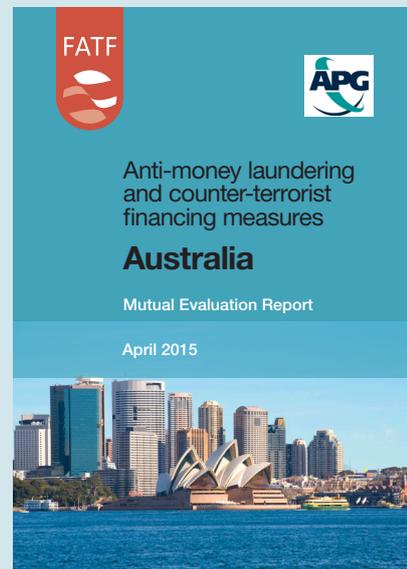




## *Anti-money laundering and counter-terrorist financing measures - Australia*

### **7. Legal persons and arrangements**

Effectiveness and technical compliance



7

Citing reference:

FATF and APG(2015), “Legal persons and arrangements” in *Anti-money laundering and counter-terrorist financing measures - Australia*, Fourth Round Mutual Evaluation Report, FATF, Paris and APG, Sydney  
[www.fatf-gafi.org/topics/mutualevaluations/documents/mer-australia-2015.html](http://www.fatf-gafi.org/topics/mutualevaluations/documents/mer-australia-2015.html)

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## 7. LEGAL PERSONS AND ARRANGEMENTS

### Key Findings

**Australia has not conducted a formal risk assessment on TF risks associated with legal persons and arrangements.** The majority of legal persons are registered with ASIC (federal) while others with State or Territory authorities. While the information seems to be largely available to competent authorities and to the public, very limited verification is conducted on the registration information. **Hence, there is no certainty that information maintained on legal persons is accurate or up-to-date.** The same conclusion applies to the Australian Business Register maintained by the ATO.

**In most cases, registration is carried out by a third party (i.e. lawyers, accountants or trust and company service providers) not subject to AML/CTF obligations.**

**Trustees are not required to maintain adequate, accurate and current information on the settlor, trustee, protector, beneficiaries, etc. of a trust.** Nor are they explicitly required to disclose their status.

**Information on the beneficial owner of legal persons and legal arrangements is not maintained and accessible to competent authorities in a timely manner.**

**Some information on shareholders is available** (on first rank shareholders only, but does not extend to the beneficial owner as defined by the FATF), which may themselves be other legal persons. Public company share registries are required to collect information on whether shares are held beneficially or not. Information on proprietary companies is collected through the Australian Business Register. Law enforcement agencies advised that access to companies' registers was not timely due to obstacles posed by lawyers.

**Some measures have been taken to mitigate the risks posed by nominee shareholders and directors but they are insufficient to address other risks.**

## 7.1 Background and Context

### (a) Overview of legal persons

7.1. The types of legal persons that can be established or created in Australia are: proprietary companies; public non-listed companies; public listed companies; incorporated and limited partnerships; incorporated associations; and cooperatives.

7.2. Australia reports that in 2012-13 there were more than 2 million registrations with ASIC, including 1 990 551 proprietary companies; 21 690 public companies; and 3 324 foreign companies. Incorporated and limited partnerships, incorporated associations and cooperatives are registered at State or Territory level. The number of registrations by jurisdiction are listed below.

**Table 7.1. Number of legal person registrations by jurisdiction**

State / Territory	Incorporated Associations – New	Incorporated Associations – Total	Registered Cooperatives – New	Registered Cooperatives – Total	Limited Partnerships – New	Limited Partnerships – Total
New South Wales	Data not available	<b>36 037</b> (as at 30 June 2013)	121 (as at 30 June 2013)	<b>617</b> (as at 30 June 2013)	Data not available	Data not available
Victoria	<b>1 695</b> (2013-14)	<b>39 883</b> (2013-14)	Data not available	Data not available	<b>29</b> (2013-14)	<b>271</b> (2013-14)
Queensland	<b>1 081</b> (2012-13)	<b>23 631</b> (as at 30 June 2013)	<b>4</b> (2012-13)	<b>182</b> (as at 30 June 2013)	Data not available	Data not available
Australian Capital Territory	<b>93</b> (2013-14)	Data not available	Data not available	Data not available	Data not available	Data not available
Tasmania	<b>165</b> (2012-13)	<b>3 591</b> (as at 30 June 2013)	Data not available	<b>27</b> (as at 30 June 2013)	Data not available	<b>122</b> (as at 30 June 2013)
South Australia	<b>380</b> (2012-13)	<b>19 770</b> (as at 30 June 2013)	<b>0</b> (2012-13)	<b>56</b> (as at 30 June 2013)	Data not available	Data not available
Northern Territory	<b>20</b> (2012-13; includes unincorporated associations)	<b>535</b> (2012-13; includes unincorporated associations)	Data not available	Data not available	Data not available	Data not available
Western Australia	Data not available	Data not available	Data not available	Data not available	Data not available	Data not available

7.3. The New South Wales (NSW) Department of Fair Trading registers incorporated and limited partnerships, incorporated associations and cooperatives. There are approximately 36 037 associations; 149 limited partnerships, 121 incorporated partnerships and 617 cooperatives registered in NSW. Some information on the number of entities registered in other States and Territories was also provided. NSW is expected to have the largest number of entities registered in each category of legal persons registered

7.4. As described below and in the TC Annex, proprietary companies, public non-listed companies, public listed companies, incorporated limited partnerships, and incorporated associations must register with ASIC. Incorporated and limited partnerships, incorporated associations and cooperatives are at State or Territory level. ASIC and the relevant State or Territory authorities maintain a number of registers that relate to legal

persons. They are available to competent authorities and to the public (possibly subject to the payment of a fee) and allow for several types of searches.

