



Financial Action Task Force  
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## **Submission on Revisions to Recommendation 24 20 August 2021**

The Tax Justice Network Australia (TJN-Aus) welcomes this opportunity to make submission on potential amendments to Recommendation 24. TJN-Aus supports the creation of accurate, accessible registries of ultimate beneficial ownership for all companies and trusts. Such registries would greatly assist businesses and entities with a legal anti-money laundering and countering terrorism financing obligation to carry out due diligence. Such registries can reduce the due diligence costs for reporting entities to determine the ultimate beneficial owners of legal entities they are dealing with and assess money laundering and terrorism financing risks. Costs are also saved because multiple reporting entities are not paying for the same due diligence if the beneficial ownership registries are public.

### **1. Should countries be required to apply measures to assess the ML and TF risks to all types of legal persons created in the country and also to at least some foreign-created legal persons and take appropriate steps to manage and mitigate the risks?**

Governments should be required to assess money laundering and terrorism financing risks for all types of legal persons created in their jurisdiction and take steps to curb those risks in the way the entities are permitted to come into existence. They should also be required to take steps to reduce the risks that foreign-created legal persons can be used for money laundering and terrorism financing by placing requirements on such entities if they are to operate within the jurisdiction in question. For example, a foreign legal person might be denied the right to purchase property or enter the financial system if they have not fully disclosed their real owners and controllers.

### **3. (a) What do you see as the key benefits and disadvantages of a BO registry, and (b) what are the alternative approaches to registries, such as BO information held by companies, FIs, and DNFBPs, and their key benefits and disadvantages?**

Beneficial ownership registers make it easier for entities with anti-money laundering obligations to conduct due diligence on the legal entities they are dealing with. However, for such a register to be effective, the people who would act as front owners need to face the prospect of severe penalties for failing to disclose honestly whom they are acting as a front for. Penalties targeted at the ultimate beneficial owner are unlikely to be effective. A person involved in money laundering or the financing of terrorism already faces the risk of severe criminal penalties, so the threat of an additional penalty for failing to disclose their beneficial ownership is unlikely to have any deterrent impact on their criminal activities. The person acting as a front for them is far less likely to have any direct involvement in other criminal activity, so the threat of a serious penalty for failing to disclose the ultimate beneficial owner is likely to act as a deterrent.

The World Bank pointed out in 2011 that in one jurisdiction that they did not name, customers of financial institutions are required to complete a written declaration of the

identity and details of the beneficial owner(s) – a requirement pursuant to an agreement between the jurisdiction's bankers association and signatory banks. The form is signed and dated by the contracting party and includes a statement that it is a criminal offence (document forgery) to provide false information on the form, with a penalty of up to five years imprisonment or a fine. Banks in other jurisdictions have adopted the form approach, even when not required by law or regulation. In the jurisdiction where the form is used, the prosecuting authority has prosecuted cases of forgery (that is, falsely establishing in a written document a fact with the legal application or what is referred to as an 'intellectual lie').<sup>1</sup>

The World Bank argued that the written declaration of beneficial ownership is a valuable tool for several reasons. First, it assists in focusing on identifying the beneficial owner at the outset, not only for the bank officials but also for the contracting party. It provides the background information that will assist the bank with verification and determine if the beneficial owner(s) is a Politically Exposed Person (PEP). It assists regulatory authorities in evaluating beneficial ownership practices and enables better oversight of how banks are handling beneficial ownership issues. Finally, the requirement to sign under penalty of a criminal offence and, where appropriate, the additional consequences of non-conviction based or criminal forfeiture serves to alert the contracting party to the seriousness and importance of the information and therefore acts as a deterrent. It may not deter someone already engaged in serious criminal activity but for intermediaries and others (including family and close associates) who act as the contracting party.<sup>2</sup>

As an example of the benefits of a public register of beneficial ownership, Global Witness pointed out that after the UK Persons of Significant Control register was extended to cover Scottish Limited Partnerships (SLPs) in June 2017, the rate of SLP incorporation dropped to its lowest level for seven years. The incorporation rate dropped by 80% in the last quarter of 2017 compared to the peak at the end of 2015. SLPs had become notorious for their association with corruption, organised crime and tax evasion and were highly attractive as vehicles for criminals.<sup>3</sup>

There is plenty of examples of criminals using shell companies with concealed ownership to carry out money laundering activities.

The World Bank and UN Office on Drugs and Crime (UNODC) have previously conducted research showing how shell companies with concealed ownership are used to facilitate a range of criminal activity. They published a report reviewing some 150 cases of corruption where the money from laundered. In the majority of cases:<sup>4</sup>

- A corporate vehicle (usually a shell company) was misused to hide the money trail;
- The corporate vehicle in question was a company or corporation;
- The proceeds and instruments of corruption consisted of funds in a bank account; and
- When ownership information was available, the corporate vehicle in question was established or managed by a professional intermediary to conceal the real ownership.

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<sup>1</sup> Theodore Greenberg, Larissa Gray, Delphine Schantz, Michael Latham and Carolin Gardner, 'Stolen Asset Recovery. Politically Exposed Persons. A policy paper on strengthening preventative measures', The World Bank, 2009, p. 37.

