

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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Organisation	on behalf of the Office of the Privacy Commissioner

Responses to discussion document questions

Preliminary comments

The Privacy Commissioner has a statutory mandate under section 13 of the Privacy Act 1993 to examine policy proposals that may affect individuals' privacy. Our submission comments broadly on MBIE's expected benefits and the workability of this policy proposal. These matters are relevant as to whether the privacy impacts can be justified.

Our overarching view is that the potential privacy impacts and compliance costs of MBIE's options for beneficial ownership information are disproportionate and unjustified.

We agree with MBIE that people who use corporate entities to conduct their business should do so transparently. However, for the reasons we set out in our submission we are concerned MBIE's proposed disclosure requirements for beneficial ownership information will not address the policy problem. Meanwhile, they will impose unreasonable compliance costs and privacy impacts across the population of corporate entities and the individuals connected to them.

We recommend MBIE and law enforcement agencies investigate how they can use the Registrar's existing powers under sections 365B to 365H of the Companies Act 1993 and 78B to 78H of the Limited Partnerships Act 1998 to effectively obtain information about beneficial ownership and control of companies for law enforcement purposes.

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 have no information beyond that in the discussion document as to the nature of the problem. We note the international context, and agree regulation needs to align internationally to implement shared commitments – as New Zealand has done for the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) regime.

However, MBIE should examine whether international solutions are appropriate in light of the situation in New Zealand. That examination will assist in determining whether MBIE's proposed solution is proportionate.

It is not clear that our corporate entities are being criminally misused to an extent that requires us to take an international lead with exceptionally comprehensive and onerous changes. We note New Zealand is consistently ranked as having the least, or among the least perceived corruption in the world according to Transparency International's Corruption Perception Index.

What do you think are the benefits from increased transparency of beneficial ownership information?

Based on the information available, we think the discussion document overstates the benefits and underestimates the negative impacts of MBIE's options. We recommend MBIE explicitly addresses, as part of its analysis:

- the quality of information it expects to collect on beneficial owners, and how poor quality information may impact the expected benefits
- how effectively the Companies Office can audit the quality of the information and enforce the requirements against entities who do not comply.

MBIE's expected benefits assume accurate and complete information

MBIE expects the benefits from its preferred option (publishing beneficial ownership information on the registers) will include:

- supporting law enforcement agencies to detect, investigate and hold natural people accountable for crime involving New Zealand corporate entities
- deterring criminals from using these entities in the first place
- providing accurate information on beneficial ownership for the economy and general public, and in particular for entities conducting customer due diligence under the AML/CFT Act.

These benefits are based on MBIE's assumption that people who misuse corporate entities will provide good quality information, or will otherwise avoid using an NZ company or limited partnership. High-risk entities with criminal intent are more likely to evade the proposed requirements by providing incomplete or false information.

The requirements will not deter or detect false information and will be difficult to enforce

If the person controlling an entity is motivated to avoid disclosing this fact to the Registrar they will be able to do so under MBIE's options. A person in control will be able to appoint persons other than themselves in any specific role MBIE includes within the definition of beneficial owner.

Further disclosure requirements across the economy will also increase the volume and complexity of information available to the Registrar and the public. We expect this information make it harder for the Registrar to detect useful details. To apply a "needle in haystack" analogy, while the Registrar is looking for the needles – a small number of criminals in the system – disclosure requirements on compliant entities will throw more hay on the haystack.

We expect the requirements will be resource-intensive for the Companies Office to audit and enforce. For example, if an entity does not declare an individual's beneficial ownership that is based on a close family relationship, how will the Companies Office detect this and demonstrate the connection?

MBIE might obtain relevant insights from the Insolvency and Trustee Service and the Companies Office as to how they currently enforce comparable obligations that are based on a relationship to a corporate entity, including:

- the prohibition on bankrupts taking part in the management or control of a business under section 149 of the Insolvency Act 2006
- the prohibition on certain persons taking part in the management of a company under section 382 of the Companies Act.

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?

This proposal would not affect us as we are not a company or limited partnership.

From our experience as a regulatory agency, we recommend MBIE considers the ease (or difficulty) of interpreting the proposed statutory requirements as part of its assessment of compliance costs for corporate entities.

MBIE's proposed definition of beneficial ownership (specifically the "effective control" element) is likely to be difficult for many agencies to interpret when deciding what they need to declare.

Some of the roles MBIE says will be captured, including senior management and family relationships could be subject to frequent change. This would exacerbate compliance costs.