7.5. In addition to these registers, the ATO maintains a register of the businesses (i.e. any type of legal persons and arrangements) holding an Australian Business Number (ABN). Holding an ABN is compulsory for businesses that are required to register for the goods and services tax (GST). Australia also advised that there is a significant incentive for businesses which are not required to have an ABN to register for one, as other businesses are required to withhold 46.5% of the value of the invoice when paying charges to businesses without an ABN.

7.6. Some specific sectors, such as the non-profit and alternative remittance sectors, are subject to additional regulation which applies to all entities operating within these sectors, regardless of the type of legal persons and arrangements.

### *(b) Overview of legal arrangements*

7.7. Trust law in Australia is governed primarily by common law at the State and Territory level. States and Territories also have statutes which impose additional obligations on trustees and a trust's constituent elements. The federal *Corporations Act 2001* (Corporations Act) applies in addition to trust law when a trustee is a corporate entity; and if the trust receives income, it is subject to federal tax laws and must lodge an annual tax return with the ATO. In doing so, information about trustees and in some cases beneficiaries is disclosed and recorded by the ATO.

7.8. Australia does not have a central registry of trusts although the Australian Business Register (ABR), hosted by the ATO, records information for a significant number of trusts. Some information on trusts holding a tax file number is recorded by the ATO but is limited to trusts registered with the ATO. As of 30 September 2014, approximately 802 700 trusts lodged a tax return for the 2011–12 income year and over 768 000 trusts lodged tax returns for the 2012/13 income year. The ABR indicated that the number of trusts registered as of 30 June 2013 was over 991 000 trusts. There is no estimate of the total number of trusts existing in Australia.

### *(c) International context for legal persons and arrangements*

7.9. Australia's political and economic stability is attractive to foreign investment. Australia requires that at least one corporate director resides in Australia.

7.10. In 2009, Project Mercury investigated risks or vulnerabilities arising from the lack of transparency in the ownership of Australian securities. The primary focus was offshore ownership and Custodial Service Provider (CSP) and nominee company arrangements. It found that:

- Approximately 40% of the ASX (Australia Securities Exchange) market was owned by foreign entities, and
- Approximately 47% of the ASX market was held by CSPs and nominee companies.

7.11. These characteristics of the ownership of ASX securities were not in themselves cause for concern, provided effective controls and measures for accessing information are in place. Indeed, foreign investment is essential to the Australian economy. Further, CSPs and nominee companies play an important role for investors in helping them to maintain a level of public anonymity, as well as providing flexibility in their investment options.

## 7.2 Technical Compliance (R.24, R.25)

7.12. See for the full narrative the technical compliance annex:

- **Recommendation 24 (transparency and beneficial ownership of legal persons) is rated partially compliant.**
- **Recommendation 25 (transparency and beneficial ownership of legal arrangements) is rated non-compliant.**

## 7.3 Effectiveness: Immediate Outcome 5 (Legal Persons and Arrangements)

### *Risk and transparency of legal persons and legal arrangements*

7.13. Australia has assessed the threat of ML through corporate vehicles and other legal persons in the NTA and, in the context of organised crime, in the sanitised version of the ACC's biennial OCTA (Organised Crime Threat Assessment in Australia). The NTA made a distinction between corporate entities that can be used to conceal crime wealth and ownership, and public companies where shares can be purchased using proceeds of crime. The first scenario was given a high threat rating; the second a medium threat rating. The two threat/risk levels over the next three years was assessed as being stable, although there will be an increasing use of legal persons and arrangements by organised crime and an increased use of foreign legal entity structures. During the on-site visit to Australia, the different stakeholders advised that they shared the conclusions of the NTA with respect to legal persons and arrangements. The sanitised version of the NRA on TF risk does not formally assess the risk of TF through legal persons. Nevertheless, Australia does have some understanding of TF risks associated with legal persons as a result of the NTA in which TF, as a predicate crime to ML, was examined. This understanding flows into the NRA where TF through legal persons is referenced by case examples and red flag indicators, although not formally rated with a risk rating.

7.14. Prior to the NTA, in 2009 Project Mercury (a sub-project of Project Wickenby) investigated the risks and vulnerabilities arising from the lack of transparency in the ownership of Australian securities. The primary focus was on the following: (1) offshore ownership, (2) custodial service providers and (3) nominee company arrangements. However, no specific assessment of the ML and TF risks associated with numbered companies, shelf companies, foreign owned domestic companies and companies incorporated in high risk jurisdictions subsequently registered in Australia has been undertaken.