<sup>2</sup> Theodore Greenberg, Larissa Gray, Delphine Schantz, Michael Latham and Carolin Gardner, 'Stolen Asset Recovery. Politically Exposed Persons. A policy paper on strengthening preventative measures', The World Bank, 2009, p. 37.

<sup>3</sup> Global Witness, 'The Companies We Keep', July 2018, 10.

<sup>4</sup> Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 2.

In two-thirds of the cases, some form of surrogate, in ownership or management, was used to increase the opacity of the arrangement.<sup>5</sup> In half the cases where a company was used to hide the proceeds of corruption, the company was a shell company.<sup>6</sup> One in seven of the companies misused were operational companies, that is, 'front companies'.<sup>7</sup>

As an example of a specific case, there is the case of Liberty Reserve. In this case, US authorities sought to seize the assets in three Westpac accounts held by Technocash Ltd, holding up to \$36.9 million.<sup>8</sup> Technocash Limited was an Australian registered company. The funds were allegedly connected to shell companies ultimately owned by the defendants in the case.<sup>9</sup> According to the case filed by the US Attorney for the Southern District of New York, Liberty Reserve SA operated one of the world's most widely used digital currencies. Through its website, the Costa Rican company provided its users with what it described as "instant, real-time currency for international commerce", which could be used to "send and receive payments from anyone, anywhere on the globe". The US authorities allege that people behind Liberty Reserve:<sup>10</sup>

*...intentionally created, structured, and operated Liberty Reserve as a criminal business venture, one designed to help criminals conduct illegal transactions and launder the proceeds of their crimes. Liberty Reserve was designed to attract and maintain a customer base of criminals by, among other things, enabling users to conduct anonymous and untraceable financial transactions.*

*Liberty Reserve emerged as one of the principal means by which cyber-criminals worldwide distributed, stored and laundered the proceeds of their illegal activity. Indeed, Liberty Reserve became a financial hub of the cyber-crime world, facilitating a broad range of online criminal activity, including credit card fraud, identity theft, investment fraud, computer hacking, child pornography, and narcotics trafficking. Virtually all of Liberty Reserve's business derived from suspected criminal activity.*

*The scope of Liberty Reserve's criminal operations was staggering. Estimated to have had more than one million users worldwide, with more than 200,000 users in the United States, Liberty Reserve processed more than 12 million financial transactions annually, with a combined value of more than \$1.4 billion. Overall, from 2006 to May 2013, Liberty Reserve processed an estimated 55 million separate financial transactions and is believed to have laundered more than \$6 billion in criminal proceeds.*

US authorities further alleged that for an additional "privacy fee" of 75 cents per transaction, a user could hide their own Liberty Reserve account number when transferring funds, effectively making the transfer completely untraceable, even within Liberty Reserve's already opaque system.<sup>11</sup>

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<sup>5</sup> Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 58.

<sup>6</sup> Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 34.

<sup>7</sup> Emile van der Does de Willebois, Emily M Halter, Robert A Harrison, Ji Won Park and J. C. Sharman, 'The Puppet Masters', The World Bank, 2011, p. 39.

<sup>8</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 29, 43.

<sup>9</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 21.

<sup>10</sup> US Attorney for the Southern District of New York, 13 Civ 3565, 28 May 2013, pp. 4-5.

<sup>11</sup> US Attorney for the Southern District of New York, 13 Civ 3565, 28 May 2013, p. 6.

US authorities alleged defendant Arthur Budovsky used Technocash to receive funds from exchangers. Mr Budovsky, the alleged principal founder of Liberty Reserve,<sup>12</sup> allegedly used his bank to wire funds to Technocash bank accounts held by Westpac.<sup>13</sup> He was also alleged to be the registered agent for Webdata Inc, which held an account with SunTrust. Technocash records allegedly showed deposits into the SunTrust account from Technocash accounts associated with Liberty Reserve between April 2010 and November 2012 of more than \$300,000.<sup>14</sup>

Arthur Budovsky was allegedly listed as the president for Worldwide E-commerce Business Sociedad Anonima (WEBSA) and defendant Maxim Chukharev as the secretary. Maxim Chukharev was alleged to have helped design and maintain Liberty Reserve's technological infrastructure.<sup>15</sup> WEBSA allegedly served to provide information technology support services to Liberty Reserve and serve as a vehicle for distributing Liberty Reserve profits to Liberty Reserve principals and employees.<sup>16</sup> It was alleged that bank records showed that from July 2010 to January 2013, the WEBSA account in Costa Rica received more than \$590,000 from accounts at Technocash associated with Liberty Reserve.<sup>17</sup>

It was alleged that Arthur Budovsky was the president of Grupo Lulu Limitada, allegedly used to transfer and disguise Liberty Reserve Funds.<sup>18</sup> Records from Technocash allegedly indicate that from August 2011 to November 2011, a Costa Rican bank account held by Grupo Lulu received more than \$83,000 from accounts at Technocash associated with Liberty Reserve.<sup>19</sup>