4

What impact do you think the options would have on businesses deciding whether to register as a company or limited partnership?

The impact on people who intend to misuse entities will depend on their attitude to compliance. Criminals may only be deterred if they perceive the Companies Office will detect any false information they provide.

5

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

We set out our overarching view in our preliminary comments to this submission. Our answer to this question focuses on the privacy impacts across the three options.

Information collection under all options

MBIE has assessed the privacy impacts of option 1 (entities holding information and providing it to the Registrar on request) and option 2 (entities providing information to the Registrar without the Registrar making it publicly available) as "about the same as the status quo".

All the options have additional privacy impacts compared to the status quo. They would require entities and the Registrar to collect additional personal information compared to what they currently collect. Under MBIE's options 2 and 3 the Companies Office will collect considerable information about individuals if MBIE's broad definition of beneficial owner applies to all companies and limited partnerships.

For the reasons we provide in our preliminary comments and at question 2, we do not consider this collection would be justified by the policy outcome.

MBIE's preference to make the information publicly available

MBIE has assessed its preferred option 3 (making beneficial ownership information publicly available) as having a privacy impact that is "worse than the status quo". We agree this option would have the most significant impact on individuals' privacy because of the expanded disclosure and use.

MBIE prefers option 3 because public access would provide for public scrutiny and assist reporting entities with their due diligence obligations under the AML/CFT Act. We reiterate our concern that information about high-risk entities may be unreliable. MBIE needs to be sufficiently confident about the quality of this information to justify making it publicly available.

6

What is your preferred option?

We do not support any of MBIE's options 1-3 for the reasons we provide in our preliminary comments and at question 2. While MBIE's option 1 would have the least negative impact,

each option would result in disproportionate privacy impacts and compliance costs across the broader economy.

We consider the Registrar and law enforcement will only obtain reliable information through investigation. We recommend MBIE and law enforcement agencies explore how they can use the Registrar's existing powers under sections 365B to 365H of the Companies Act 1993 and 78B to 78H of the Limited Partnerships Act 1998 to effectively obtain information about beneficial ownership and control of companies for law enforcement purposes.

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

MBIE's policy intention is to identify "the actual people who own or control a corporate entity". MBIE proposes to define beneficial owner as an individual who:

- has "effective control" of an entity, or
- owns more than 25% of the entity.

This definition would align with the definition of beneficial owner in section 5 of the AML/CFT Act. MBIE provides guidance on who could be a beneficial owner under this test, including natural people who:

- a) own more than 25 percent of the corporate entity
- b) hold or control more than 25 percent of the voting rights in a company
- c) control the corporate entity through close family relationships, personal connections or contractual associations
- d) hold senior management positions in the corporate entity and, thereby, exercise control over the daily or regular affairs of the corporate entity
- e) can appoint or remove the corporate entity's directors, general partners or senior managers.

We have no concerns with the legal ownership element of this definition, and note legal owners will often be identifiable from information on the Register. We have a number of comments on the "effective control" element.

Firstly, at question 2 we suggest that if a person in control of an entity wants to avoid identifying themselves, they will be able to appoint people to meet any criteria MBIE proposes and remove themselves one step.

Secondly, the term "effective control" will be difficult to interpret for legitimate entities deciding what they need to declare, especially under MBIE's guidance at (c) and (d). This will increase their compliance costs and could lead to them declaring more information than necessary.

Thirdly, while useful in an investigation context the definition is excessively broad when applied to all entities. Routine collection and publication of employee information under (d) seems particularly unnecessary. Senior managers make decisions and move funds on behalf of their company, but we doubt the majority could be considered to "control" their employer.

Finally, because employment, family and contractual circumstances will be subject to change much of this information will quickly go out of date. This will decrease the accuracy (and therefore the value) of the information and increase compliance costs of keeping it up to date.

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

MBIE proposes that the Companies Office collects beneficial owners':

- Full legal name

- Residential address
- Address for service
- Email address
- Date and place of birth
- Basis on which they are a beneficial owner.

If MBIE proceeds with a general disclosure obligation, the Companies Office should collect the minimum information necessary for it to identify beneficial owners. The Registrar can use their existing information-gathering powers to require further information if necessary.

9

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

We recommend MBIE first considers what should be publicly available by default, including reasons why the public would need to uniquely identify or contact a beneficial owner. MBIE notes that under the status quo for directors and shareholders, this information is publicly available excluding date and place of birth.