7.15. Following the assessment of ML risks associated with legal persons and legal arrangements in the NTA, some improvements to the ABR were made to address the general identified risk requiring the collection of information on associates and trustees for new registrations from December 2013. In addition, as a result of Project Mercury, some typologies and case studies following on from that project supported general CDD enhancements in recent 2014 measures.

7.16. Apart from the general information in the NTA, no other risks specific to the trusts were raised by the Australian authorities. However, it was acknowledged that the authorities have encountered difficulties, in particular, to access information on foreign trusts established in jurisdictions such as the Cook Islands, Jersey, and Panama, and other off-shore trust jurisdictions. They further advised that the difficulties encountered with certain jurisdictions are limited thanks to a good cooperation with key partners. It is however planned to improve the ABN register held by the ATO and to computerise the register held by the NSW Department of Fair Trading.

### *Nominee shareholders and nominee directors*

7.17. As described in the TC Annex, nominee shareholders may hold shares for the benefit of another natural or legal person. Under the Corporations Act, nominee shareholders are required to advise the company that shares are held "non-beneficially" which must be recorded in the company register. Failure to comply with this requirement is an offence under the Corporations Act (section 1311(1); and Schedule 3) (i.e. a fine

of 5 penalty units or AUD 850). If the offence is committed by a body corporate, the fine may be increased by up to 5 times the maximum amount. Further sanctions apply if the shareholder fails to comply with their obligations in relation to any beneficial tracing notice issued to it. Australia has partially addressed issues with nominee shareholders using ASIC powers to trace beneficial owners of shares, but only for publicly listed entities.

7.18. The appointment of nominee directors (“alternate directors”) must be notified to ASIC within 28 days. Failure to notify such a nomination is sanctioned by a fine (approx. AUD 10 000) and/or one year imprisonment. While the sanction is appropriate to the risk of nominee directors being appointed to conceal control of corporate entities, no fines under this provision have ever been applied.

### *Basic information*

7.19. ASIC holds a number of on-line registers, including:

1. the company register, containing approximately 2 million registrations at the time of the on-site visit;
2. the national business register;
3. the register for AFSL holders; and
4. the register for liquidators and company auditors.

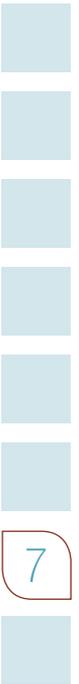
7.20. When registering, companies are required to provide certain information, including the company details (name, type, address of the registered office, etc.), the names and addresses of the directors and secretaries and the share structure. Although rarely seen, bearer share warrants may nevertheless be issued by Australian companies incorporated under the Corporations Act, but there are no measures in place to identify the holder of the beneficial owner of those instruments.

7.21. The company register contains the following information:

- name of the company;
- unique identification number (ABN, Australian Company Number [ACN], Australian Registered Business Number [ARBN], or Australian Registered Scheme Number [ARSN]);
- type of company;
- date of registration;
- date of the next annual review;
- address of registered office, and
- the list of documents lodged with ASIC.

7.22. This information is available to competent authorities. Basic information is accessible to the public online. Other information, such as current or historical extracts, roles and relationship extracts or copies of certain documents lodged with ASIC, is available to competent authorities as well as to the public for a small fee.

7.23. While ASIC does checks to ensure substantial compliance with lodgement obligations, it conducts only limited accuracy of information checks. Examples are (1) checks against Australia Post Files to ensure addresses are valid physical addresses if required, and (2) checks of new officeholder names against bankruptcy records held by the Australian Financial Security Authority. No key information verification, including checks on criminal records or terrorist lists, is conducted. ASIC advised that if the registration



contains suspicious elements or raises suspicion, more verification would be undertaken but that such a situation is very rare.

7.24. Companies are required to notify ASIC within specified timeframes (generally 28 days or less) about a change of registered office, principal place of business, its member register, its share structure, directors or secretaries, including in their personal details. Failure to notify is sanctioned by a fine of 60 penalty units (AUD 10 200) and/or one year imprisonment.

7.25. ASIC also conducts an annual review of each of the companies registered. The review occurs at the anniversary date of the registration. Companies are required to review and as necessary update their information and to provide a solvency declaration. Along with the annual review, companies also have to pay the annual review fee, which helps to identify companies that have changed address or that have ceased their activities. However, ASIC advised that it does not have the resources for proactive searches and verifications. ASIC may also require a company at any time to respond to a return of particulars (section 348A of the Corporations Act) if there is a suspicion that recorded information is incorrect.

7.26. ASIC advised that 80 to 95% of the companies registered were registered online by a third party. These third parties can be lawyers or accountants, but a large majority of the companies are registered by trust and company service providers specialising in companies' registration. In addition to registration, trust and company service providers also set up trust and self-managed funds. They justified the high level of reliance on third parties for companies' registration by the fact that they are specialised in this activity and are aware of any obstacle in the registration process. Moreover, most trust and company service providers have direct access to ASIC and ASIC's registers, which ensures a timely registration. Trust and company service providers met during the onsite also advised that the large majority of their clients are not the companies themselves, but lawyers and accountants acting on the behalf of their clients. Once registered, companies can still rely on trust and company service providers to fulfil the companies' obligations vis-à-vis ASIC. This includes the notification of any changes affecting the company or the response to the annual review and the payment of the annual fee. These elements (the fact that companies' registration businesses do not know who their clients are and provide services after the registration) raise concerns as to the veracity and accuracy of the information recorded in ASIC registers and potential misuse of companies for ML/TF purposes. Neither trust and company service providers nor lawyers or accountants are subject to AML/CTF obligations.