Further, defendant Azzeddine El Amine, manager of Liberty Reserve's financial accounts,<sup>20</sup> was the Technocash account holder for Swiftexchanger. It was alleged e-mails showed that exchangers wishing to purchase Liberty Reserve currency wired funds to Swiftexchanger. When Swiftexchanger received funds in its Technocash account, an e-mail alert was sent to El Amine, notifying him of the transfer. Based on these alerts, it is alleged that between 12 June 2012 and 1 May 2013, exchangers doing business with Liberty Reserve send approximately \$36,919,884 to accounts held by Technocash at Westpac.<sup>21</sup>

The defendants were alleged to have used Technocash services to transfer funds to nine Liberty Reserve controlled accounts in Cyprus.<sup>22</sup>

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<sup>12</sup> US Department of Justice, 'One of the World's Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged \$6 Billion Money Laundering Scheme', 28 May 2013.

<sup>13</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 29.

<sup>14</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

<sup>15</sup> US Department of Justice, 'One of the World's Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged \$6 Billion Money Laundering Scheme', 28 May 2013.

<sup>16</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 37.

<sup>17</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

<sup>17</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 38.

<sup>18</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

<sup>18</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 40.

<sup>19</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 36.

<sup>19</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 41.

<sup>20</sup> US Department of Justice, 'One of the World's Largest Digital Currency Companies and Seven of Its Principals and Employees Charged in Manhattan Federal Court and Running Alleged \$6 Billion Money Laundering Scheme', 28 May 2013.

<sup>21</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 30.

<sup>22</sup> USA vs Liberty Reserve, US District Court, Southern District of New York, 13 CRIM368, para 31.

Arthur Budovsky was sentenced to 20 years in prison for the offences related to Liberty Reserve in May 2016. The court noted that his crimes caused “widespread harm” and led to “countless victims of fraud around the world”. Maxim Chukharev pled guilty and was sentenced to three years in prison.<sup>23</sup> Azzeddine El Amine pled guilty and was sentenced in May 2016 to time served.<sup>24</sup>

Technocash Limited was reported to have been forced out of business in Australia following the action by US authorities when it was denied the ability to establish accounts in Australia by financial institutions.<sup>25</sup> Technocash stated that it “complied with Australia’s comprehensive AML regime, verified customers and has an AFSL licence since 2003. Technocash denied any wrong doing.”<sup>26</sup>

A beneficial ownership register may have assisted Westpac and Technocash detect the suspicious source of the funds they ultimately dealt with through the shell companies owned by the people running Liberty Reserve.

*The Age* reported in October 2020 of an Australian lawyer that advises clients to use Seychelles' private foundations to conceal the actual ownership of companies and conceal activities from law enforcement agencies. He was quoted as advising, "In the event of a lawsuit or tax investigation or regulatory inquiry, your client can swear under oath, 'I am not the legal or beneficial owner of this company', which could be the difference between being charged with/ jailed for tax evasion and walking away a free man."<sup>27</sup>

Publicly listed companies have not been above involvement with subsidiaries with hidden ownership to engage in serious criminal activity. For example, Alcoa, the world's third-largest aluminium producer, used anonymous companies formed in the British Virgin Islands to transfer millions of dollars in bribe payments to Bahraini officials to secure a supply deal.<sup>28</sup>

Alcoa and a joint venture it controlled agreed to pay US\$384 million to resolve charges of bribing officials of a Bahraini state-controlled aluminium smelter, marking one of the largest US anti-corruption settlements of its kind.<sup>29</sup> The payment was to settle criminal and civil allegations that two of the joint venture's subsidiaries bribed officials for years so they could

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<sup>23</sup> US Attorney’s Office, Southern District of New York, ‘Liberty Reserve Founder Arthur Budovsky Sentenced In Manhattan Federal Court To 20 Years For Laundering Hundreds OF Millions Of Dollars Through His Global Digital Currency Business’, 6 May 2016, <https://www.justice.gov/usao-sdny/pr/liberty-reserve-founder-arthur-budovsky-sentenced-manhattan-federal-court-20-years>

<sup>24</sup> Nate Raymond and Brendan Pierson, 'Digital currency firm co-founder gets ten years in prison in US Case', Reuters, 14 May 2016, <https://www.reuters.com/article/us-usa-cyber-libertyreserve-idUSKCN0Y42A2>

<sup>25</sup> Technocash, ‘Opportunity: Own the Technocash Payment Platform’, Media Release, 5 July 2013.

<sup>26</sup> <http://www.technocash.com/pages/press-release.cfm>

<sup>27</sup> Nick McKenzie, Charlotte Grieve and Joel Tozer, 'Lawyer who built a booming practise on finding loopholes', *The Age*, 20 October 2020.

