owners' on a public register.

1. Companies

We do not perceive any real practical issues arising from companies identifying the last class of 'beneficial owner' in the AML/CFT Act definition. There exists enough guidance, such as from the Financial Markets Authority (FMA) and in this discussion document, to understand how to calculate if an individual meets the 25% threshold of a 'beneficial owner' of a company/limited partnership.[7]

We have greater difficulty in understanding how a company may be able to consistently identify those individuals who have 'effective control', and are therefore 'beneficial owners' according to the AML/CFT Act's definition. In the FMA's guidance on 'beneficial ownership', an individual may be considered to have 'effective control' if:[8]

- they have the ability to control the company and/or dismiss or appoint those in senior management positions;
- they hold more than 25% of the voting rights in the company;
- they hold senior management positions (such as the CEO); or
- they are trustees (where applicable)

This rather broad definition could result in a great pool of people whose details will become public knowledge which could include their name, usual residential address, and position in/relationship to the company. We would suggest that either very clear guidelines on individuals with 'effective control' be produced when implementing the proposal, or this part of the definition be significantly narrowed in order to make this a feasible disclosure obligation for the company.

'An individual on whose behalf a person is acting in a transaction' is an unworkable definition of a class of beneficial owner in the context of the present proposal. We do not believe that the suggestion is for companies to publicly disclose the personal details of *any* individual that may become involved in a transaction of the company. Rather, we see the disclosure obligation as intended to be limited to persons who are permanently within the company

[6] Regulation 5 of the AML/CFT (Definitions) Regulations 2011.
[7] See for example FMA 'AML/CFT beneficial ownership guideline' (December 2012): ***https://fma.govt.nz/assets/Guidance/121221-beneficial-ownership-guideline.pdf***.
[8] FMA 'AML/CFT beneficial ownership guideline' (December 2012) at [24].

structure. The definition of 'an individual on whose behalf a person is acting in a transaction' works in the context of the AML/CFT Act because reporting entities will typically come into contact with companies on transactional matters. Our opinion is that this part of the definition of 'beneficial owner' from the AML/CFT Act should not be carried over into the proposed amendment of the Companies Act.

2. Limited Partnerships

The issues associated with the definition of 'beneficial owner' are amplified when applied to limited partnerships.

8	What information do you think should be collected about beneficial owners?

With Option 2, where the information on beneficial ownership is not publicly available, we think that the information collected should be consistent with that currently collected about directors and shareholders of a company, or general and limited partners of a limited partnership, when it is first registered, namely full legal name, date of birth, residential address, position/relationship to the corporate entity, and date from which this position/relationship to the corporate entity began. It is optional for a company to provide a contact number, email address, and fax numbers.[9] These details should be sufficient to assist governmental and law enforcement agencies in identifying and tracking down beneficial owners who are subjects of their investigations.

With Option 3, where the information on beneficial ownership is publicly available, we think that the details of beneficial owners available on the register should be limited to their name, their position/relationship to the corporate entity and (possibly) an address for service because (a) there are legitimate privacy concerns for these people; and (b) this would be consistent with the other proposal put forward by the MBIE to remove directors' residential addresses from the companies register.[10] We have said that an address for service should 'possibly' be made public as we are unsure of what grounds such an address may be legitimately required, either by governmental or law enforcement agencies, or by the general public.

We recognise that our suggestion for Option 3 could hamper the capabilities of governmental and law enforcement agencies to collate and use the information on beneficial owners to track suspected money-laundering schemes. We therefore propose a hybrid of our suggestions for the two Options whereby companies should be required to provide the full set of details about beneficial owners on their private register, of which only their name and position/relationship to the corporate entity will be made publicly available. This strikes the best balance between the privacy concerns of beneficial owners and the interests of governmental and law enforcement agencies.

9	What information about beneficial owners do you think should not be publicly available, and in what circumstances?

As per our response to Question 8 above, we think that beneficial owners' residential

[9] ***https://companies-register.companiesoffice.govt.nz/help-centre/starting-a-company/registering-a-director/***; ***https://companies-register.companiesoffice.govt.nz/help-centre/starting-a-company/registering-a-shareholder/***.

[10] ***www.mbie.govt.nz/info-services/business/business-law/insolvency-law-working-group/report-no-2-voidable-transactions-ponzi-schemes-other-corporate-insolvency-matters.***