7.27. Registers are maintained by State and Territory authorities in relation to the creation of incorporated and limited partnerships, incorporated associations and cooperatives. From discussions that the assessment team had with the New South Wales (NSW) Department of Fair Trading, it appears that the obligations on partnerships, associations and cooperatives are similar to those of companies registered by ASIC, including with respect to the notification of changes affecting them. Certain basic information is available to competent authorities and to the public for a small fee. It should be noted that access to the registries is currently being improved through a computerisation project. As with ASIC, the NSW Department of Fair Trading takes the registration information it receives on face value and does not conduct any specific accuracy verification. Accordingly information in State and Territory registers may not be accurate or up-to-date.

7.28. Apart from the registers held for the different types of legal persons, the ATO also maintains the ABR, which gathers information on the natural persons, legal persons and arrangements that have an ABN. In total there are over 7.5 million ABN holders registered in the ABR.

7.29. The ABR contains information on individuals, companies, government agencies, partnerships, trusts and superannuation funds. The ABR contains information on the ABN holder; however in case of companies, there is no comparison / cross-verification with the data held by ASIC on a specific company. There is, however, verification of company number and company name, but no cross-referencing of director or secretary information. ABN holders are required to notify the ATO of any relevant change; in case of failure to notify changes within the set period, sanctions similar to those mentioned above for failure to notify ASIC apply. In 2013-14, 3.8 million updates were made to the ABR. The ATO advised that only a few companies are picked up every year for a review of their information. The ABR is available to competent authorities and to the public. Numerous searches are made every year; however only limited information on the ABN, state of operation, legal name and business name, and date of registration, is available to the public. The ATO advised

that it has a project to improve the ABR and implement expanded automated processes, including for the verification of the information provided.

7.30. With respect to legal arrangements, there is no obligation for trustees to maintain basic information on the trust. Australia relies on the obligation to identify customers that are legal arrangements, which apply to reporting entities to get basic information on legal arrangements. As described under IO.4 and in the TC Annex, this obligation is overall in line with the FATF Standards. While the measures were introduced on 1 June 2014, entities have a transition period until 31 December 2015. Moreover, this mechanism will only be available for trusts with relationships with financial institutions, because trust and company service providers, lawyers, and accountants who create the trusts do not have AML/CTF obligations.

### *Beneficial ownership information*

7.31. Under section 169 of the Corporations Act, companies are required to hold a register of members (shareholders) containing each member's name and address, date on which the member was issued shares, the number and class of shares held, and date of issuance. This information relates to legal, not beneficial, ownership. However, for publicly listed entities, the register must also include information disclosed in the context of the ASIC's power to trace beneficial ownership of shares (Corporations Act, Part 6C.2). Under this article, ASIC may direct a member of a publicly listed company, a person having a relevant interest or having given instructions about voting shares, to disclose the detail of his/her interest in the shares, information about the acquisition or disposal of the shares, the exercise of the voting rights or any other matters relating to the shares. Any information received by the company in this context must be recorded. There are no equivalent powers in relation to non-list companies. Law enforcement agencies met in Australia recognised that companies' registers are a good source of information on beneficial ownership, but also expressed frustration about how long it can take to trace such information, exacerbated if structures are complex and involve foreign shareholders, the use of front persons or trusts that mask the ultimate beneficial owner, or both.

7.32. For listed companies, section 672DA of the Corporations Act provides that "relevant interests" in shares (securities) must be disclosed; "relevant interest" is defined in section 608 as meaning, amongst other things, an interest "however remote" and can include beneficial interests as contemplated by the meaning of beneficial owner in the Glossary to the FATF Methodology.

7.33. ASIC registers contain information on the share structure, including for companies limited by shares the number and class of shares each member and for unlimited companies, information on the issue of shares, as well as membership details. The ATO registers also contain information on 20 key shareholders (regardless of whether they are natural or legal persons) as well as on the trustee, the settlor and the beneficiaries of a trust. The ABR holds information on the 20 key shareholders of private companies, registered from December 2013 and trustees and beneficiaries for closely held trusts registered from December 2013. The ABR is governed by the *A New Tax System (Australian Business Number) Act 1999*. These measures mitigate to some extent the ML and TF risks identified in the NTA.

7.34. With respect to beneficial ownership, law enforcement advised that the best source of information is reporting entities. This entails that law enforcement knows which reporting entity has a business relationship with the legal person or arrangement at stake, and that the legal person or arrangement has established a business relationship with a reporting entity. As mentioned above, reporting entities are since 1 June 2014 required to identify the beneficial owner of their clients and to take reasonable measures to verify their identity consistent with Recommendation 10. However, entities have a transition period until 31 December. The quality of the information held by reporting entities is therefore questionable. Furthermore, reporting entities met during the onsite visit to Australia advised that they currently fulfil their obligation with respect to beneficial owners through the consultation of public registers, such as ASIC registers. In addition, as mentioned, TCSPs, lawyers, and accountants are not reporting entities.