<sup>28</sup> Murray Worthy, ‘The UK’s Tax Havens: Top 10 Corruption Cases involving anonymous companies’, Global Witness, 21 February 2017; and US Securities and Exchange Commission, ‘SEC charges Alcoa with FCPA violations’, 9 January 2014, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936>

<sup>29</sup> Allison Martell, ‘Alcoa to pay \$384 million to settle Bahrain bribery charges’, *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

supply raw materials to Aluminum Bahrain or Alba.<sup>30</sup> Alcoa's mining operations in Australia were the source of the alumina that Alcoa supplied to Alba.<sup>31</sup>

Alcoa failed to maintain adequate internal controls to prevent or detect more than US\$110 million in improper payments funnelled to Alba through a consultant between 1989 and 2009, according to the US Securities and Exchange Commission (SEC), which brought civil charges under the *Foreign Corrupt Practices Act*. In the words of the SEC:<sup>32</sup>

*An SEC investigation found that more than \$110 million in corrupt payments were made to Bahraini officials with influence over contract negotiations between Alcoa and a major government-operated aluminium plant. Alcoa's subsidiaries used a London-based consultant with connections to Bahrain's royal family as an intermediary to negotiate with government officials and funnel the illicit payments to retain Alcoa's business as a supplier to the plant. Alcoa lacked sufficient internal controls to prevent and detect the bribes, which were improperly recorded in Alcoa's books and records as legitimate commissions or sales to a distributor.*

The Department of Justice brought criminal charges under the same law.<sup>33</sup>

The US SEC said Alcoa's subsidiaries used a London-based consultant to funnel the payments to officials. The subsidiaries cited by the US SEC were Alcoa World Alumina and Alcoa of Australia, both of which were parts of the joint venture.<sup>34</sup> The SEC stated:<sup>35</sup>

*According to the SEC's order, Alcoa's Australian subsidiary retained a consultant to assist in negotiations for long-term alumina supply agreements with Alba and Bahraini government officials. A manager at the subsidiary described the consultant as "well versed in the normal ways of Middle East business" and one who "will keep the various stakeholders in the Alba smelter happy..." Despite the red flags inherent in this arrangement, Alcoa's subsidiary inserted the intermediary into the Alba sales supply chain, and the consultant generated the funds needed to pay bribes to Bahraini officials. Money used for the bribes came from the commissions that Alcoa's subsidiary paid to the consultant, as well as price markups the consultant made between the purchase price of the product from Alcoa and the sale price to Alba.*

The Department of Justice's settlement was with Alcoa World Alumina LLC, a joint venture with Australia's Alumina Ltd. The venture, 60 percent-owned by Alcoa, agreed to plead guilty

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<sup>30</sup> Allison Martell, 'Alcoa to pay \$384 million to settle Bahrain bribery charges', *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

<sup>31</sup> US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936>

<sup>32</sup> US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936>

<sup>33</sup> Allison Martell, 'Alcoa to pay \$384 million to settle Bahrain bribery charges', *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

<sup>34</sup> Allison Martell, 'Alcoa to pay \$384 million to settle Bahrain bribery charges', *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

<sup>35</sup> US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936>

to a single count of violating the *Foreign Corrupt Practices Act* and pay US\$223 million in five instalments over four years.<sup>36</sup>

Alcoa was listed on the ASX as of 15 June 2000 and removed itself from the ASX listing in 2016.<sup>37</sup>

**4. What are the key attributes and role regulators play in ensuring that a BO registry has adequate, accurate and up-to-date BO information available for competent authorities? Does this make a difference if BO information is held by a BO registry and alternative approaches to registries (e.g. BO information held by companies, FIs, and DNFBPs)?**

Regulators need sufficient powers to be able to require beneficial ownership information to be provided. In addition, there need to be sufficient consequences when beneficial ownership information is not provided. For example, if the regulator of a corporate registry is unable to establish the ultimate beneficial ownership of a company seeking to be registered, it should deny registration to that company.

The experience with the UK Persons of Significant Control (PSC) register is that only 2% of companies reported struggling to identify a beneficial owner or collect the right information.<sup>38</sup>

The register needs to collect unique identifiers of beneficial owners in the database so that an individual can be clearly identified and all their beneficial ownership holdings known. In the UK company database, company director records are connected between multiple companies to quickly see if one individual is a director of more than one company. Member organisations of TJN-Aus have had the experience of being unclear if the same person is the director of multiple companies due to slight variations in name and place of birth on the Australian business registry. The lack of unique identifiers (in the absence of a full date of birth) in the UK PSC register also makes it hard to compare the data against other data sets.

In the case of a public beneficial ownership register, it should include present given and family name, residential address, all former given and family names and the date and place of birth. Such information has been available on the Australian business registry for company directors.

Regulators will need sufficient resources to follow up with legal entities that fail to report beneficial ownership. In 2018, Global Witness reported that 13% of companies covered by the UK PSC register had failed to report their beneficial ownership.<sup>39</sup> At the time, the non-compliant companies were disproportionately the high-risk Scottish Limited Partnerships.<sup>40</sup>

TJN-Aus favours beneficial ownership being defined by several tests, as is the case with the UK register, using a person who meets one or more of the following conditions:

- Directly or indirectly holding more than 5% of shares in the company;
- Directly or indirectly holding more than 5% of the voting rights in the company;
- Directly or indirectly holding the right to appoint or remove a majority of the directors of the company;

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<sup>36</sup> Allison Martell, 'Alcoa to pay \$384 million to settle Bahrain bribery charges', *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

<sup>37</sup> <http://www.aspecthuntley.com.au/asxdata/20160913/pdf/01778365.pdf>

<sup>38</sup> Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCA Coalition, 22 November 2016.