MBIE has specifically identified entities conducting due diligence under the AML/CFT Act as one group of users. We note that if these entities are conducting due diligence on their customers, they should have other sources of information available to them. We understand MBIE does not intend for the registers to be those entities' primary source of truth.

MBIE also needs to consider suppression for individuals with specific security concerns. The discussion document notes section 105 of the Domestic Violence Act would be available as a minimum. We recommend MBIE provides for suppression where an individual has security concerns more widely. Section 239 of the Land Transport Act provides a useful example, whereby the Registrar of Motor Vehicles may limit the supply of personal information where that would be likely to prejudice the privacy or personal safety of any person.

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?

MBIE asks what statutory obligations should be on beneficial owners to provide entities they "own" or control with information about themselves.

We consider the disclosure obligations are best placed on the entities themselves. People who are controlling an entity should have sufficient incentives to provide the information required for the entity to comply with its obligations.

11

When do you think corporate entities should update the beneficial ownership information that they hold?

Any agency using beneficial ownership information will need to comply with principle 8 of the Privacy Act. Agencies, including the Companies Office and corporate entities under this proposal, have an obligation to take reasonable steps to ensure individuals' information is accurate, up to date and complete for the purpose they are going to use it for.

To facilitate accuracy of beneficial ownership information the Companies Office would hold and provide to third parties, we recommend entities have ongoing obligations to pro-actively satisfy themselves as to the accuracy of the beneficial ownership information they hold.

12

What are your views on the enforcement mechanisms that should be available to the Registrar?

As we comment in question 2, for this policy to deliver high-quality information and the privacy

impacts to be justified, the Companies Office would need to effectively audit and enforce the requirements.

MBIE notes the Registrar has various existing enforcement tools they could apply to these options. Consistent with our comments at question 2 regarding credible enforcement, we suggest resourcing is as important as the statutory powers available.

13

Do you think there are any types of corporate entities that should be excluded from the options?

MBIE asks whether low-risk entities should be excluded from the options. Its initial view is that the requirements should apply to all entities. Under a risk-based framework it could be difficult for the Companies Office to assess whether an entity was high or low risk without requiring further information.

As we have commented in earlier questions, we consider universal disclosure requirements would be disproportionate and unjustified.

14

What are your thoughts on how frequently, and in what circumstances, the registers should be updated?

Our comments at question 11 are also relevant here. Entities should be required to update their information with the Registrar within a reasonable period after they become aware of a change in their beneficial ownership.

Information on the registers needs to be up-to-date to support MBIE's policy intention for regulators and the public to have access to accurate and complete beneficial ownership details.

15

What are your views on what verification should be undertaken?

MBIE's initial view is that the Companies Office should undertake some proactive verification of the information entities declare. We agree this is necessary to support both the policy objectives and accuracy obligations under the Privacy Act.

16

What are your views on having a unique identification number for beneficial owners?

We do not support a unique identifier for beneficial owners.

Principle 12 of the Privacy Act provides that an agency shall not assign a unique identifier to an individual unless it is necessary to enable the agency to carry out its functions efficiently.

MBIE states in its discussion document that a unique identifier would assist the Companies Office and third parties to verify a beneficial owner's links across various entities. However as MBIE also notes, this would require all beneficial owners to have their identity verified.

Our view is that assigning beneficial owners a unique identification number would be overly complex and disproportionate to their role in the system. Compared to company directors (who MBIE has previously proposed to assign a unique identifier) beneficial owners do not have statutory functions and duties in the companies system.

17

Do you have any views on whether any changes are needed to the requirements for company share registers?

MBIE asks if there should be any change to the requirement for companies to declare their ten largest shareholdings, if beneficial owners are included on the Register. We have no comments to make.

18	Are there any other factors that MBIE should consider?
	We have no further comments to make.
19	Do you have any thoughts on any additional measures that could be taken to combat the misuse of corporate entities?
	We would like to understand in more detail why the Registrar's existing powers to obtain information on beneficial ownership under sections 365B to 365H of the Companies Act are not working. MBIE states agencies have not used these powers.
20	Are there legitimate purposes for using a nominee director? What would the implications be if nominee directors were expressly prohibited?
	We have no comments to make.
21	Do you have any information about problems with companies or limited partnerships on the overseas registers?
	We have no comments to make.
22	Do you think there should be obligations on companies and limited partnerships on the overseas registers to provide information about their beneficial owners?
	We have no comments to make.
23	Do you have any information about problems related to Trust or Company Service Providers?
	We have no comments to make.
24	Are there any other areas of concern?
	We have no further comments to make.