7.35. Special measures for listed companies: ASIC or a listed company may issue a tracing notice in relation to holdings in the listed company (section 672A of Corporations Act). In practice, there are a number of businesses that issue beneficial tracing notices on behalf of listed companies and it is common for this to occur. In most instances, ASIC will not be involved as the listed company will do this work and the responses

from these notices must be publicly available (section 672DA of Corporations Act). Third parties can also request ASIC to issue a tracing notice. Disclosure in response to a tracing notice must be made within two days, and failing to respond to a tracing notice is a strict liability offence with penalty up to 25 penalty units (AUD 4 250) and/or six months imprisonment. ASIC is infrequently approached by companies seeking ASIC involvement where there has been a failure to comply with a beneficial tracing notice sent by a listed company or responsible entity of a listed management investment scheme. There are also obligations under tax law for declaring trustee status in tax returns.

### *Information exchange and international cooperation*

7.36. The numerous registers held by the different authorities involved in the registration of legal persons and the tax authorities are accessible to law enforcement authorities. At national level, ASIC can share information pursuant to MOUs or via information forums or committees with a large number of federal law enforcement agencies and competent authorities, including the AGD, the ACC, the AFP, the two financial supervisory bodies, and AUSTRAC. At the State and Territory level, ASIC can exchange information to assist the federal, State or Territory governments to perform a function or exercise a power (section 127 of the ASIC Act). In 2012/2013, over 60 million searches were made, as well as more than 4 million paid searches.

7.37. ASIC can exchange information with 102 foreign counterparts under the International Organisation of Securities Commissions (IOSCO) Multilateral Memoranda of Understanding (MMOU) Concerning Consultation and Cooperation and the Exchange of Information (enforcement). ASIC can exchange information with 64 foreign counterparts under an additional 80 bilateral MOUs covering supervision and enforcement. ASIC's MOUs and the MMOU allow for the exchange of information recorded in ASIC's registers. ASIC can exchange information recorded in ASIC registers with foreign counterparts and other agencies, including law enforcement agencies, whether or not there is an MOU. This includes publicly available information. If the information is not publicly available on ASIC's registers but is held by ASIC in relation to its registry function, ASIC can release the information pursuant to section 127(4) of the ASIC Act and, if an MOU exists, pursuant to the terms of the MOU.

7.38. The ABR is widely accessible to federal agencies and State and Territory Governments. Over 370 million searches were made in the ABR in 2012-2013. In addition, ASIC has provided information on the number of additional requests made by law enforcement authorities for information not in the public registers. Also in 2013-2014, the ATO received 2 610 requests from a range of law enforcement agencies, including 10 requests for ABR information.

### **Overall conclusions on Immediate Outcome 5**

7.39. Legal persons and legal arrangements were identified as presenting medium to high risks for ML in the NTA, and the use of complex corporate structures in ML schemes was frequently cited by law enforcement spoken to by the assessment team. There is good information on the creation and types of legal persons in the country available publicly, but less information about legal arrangements. The ATO has made some improvements to the ABR that involve collecting information on associates and trustees for new registrations from December 2013. The authorities seem to appreciate the extent to which legal persons can be, or are being misused for ML, and had some awareness in relation to TF. However, they could do more to identify, assess and understand the vulnerabilities both for ML and TF, as past assessment efforts seem to have focused more on underlying predicate crime. While Australia has implemented some measures to address the specific risk identified in the NTA to legal persons and legal arrangements, other measures need to be taken, including imposing AML/CTF obligations on those who create and register them to strengthen the collection and availability of beneficial ownership information. Concerning beneficial owners of legal persons and legal arrangements, the existing measures and mechanisms are not sufficient to ensure that accurate and up-to-date information on beneficial owners is available in a timely manner. It is not clear that information held on legal persons and legal arrangements is accurate and up-to-date. The authorities did not provide evidence that they apply effective sanctions against persons who do not comply with their information requirements. Overall, legal persons and arrangements remain very attractive for criminals to misuse for ML and TF.

7.40. **Australia has a moderate level of effectiveness for IO.5**

## 7.4 Recommendations on Legal Persons and Arrangements

7.41. In relation to IO.5, Australia should:

- Conduct a formal assessment of the TF risks to which legal persons are exposed, and subsequently take adequate mitigating measures.
- Conduct ML and TF risk assessments for differing legal persons (numbered companies, public companies, foreign companies, etc.) to identify where the risks are, to address those specific issues.
- Ensure that minimal information on the creation of legal arrangements, including those that are not registered with ATO, is publicly available.
- Ensure that information on legal persons recorded in ASIC, State or Territory, and ATO registers is accurate and up-to-date.
- Take measures to mitigate the ML/TF risk posed by bearer share warrants.
- Ensure that competent authorities have timely access to a company's register.
- Ensure that information on the beneficial owner of legal persons and legal arrangements is maintained and accessible to competent authorities in a timely manner.
- Require reporting entities to implement as early as possible before 1 January 2016 their obligations on beneficial ownership, introduced on 1 June 2014.
- Apply proportionate and dissuasive sanctions for failure to advise a company that shares are held non-beneficially and take further measures against nominee directors.