<sup>39</sup> Global Witness, 'The Companies We Keep', July 2018, 11.

<sup>40</sup> Global Witness, 'The Companies We Keep', July 2018, 12-13.

- Has the right to exercise, or actually exercises, significant influence or control over the company; and/or
- Where a trust or firm would satisfy one of the first four conditions if it were an individual, any individual holding the right to exercise, or actually exercising, significant influence or control over the activities of that trust or firm.

TJN-Aus favours a lower threshold than the UK 25% ownership of shares or voting rights. Though some international definitions stipulate a beneficial owner as a natural person who possesses more than 25% of company shares, this is by no means the only definition (the banking industry often uses a definition of 10% as does the US FACTA Act, which requires foreign financial institutions to provide information on US taxpayers to the US authorities). TJN-Aus favours a 5% or lower threshold to be used. Corruption often flourishes through shareholdings of smaller stakes, as these entities draw less attention to themselves. TJN-Aus notes that for listed companies in Australia, 'substantial holding' provisions already require disclosures of persons or their associates who hold a relevant interest in 5% or more of the total number of votes attached to voting shares in the company.

There is a danger that by using a high threshold, the process will fail to reveal many beneficial owners and will result in only cursory information that will be of limited benefit. As a result, fewer actual owners will be identified, allowing the identities of those involved in potentially corrupt and criminal behaviour to remain hidden. A lower threshold will help prevent this.

In the case of the UK PSC register, 8.7% of 1.3 million companies that had provided information for the register as of November 2016 stated they had no beneficial owners meeting the criteria for disclosure<sup>41</sup>, which shows the problem of having a high threshold of ownership or control before disclosure needs to be made. Global Witness reported in a subsequent analysis of the PSC register in July 2018 that there were 335,000 companies that were able not to have to declare any beneficial owners.<sup>42</sup>

Global Witness has provided the following examples of where less than 25% ownership or control would have raised red flags:<sup>43</sup>

1. In Azerbaijan, a gold mine was awarded to a UK company that allegedly involved the daughters and wife of Azeri President Ilham Aliyev. They ultimately owned 11% of the company.
2. In Zimbabwe, a diamond mining concession was allocated to a company called Mbada. Under 25% of Mbada was passed to a third party, Transfrontier, which has an opaque company structure based in secrecy jurisdictions and tax havens. The beneficial owners of Transfrontier are unknown.
3. A US company, Cobalt International Energy, formed joint ventures in Angola with two companies, Nazaki Oil and Gas and Alper. Nazaki initially held 30%, later dropping to 15%. Alper held 10%. Nazaki was found to be owned by Angolan Vice President Vicente, Director of the National Reconstruction Office General Kopelipa and his advisor General Dino. Alper's ownership is also suspected to include officials. Cobalt was under a US *Foreign Corrupt Practices Act* investigation as a result but revealed that the US Department of Justice informed it that the investigation had been closed without any regulatory action in February 2017.<sup>44</sup>

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<sup>41</sup> Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCA Coalition, 22 November 2016.

<sup>42</sup> Global Witness, 'The Companies We Keep', July 2018, i.

<sup>43</sup> Global Witness, 'Assessment of EITI Beneficial Ownership pilots', March 2015, p. 7.

<sup>44</sup> <http://www.cobaltintl.com/newsroom/cobalt-announces-closing-of-doj-investigation>

4. Statoil's deals in Angola have also been under considerable scrutiny. In July 2005, Norsk Hydro (a company that later merged with Statoil) was awarded a 20% share in an oil licence in Angola. Two 15% slices were awarded to two Angolan private companies, Somoil and Angola Consultancy Resources. At the time, Norsk Hydro was "concerned about partnering with a company whose owners are unknown" but went ahead with the deal anyway.
5. In 2005, a subsidiary of Swiss corporation Weatherford entered into a joint venture in Angola with two local entities. The joint venture was split 45/45/10, with the 10% share held by "the relative of an Angolan Minister."

In the public disclosure of beneficial ownership under the Extractive Industries Transparency Initiative (EITI), Honduras, Liberia, Tajikistan, and the Kyrgyzstan Republic have all adopted a 5% ownership threshold for the disclosure of beneficial ownership.<sup>45</sup>

Liberia initially decided on a 10% threshold, but this has since been lowered to 5% for companies involved in Agriculture, Mining and Oil (the threshold of 10% remains for other companies). An additional point of disclosure has also been added to the Liberian process – that if no single shareholder holds over the relevant threshold (5% or 10%, depending on the sector), then the top five shareholders by percentage must be revealed. This is a valuable addition to the beneficial owner definition. It is perhaps worth considering whether it would be better for the EITI to have a standard definition of beneficial ownership with a fixed percentage for all countries to use. This would end possible confusion and allow for better data comparison and analysis.

Nigeria decided to remove the concept of thresholds, arguing that all people who benefit should be revealed.