	addresses should not be made publicly available, in order to retain consistency with the proposal put forward by the MBIE to remove directors' residential addresses from the companies register. Another detail that is not published currently for directors and shareholders, and therefore should not be for beneficial owners, is date of birth.
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 think that consistency should be maintained with the current approach under the Companies Act to enforcing a company's obligation to provide information to the Companies Register. It is an offence under sections 377 and 379 for an individual to either (a) make, or authorise to make, a false or misleading statement in its application for registration; or (b) falsify entries in the register. The penalty for breach, according to section 373, is either imprisonment for a term not exceeding 5 years or a fine not exceeding $200,000. Further, it is an offence under sections 94B(3) and 159 for an individual to not notify the Registrar of a change in either the ultimate holding company or directors. The penalty for breach, according to section 374, is a fine not exceeding $10,000. We believe that these penalties are sufficiently onerous to be effective in ensuring compliance with a corporate entity's obligation to disclose information about its beneficial owners. We cannot think of any good policy argument for why failing to disclose or making a false disclosure about the details of directors, shareholders or the ultimate holding company should be considered any less egregious than a similar failure in relation to beneficial owners.
11	When do you think corporate entities should update the beneficial ownership information that they hold?
	Annually.
12	What are your views on the enforcement mechanisms that should be available to the Registrar?
	No comments provided.
13	Do you think there are any types of corporate entities that should be excluded from the options?
	We think that listed companies should be excluded from the application of the proposed Options as they are already subject to extensive and comprehensive disclosure obligations on their 'beneficial owners'. Under the Financial Markets Conduct Act 2013 (FMCA), a person who has a 'substantial holding' in listed companies, of 5% or more of the total number of votes attached to voting shares,[11] are required to disclose to the listed issuer and every relevant financial market operator if:[12] • they begin to have a substantial holding in a listed issuer;[13] • there is any change in their substantial holding of more than 1%;[14] • there is any change in the relevant nature of the substantial holding;[15] or

[11] Sections 6 and 274 of the FMCA.
[12] Section 280 – 281 of the FMCA.
[13] Section 276 of the FMCA.
[14] Section 277.

	• they cease to have a substantial holding.[16] An exemption of listed companies would be consistent with other jurisdictions. In the United Kingdom, there is an exemption for listed companies trading on certain 'regulated markets' as they are subject to other transparency rules requiring regular public disclosure of major shareholdings. In Australia, which has similar disclosure obligations to the FMCA in Chapter 6C of the Corporations Act, the suggestion was raised in the Consultation Paper produced by the Government.[17]
14	What are your thoughts on how frequently, and in what circumstances, the registers should be updated?
	As the information is provided to the company.
15	What are your views on what verification should be undertaken?
	Our view is that there should not be a process of verification undertaken, unless if a concern is raised as to compliance.
16	What are your views on having a unique identification number for beneficial owners?
	We acknowledge that this proposal would tie in well with the other proposal to introduce DINs in lieu of publishing directors' residential addresses on the register. We also suggested in our response to Question 8 above that beneficial owners' residential addresses should not be made public in recognition of their privacy interests. A unique identification number for beneficial owners could potentially be the solution to alleviating the concerns about the lack of transparency in our suggestion of limited public information under Option 3 in response to Question 8 above. We note that this unique identification number for beneficial owners would need to be distinct from other identification numbers currently in use, such as the company number and New Zealand Business Identification Number, and those potentially to be introduced, such as DINs and Shareholder Identification Numbers. Otherwise the perceived benefits of having such a number would be hindered.
17	Do you have any views on whether any changes are needed to the requirements for company share registers?
	Our view is that no changes are required for company share registers.
18	Are there any other factors that MBIE should consider?
	We are concerned that there seems to be a lack of discussion of potential issues that may arise as a result of implementing any of the proposed options, and how the Registrar or companies would be expected to resolve these issues. One possible scenario we can envisage is the company directors requesting the required information of beneficial ownership from the company's shareholders but being met with

[15] Section 278.
[16] Section 279.
[17] The Australian Government's Consultation Paper 'Increasing Transparency of the Beneficial Ownership of Companies' (February 2017) at 4.1.

	extreme or flat out resistance from the shareholders to providing such information. We wonder what would be the solution to this situation as: • the directors do not have any powers under the current proposed options to force the shareholders to disclose this information, and • there is no mechanism for the directors to notify the Registrar discreetly, of issues with compliance due to resistance from the shareholders, and • therefore, the company may be held liable for being in breach of its obligations under the Companies Act to provide information on beneficial ownership. We would find such an outcome unduly harsh on companies, and particularly directors, as the ultimate focus of the beneficial owner, who refuses to provide the information, remains untouched. The burden of compliance with this proposal, as it is currently envisaged, may discourage people from becoming a director.
19	Do you have any thoughts on any additional measures that could be taken to combat the misuse of corporate entities?
	No comments to be provided.
20	Are there legitimate purposes for using a nominee director? What would the implications be if nominee directors were expressly prohibited?
	Our opinion is dependent upon what is meant by a 'nominee'. For instance, it is perfectly acceptable for a 'nominee' director to represent the interests of a group of shareholders.
21	Do you have any information about problems with companies or limited partnerships on the overseas registers?
	No comments to be provided.
22	Do you think there should be obligations on companies and limited partnerships on the overseas registers to provide information about their beneficial owners?
	No comments to be provided.
23	Do you have any information about problems related to TCSPs?
	No comments to be provided.
24	Are there any other areas of concern?
	No comments to be provided.

Other comments