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## 7. LEGAL PERSONS AND ARRANGEMENTS

### Recommendation 24 – Transparency and beneficial ownership of legal persons

a7.1. Australia received a largely compliant rating in 2005 for Recommendation 33 in the 2004 Methodology (the predecessor to Recommendation 24). The only deficiency noted in the 2005 assessment was that administrative measures supporting corporate on-going maintenance did not provide adequate access to beneficial ownership information in a timely manner for the majority of legal persons. Recommendation 33 was not part of the follow-up process for Australia given the strength of this rating. The new Recommendation 24 is much more detailed than the previous standard.

a7.2. **Criterion 24.1** – The principal forms of legal persons in Australia are proprietary companies, public non-listed companies, public listed companies, incorporated limited partnerships, and incorporated associations. All companies (proprietary and public companies) must register with ASIC. ASIC maintains a record of the incorporation, as well as type of incorporation, of each company on its publicly accessible “Companies and Organisations Register”, which is updated and maintained on an on-going basis. The process for the creation of these legal persons and for the obtaining and recording of basic ownership information about them is clear. There is no clear process for the obtaining or recording of beneficial ownership information (as that term is defined by FATF). However, pursuant to the provisions in Part 6C.2 of the Corporations Act, beneficial ownership tracing notices can be issued with respect to a person’s interest in the shares of a public company (listed company or listed investment scheme). Other legal persons, such as incorporated limited partnerships, incorporated associations, are incorporated by the States and Territories. There is no beneficial ownership tracing notice mechanism available for State/Territory entities. The processes for the creation and the public availability (all registers are publically available) of information relating to these types of legal persons, including on beneficial ownership, therefore vary throughout the country.

a7.3. Australia reports that in 2012-13 there were approximately 2 million registrations with ASIC, including 1 990 551 proprietary companies; 21 690 public companies; and 3 324 foreign companies.

a7.4. **Criterion 24.2** – Australia has assessed the threat of ML through corporate vehicles and other legal persons in its (sanitised) NTA and, in the context of organised crime, in the sanitised version of the ACC’s biennial OCTA (Organised Crime in Australia). The NTA made a distinction between corporate entities that can be used to conceal ownership and public companies where shares can be purchased using proceeds of crime. The first scenario was given a high threat rating; the second a medium threat rating. The sanitised version of the NRA is silent about legal persons.

a7.5. **Criterion 24.3** – The Corporations Act (section 117) requires the provision of specific information on company information when an application for registration is made, including the address of the registered office, share structure of the company, name and address of directors (who cannot be legal persons) and whether a registered company will have an ultimate holding company in Australia or overseas. Other required information is registered as well. ASIC maintains a Companies and Organisations Register (on which the information is publicly available). According to section 112 of the Corporations Act, proprietary and public companies are registered under the Act. The registration process for the other types of legal persons, including incorporated limited partnerships and incorporated associations, and the basic information required in this context vary throughout the country. Australia advised that according to State and Territory legislation, the name of the entity, its legal form and status, its address, the basic regulating powers and officeholders and members are registered and that this information is publically available.

a7.6. **Criterion 24.4** – Under section 168 of the Corporations Act companies must set up and maintain a shareholders (“members”) register which contains each member’s name and address, and date of entry of the member’s name in the register. If the company has more than 50 members there must be an up-to-date index of names that is easily accessible. Where the company has share capital, that register must also contain information including the date, number and share class allotted to each member. It must also contain the amount paid for each share. The register must also show the names and details of former shareholders and

## LEGAL PERSONS AND ARRANGEMENTS

the date they stopped being a member. This information is required to be held at the company's corporate registered office (section 172).

a7.7. **Criterion 24.5** – A number of provisions of the Corporations Act require that changes in the information submitted to ASIC be notified within a specified timeframe (usually within 28 days of the change). Failure to notify such changes is punished by an AUD 10 700 fine and/or one year of imprisonment. ASIC also has the power to require a company to respond to a return of particulars (section 348A of the Corporations Act), which may be issued at any time. Failure to respond to such notice is also liable of an AUD 10 700 fine. Every year, on the anniversary date of their registration, legal persons registered with ASIC are subject to an Annual Review Process for the purposes of updating their information registered in the public register. The register of members kept at the registered office of the company must also be kept up to date. However, Australia has not indicated any mechanism to ensure that information on the registers of members kept by companies is accurate, as no diligence to verify the information recorded is required (however, it is an offence under section 1308(2) of the Corporations Act to provide false or misleading information to ASIC; moreover, shareholders may take legal action under section 175 to correct the register).