We strongly believe that beneficial ownership should be contained in a central registry operated by a government-run regulator. Company based registers would be clumsy and deny law enforcement effective investigative capabilities. For example, a law enforcement agency detects that an individual is acting as a front for a terrorist organisation in one company. The law enforcement agency wishes to investigate if the same person has beneficial ownership in other companies. In the case of individual company based registers, the law enforcement agency would be required to make that request to every company individually to check this information. In a central searchable register, the law enforcement agency could do a simple search on the person and immediately identify any additional beneficial ownership the person has.

A searchable central register accessible to law enforcement bodies and regulators provides a valuable law enforcement tool. For example, it would allow a regulator to search and determine the extent of beneficial ownership of anyone suspected of criminal activity. It would mean if a person is added to the Interpol wanted list<sup>46</sup>, it will be possible for law enforcement agencies to search and see if the person has any beneficial ownership in their jurisdiction. It would allow regulators to identify people acting as professional nominees by being front owners in tens of companies.

## **5. How should the accuracy of BO information disclosed to the BO Registry be confirmed?**

The use of sufficient sanctions against false disclosures is likely to increase the accuracy of beneficial ownership information disclosed. However, such sanctions need to be backed up by the regulator collecting the information having sufficient investigative resources to identify

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<sup>45</sup> Global Witness, 'Assessment of EITI Beneficial Ownership pilots', March 2015, p. 8.

<sup>46</sup> <https://www.interpol.int/notice/search/wanted>

and sanction a reasonable portion of those attempting to provide false information. The risk of detection of the provision of false information is far more critical in deterrence than the size of the penalty.

Criminological research has demonstrated that increasing penalties alone cannot substitute the need to resource the law enforcement body properly. Some of the criminological literature points to the ability to get away with criminal activity as a far more important determinant of such activity than the level of penalty that may result if there is a successful prosecution. There is also a critique of the regulatory pyramid in that its graduated or accommodative response may not be suitable or effective where inspections and audits are infrequent.<sup>47</sup>

Accurate cost-benefit assessments are rarely feasible for those engaged in financial crimes. Also, those involved in financial crime often pay little attention to penalty information, and they frequently underestimate their chances of getting caught.<sup>48</sup>

The criminological literature finds that perceived certainty of punishment is associated with reduced intended offending.<sup>49</sup> The conclusion is that certainty of apprehension and not the severity of the legal consequences ensuing from apprehension is the more effective deterrent.<sup>50</sup>

## **6. What role should the private sector play, if any, in ensuring that the BO information is adequate, accurate and up-to-date? What lessons should be learned from private sector use of existing registries?**

The regulator managing the central register should be responsible for verifying the information provided to the register, using a risk-based approach to give greater scrutiny to business areas that have a higher risk of using concealed beneficial ownership for criminal activity, such as the extractives sector. Having a system by which companies must make suspicious activity reports about beneficial ownership to the regulator managing the central register would assist the risk-based approach.

Analysis of the UK PSC register by Global Witness in 2016 showed the regulator needed greater verification of the data entered. Almost 3,000 companies as of November 2016 listed their beneficial owner as a company with a secrecy jurisdiction address – something that was not allowed under the rules.<sup>51</sup> Analysis by Global Witness in 2018 found that the problem had not been addressed with at least 7,200 companies declared a foreign company linked to a secrecy jurisdiction as their beneficial owner.<sup>52</sup>

Further, it was found in 2016 that 76 beneficial owners shared the same name and birthday as someone on the US sanctions list, and 267 disqualified directors were listed as beneficial owners. There were also 2,160 beneficial owners with a 2016 date of birth and people who

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<sup>47</sup> Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal*, (2021), 139.

<sup>48</sup> Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal*, (2021), 137.

<sup>49</sup> Daniel S. Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (2013), 201.

<sup>50</sup> Daniel S. Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (2013), 202.

<sup>51</sup> Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCA Coalition, 22 November 2016.

<sup>52</sup> Global Witness, 'The Companies We Keep', July 2018, i.

listed the year 9988 as their date of birth.<sup>53</sup> In 2018, Global Witness found there were still beneficial owners on the PSC register with dates of birth that would mean they were yet to be born.<sup>54</sup>

In their 2018 analysis, Global Witness found 345 companies had a beneficial owner who was a disqualified director. There were also 7,848 companies that shared a beneficial owner, officer or registered postcode with a company suspected of having been involved in money laundering.<sup>55</sup>

In 2018, Global Witness reported that 328 companies in the UK PSC register were part of circular ownership structures, where they appear to control themselves.<sup>56</sup>

As demonstrated by the findings of Global Witness, having a public register will allow third parties to assist the regulator in verifying data, allowing for more cost-effective detection of errors on the register and possible examples of false information being provided to the register.

#### **10. Should BO registries (where they exist) follow a risk-based approach to verifying of BO information?**

Given the volume of legal entities required to disclose beneficial ownership in most jurisdictions, it is unlikely regulators in most jurisdictions will have the resources to check all the beneficial ownership information provided thoroughly. Thus, out of necessity, a risk-based approach by the regulators will be required.

#### **11. How frequently should disclosed BO information be updated or re-confirmed (e.g. annually, within a set period after a change is made)?**

Beneficial ownership information should be required to be re-confirmed annually. In addition, any change in the beneficial ownership of a legal entity should be required to have to be reported within 28 days of the change having occurred.