a7.8. **Criteria 24.6 and 24.7** – While the Corporations Act requires companies to obtain and hold accurate and up-to-date information on the direct owner of the shares of a company there is no requirement in the Act for companies or ASIC to obtain and hold up-to-date additional information to determine the ultimate natural person who is the beneficial owner beyond the immediate shareholder. Nor are companies required to take reasonable measures to obtain and hold this information. As a result, beneficial ownership information is only recorded if the legal owner of the share certificate happens to be the beneficial owner. For public companies (listed company or listed investment scheme) Australia also relies on the provisions of Part 6C.2 of the Corporations Act, according to which ASIC or a company can require any person to disclose the name and address of another person, who has a relevant interest in any of the shares or interests of a public company, or the name and address of each person who has given the person instructions about acquisition, exercise or any other matter relating to the shares. The information disclosed must be recorded in a register kept by the company. This mechanism also provides information on the beneficial owner if the person having an interest or having given instructions happens to be the beneficial owner. It is also not clear how beneficial ownership information could be obtained on foreign companies, which may register with ASIC but which must only maintain a local agent (who can be a natural or legal person). Pursuant to the introduction of the 2014 AML/CTF Rules, reporting entities are now required to identify the beneficial owner and take reasonable measures to verify the identity of the beneficial owner (see Recommendation 10.5). For all the information above, Australia has not indicated any mechanism to ensure that the information collected is accurate, as no diligence to verify the information recorded is required.

a7.9. **Criterion 24.8** – Australia partly addresses this issue (through criterion 24.8(a)) by requiring proprietary companies to have at least one director ordinarily resident in Australia. Public companies must have at least three directors, and at least two of them must ordinarily reside in Australia. Proprietary companies must notify ASIC about the details of the top 20 members for each class of shares, including whether the shares are not held beneficially. Companies other than proprietary companies must have a company secretary. ASIC can request and/or compel information that is available from the resident directors and secretaries, but only in relation to the information that this person(s) holds or has knowledge about. Foreign registered companies must have at least one local agent ordinarily resident in Australia, who may be liable for breaches of the Corporations Act.

a7.10. **Criterion 24.9** – The Corporations Act requires that the directors of deregistered companies (or companies which otherwise cease to exist) maintain the books and records of the company (“books” is defined in the Act to include virtually all company records including the members’ (shareholders’) register, etc.) for a period of three years from the time a company is de-registered. Section 286 of the Act requires financial records to be held for at least five years. Subsection 542(2) of the Corporations Act also requires liquidators to keep books and records for five years. There is no specific provision applicable to ASIC in this context.

a7.11. **Criterion 24.10** – ASIC has sweeping statutory authority to require disclosure of all information held by corporations established under the Corporations Act by virtue of Part 3 of the *Australian Securities and Investment Commission Act 2001* (ASIC Act). ASIC also has the power to issue tracing notices under Part 6C.2 of the ASIC Act (see also criterion 24.6 above). These powers include powers to require production, inspection,

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disclosure, attendance, compelling assistance, and other wide powers (including warrants). The AFP and State/Territory Law enforcement authorities in Australia also have wide powers to secure ownership, control and other information from companies incorporated under the Corporations Act.

a7.12. **Criterion 24.11** – Corporations established under the Corporations Act are prohibited from issuing bearer shares (section 254F). There is no prohibition on corporations issuing bearer share warrants. While rarely seen, there are no mechanisms, statutory or otherwise, to mitigate the risk of ML and/or TF posed by these instruments.

a7.13. **Criterion 24.12** – Nominee shareholders and nominee directors are permitted under the Corporations Act. Australia applies the following mechanisms aiming to ensure that such nominees are not abused:

- With respect to nominee shareholders, a shareholder may hold shares for the benefit of another person (including a legal person) either as trustee or nominee or otherwise on behalf of, or on account of, another person. In those cases, under section 1072H of the Corporations Act the shareholder of such shares must advise the company that he/she/it is holding those shares “non-beneficially” and the company must indicate in the share register that those shares are not held beneficially (section 169(5A)). Failure to comply with this requirement is an offence under the Act (section 1311(1)) attracting penalties. ASIC’s power to trace beneficial owners of shares for publicly listed entities (Part 6C.2 of the Corporations Act) means that, where applicable, nominee shareholders are required to disclose the identity of the nominator. The information disclosed must be kept in the company’s register. This mechanism does not apply to the vast majority of legal entities – only to public companies.
- With respect to nominee directors, the Corporations Act refers to these as “alternate directors” (section 201K). A company must notify ASIC within 28 days if a person is appointed as an alternate director. The following details are required when appointing an alternate director: full name and any former names; date and place of birth; residential address; date of appointment; the name of the director for whom the individual is an alternate; and the expiry date (if applicable). If the appointment is open-ended, they must provide the date of appointment only and the terms of appointment. These must include details such as the timeframe of the appointment, capacity to sign instruments and attend meetings.

a7.14. **Criterion 24.13** – ASIC has a range of administrative, civil and criminal remedies under the Corporations Act. The failure to comply with some statutory requirements constitutes an offence punishable by monetary penalties or terms of imprisonment. For example:

- Failure to maintain a member’s register - maximum penalty of AUD 1 170 or imprisonment for three months or both for an individual and AUD 8 500 for a company.
- Failure to notify ASIC about a change to a member register or a change to the company’s share structure - maximum monetary penalty of AUD 10 200 for an individual and AUD 51 000 for a company.
- Failure to notify ASIC about the appointment/cessation of a director or a change in a director’s address - maximum monetary penalty of AUD 10 200 or imprisonment for one year or both, and AUD 51 000 for a company.
- Failure of a person to comply with a tracing notice under Part 6C.2 - maximum monetary penalty of AUD 4 250 or six months imprisonment or both for an individual and AUD 21 250 for a company.
- The Court may disqualify persons from managing corporations in certain circumstances, including repeated contraventions of the Corporations Act.