#### **12. Should access to a BO registry or another mechanism be extended beyond national (AML/CFT) competent authorities (e.g. to AML/CFT obliged entities such as financial institutions and/or DNFBS)?**

As stated above, allowing entities with obligations to conduct know-your-customer activities to address money laundering and terrorism financing risks access to beneficial ownership information would assist them in their task. Further, it means resources are not wasted by multiple reporting entities chasing down the same beneficial ownership information.

Relevant beneficial ownership information should be automatically shared with relevant authorities in other jurisdictions unless there are substantial grounds to believe that the information would be misused to violate the human rights of the beneficial owner. Automatic exchange of information about beneficial ownership will assist in combating the use of companies with concealed ownership to carry out transnational crimes such as tax evasion, money laundering, human trafficking and terrorism. Automatic exchange of information between tax authorities has already seen significant global benefits in recovering funds obtained by tax evasion and in deterring individuals from engaging in cross-border tax evasion. Similar benefits can be expected from the automatic exchange of information on beneficial ownership.

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<sup>53</sup> Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCACoalition, 22 November 2016.

<sup>54</sup> Global Witness, 'The Companies We Keep', July 2018, 13.

<sup>55</sup> Global Witness, 'The Companies We Keep', July 2018, ii.

<sup>56</sup> Global Witness, 'The Companies We Keep', July 2018, ii.

### **13. What measures should be taken to address concerns relating to privacy, security and potential misuse of BO information, arising from access to BO information?**

TJN-Aus does not believe there should be any circumstances in which beneficial ownership should not be disclosed on a register only accessible to legitimate law enforcement authorities.

For a public register of beneficial ownership, it is legitimate for beneficial ownership details not to be placed on the public register where a person or company can prove a genuine, serious risk of violence or intimidation. However, the beneficial ownership details should remain accessible to legitimate law enforcement authorities in such a case. In the case of the UK PSC register, approximately 30 beneficial owners were granted the right to keep their name off the public register due to concerns about their safety as of November 2016.<sup>57</sup> The number had increased to 199 by early 2018, out of 3.6 million companies covered by the PSC register.<sup>58</sup>

However, to highlight that safety risks are often greatly exaggerated by those who benefit from concealed ownership, the Extractive Industries Transparency Initiative reported that in the Democratic Republic of Congo, more than 100 mining companies provided public access to the names, nationality, complete addresses and identity numbers of their beneficial owners. The EITI had, as of the end of November 2016, received no reports of intimidation or other difficulties experienced by the beneficial owners of the companies that had publicly disclosed these details.<sup>59</sup>

### **14. Should issuance of new physical bearer shares without any traceability be prohibited?**

Bearer shares without any traceability are a vehicle to facilitate money laundering and should be prohibited. As an example, in the case of Syed Ziaddin Ali Akbar, the former head of the BCCI Central Treasury from 1982 to 1986, was charged and convicted in October 1988 of laundering drug money at UK Trading House.<sup>60</sup> In an attempt to defeat asset recovery efforts by law enforcement, in January 1989, he used bearer shares in a Vanuatu company to transfer assets to his brother.

### **16. With regard to nominee arrangements, what are the benefits and disadvantages of requesting nominees directors and stakeholders to declare their status? Are there alternative equivalent measures that would offer the same level of transparency?**

Nominee directors can conceal the real controllers of a company, making it harder for entities with anti-money laundering obligations to conduct due diligence to know whom they are really dealing with. The UK Government had previously revealed that 6,150 people acted as directors of more than 20 UK registered companies, with some people being directors in over 1,000 companies, clearly indicating some directors were acting as front people for the ultimate beneficial owners.

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<sup>57</sup> Robert Palmer and Sam Leon, 'What does the UK beneficial ownership data show us?', UNCACoalition, 22 November 2016.

<sup>58</sup> Global Witness, 'The Companies We Keep', July 2018, 11.

<sup>59</sup> Dyveke Rogan, 'Beneficial ownership transparency: what the EITI requires and lessons learnt for the EU', EITI, 30 November 2016.

<sup>60</sup> John Gilkes, 'Open-Ended Intergovernmental Working Group on Asset Recovery. Asset Tracing and Recovery. A case study', 17 December 2010, [http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2010-December-16-17/Presentations/John\\_Gilkes\\_StAR.pdf](http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2010-December-16-17/Presentations/John_Gilkes_StAR.pdf)

Authorities following up with directors to disclose if they are nominee directors may also help detect situations where a person has been made a company director without their knowledge.

As examples of such cases where nominee directors have been used to try and conceal criminal activity in Australia, the Australian Taxation Office (ATO) and the Australian Federal Police obtained the conviction of Philip Northam to six years in prison for tax evasion related offences in 2020. Australian companies were stripped of their assets and left in a position where they were unable to pay their tax debts. Once the company's assets were stripped, new straw directors and shareholders were put in place before the company was wound up. The joint ATO and AFP investigation was able to recover \$4.5 million of lost government revenue from the criminal conduct.<sup>61</sup>

In the case of the Plutus Payroll fraud, the criminals involved set up a significant number of shell companies with straw directors. One of the criminals involved had a full-time role in managing and controlling the straw directors.<sup>62</sup> Plutus issued false invoices to the shell companies and siphoned out the PAYG not paid on behalf of the client companies using its payroll service.<sup>63</sup> To try to escape action by the ATO, the shell companies would be wound up and replaced with a new shell company with a new straw director.<sup>64</sup> It was found that Devyn Hammond would sign off on records in place of the straw directors and impersonate them in e-mails.<sup>65</sup> The scheme allegedly defrauded the Commonwealth Government of \$105 million over three years.<sup>66</sup> As of July 2020, 16 people had been charged concerning the criminal conduct, and five had been sentenced to prison.<sup>67</sup>

Geelong baker Barry Santoro allegedly had his identity stolen and was convicted of corporate offences for companies he did not know he was the director of. He was one of several people, including people who were homeless, who were allegedly used as straw directors to allow the actual beneficial owners of the companies to cheat the tax office and other creditors of more than \$100 million.<sup>68</sup> The alleged scheme involved stripping businesses of their cash and assets to cheat the ATO and other creditors and then phoenixing under a different name. The straw directors were installed to shield the real directors from liquidators, creditors and the Australian Securities and Investments Commission.<sup>69</sup> In the same scheme, Christopher Somogyi, who had been homeless at the time, was fined more than \$6 million through director penalty notices and other fines after his identity was allegedly used without his knowledge as a straw director for several

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<sup>61</sup> ATO, '19-year tax fraud probe ends in jail time for scheme promoter', 17 August 2020, <https://www.ato.gov.au/Media-centre/Media-releases/19-year-tax-fraud-probe-ends-in-jail-time-for-scheme-promoter/>

<sup>62</sup> Cactus Consulting, 'Plutus Payroll Case Study; Significant tax fraud', 26 November 2019.

<sup>63</sup> Cactus Consulting, 'Plutus Payroll Case Study; Significant tax fraud', 26 November 2019.

<sup>64</sup> Cactus Consulting, 'Plutus Payroll Case Study; Significant tax fraud', 26 November 2019; and David Marin-Guzman, 'Architect' of Plutus tax fraud pleads guilty', *The Australian Financial Review*, 26 November 2019.

<sup>65</sup> David Marin-Guzman, 'Fourth Plutus tax fraud conspirator sentenced to jail', *The Australian Financial Review*, 10 July 2020.

<sup>66</sup> ATO, 'Plutus Payroll founder jailed in Operation Elbrus', 31 July 2020.

<sup>67</sup> ATO, 'Plutus Payroll founder jailed in Operation Elbrus', 31 July 2020.

<sup>68</sup> Dan Oakes, 'Bake made director of companies he'd never heard of in \$100m tax scam, court hears', ABC News, 27 August 2018.

<sup>69</sup> Dan Oakes, 'Bake made director of companies he'd never heard of in \$100m tax scam, court hears', ABC News, 27 August 2018.

companies.<sup>70</sup>

Requesting that a nominee director reveal they are acting as a nominee allows entities required to do due diligence to know there are concealed controllers of the legal entity they are dealing with. It will be a flag that greater due diligence is necessary.

For the requirement to be effective, it will need to be an offence under national law for someone to act as a nominee director and not disclose the fact. Furthermore, the penalty for the offence will need to be of a level that a criminal wishing to have the shield of a front director cannot simply pay a civil penalty on behalf of the nominee director if it is detected that the nominee director did not disclose they were acting as a nominee director.

Nominee owners are also common. For example, Global Witness' 2018 analysis of the UK PSC register found more than 9,000 companies controlled by beneficial owners who control over 100 companies each.<sup>71</sup> At least some of these owners were likely nominee owners.

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<sup>70</sup> Dan Oakes, 'Bake made director of companies he'd never heard of in \$100m tax scam, court hears', ABC News, 27 August 2018.

<sup>71</sup> Global Witness, 'The Companies We Keep', July 2018, i.

## **Background on the Tax Justice Network Australia**

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:

- (a) promote sustainable finance for development;
- (b) promote international co-operation on tax regulation and tax-related crimes;
- (c) oppose tax havens;
- (d) promote progressive and equitable taxation;
- (e) promote corporate responsibility and accountability; and
- (f) promote tax compliance and a culture of responsibility.

In Australia, the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union
- Australian Services Union
- Baptist World Aid
- Caritas Australia
- Columban Mission Institute, Centre for Peace Ecology and Justice
- Community and Public Service Union
- Friends of the Earth
- GetUp!
- Global Poverty Project
- Greenpeace Australia Pacific
- International Transport Workers Federation
- Jubilee Australia
- Maritime Union of Australia
- National Tertiary Education Union
- New South Wales Nurses and Midwives' Association
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- SumOfUs
- Synod of Victoria and Tasmania, Uniting Church in Australia
- TEAR Australia
- Union Aid Abroad – APHEDA
- UnitedVoice
- UnitingWorld
- UnitingJustice

- Victorian Trades Hall Council
- World Vision Australia