a7.15. **Criterion 24.14** – Australia is able to provide international co-operation through a range of mechanisms (see Recommendations 37-40 below), including any and all information relating to directors and

shareholders. In addition ASIC has a number of MOUs with both countries and international organisations, and it is also a signatory to the IOSCO Multilateral Memorandum of Understanding. These arrangements are published on ASIC's public website. Public information on legal persons from the ASIC website is also available to foreign competent authorities, and the site is structured to assist with other regulators who are not party to an MOU to request information from ASIC.

a7.16. **Criterion 24.15** – There is no information that Australia monitors the quality of assistance it receives from other countries in response to requests for basic and beneficial ownership information or requests for assistance in locating beneficial owners residing abroad. However, Australia advised that its competent authorities regularly provide feedback to the authorities from which they have received assistance, see also Recommendation 40.

### *Weighting and Conclusion*

a7.17. There are some measures in place to prevent the misuse of legal persons for ML and TF purposes. The registration processes and the necessary supporting information implemented either by the federal, the States or the Territories are diverse. There are a number of deficiencies with respect to the beneficial ownership of legal persons and Australia relies exclusively on ASIC to trace beneficial ownership of shares, which only deals with public listed companies – no such mechanism exists for private companies, or legal persons established under State/Territory legislation. There are some measures to improve the transparency of legal persons which can have nominee shareholders and alternate directors. **Recommendation 24 is rated partially compliant.**

## **Recommendation 25 – Transparency and beneficial ownership of legal arrangements**

a7.18. Australia received a partially compliant rating for Recommendation 34 (the predecessor to Recommendation 25) in the 2005 assessment, Australia has not reported any progress in relation to correcting the deficiencies noted in relation to Recommendation 34. The assessment noted that “overall the mechanisms to obtain and have access in a timely manner to beneficial ownership and control of legal arrangements, and in particular the settlor, the trustee, and the beneficiaries of express trusts, are insufficient.”

a7.19. **Criterion 25.1** – There is no requirement in Australian law (federal, state or territorial law) that requires trustees of express trusts to obtain and hold adequate, accurate and current information on the identity of settlors, trustees, protectors (if any) and beneficiaries of trusts, including any natural person who exercises ultimate effective control over a trust. While trusts that receive income are required to file a tax return with the ATO, and in doing so state who the trust beneficiaries are, the requirement to state those beneficiaries extends only to the direct beneficiary under a trust and not to other beneficiaries (for instance the shareholders of corporate trust beneficiaries).

a7.20. **Criterion 25.2** – There is no legal requirement for information on trustees, beneficiaries, settlors and others such as protectors (if any) to be held up-to-date and accurate.

a7.21. **Criterion 25.3** – There is no explicit obligation on trustees to disclose their status when entering into a business relationship or conducting an occasional transaction with a financial institution entity or a DNFBP (it is an offence to omit to provide information when entering into a business relationship with a reporting entity where omission of that information would mean that what information is given is misleading under section 139 of the AML/CTF Act). There are however obligations on reporting entities providing designated services. These obligations are described in detail under criteria 10.9 and 11, above.

a7.22. **Criterion 25.4** – There are no prohibitions in law on trustees providing trust-related information to competent authorities.

a7.23. **Criterion 25.5** – Competent authorities including law enforcement (AFP and ACC), tax authorities, and AUSTRAC have powers to obtain information relating to trustees, beneficiaries, trustee residence and assets managed under a trust.

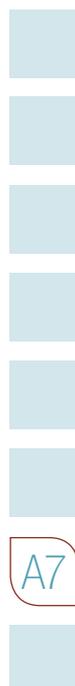
a7.24. **Criterion 25.6** – There is no framework at a State/Territory level governing the exchange of information in relation to trusts. Domestic and international exchanges could be accomplished only within the framework of a criminal investigation, and the use of MLA requests. At the federal level information may be exchanged domestically when agency secrecy requirements allow and MOUs exist between relevant agencies, which hold information relevant to trusts (the ATO and ACNC) and through double tax agreements and international information exchange agreements with foreign counterparts.

a7.25. **Criterion 25.7** – Trust law is contained in State legislation. NSW is the largest state in Australia. Under the NSW Trustee Act 1925, penalties for trustees who fail to perform their duties are not proportionate and dissuasive. The only penalties available in NSW are removal of the trustee (which is not a sanction) or a civil claim for equitable restitution/compensation (also not a sanction) by an affected beneficiary. The Trustee Act 1925 does not provide for fines or other civil or administrative measures to address breaches of obligations imposed upon trustees. Trustees who commit fraud on beneficiaries may be liable under criminal law but not for breaches of the law applicable to them as trustees – only under general criminal law. However, trustees are also legally liable for any failure to perform the duties relevant to meeting the obligations of the trust, as trusts are not separate legal entities. Measures applicable to trustees include the restoration of loss, the account of profit or the liability for legal costs. Injunctive relief is also available against trustees.

a7.26. **Criterion 25.8** – There are proportionate and dissuasive sanctions available (criminal, civil or administrative) to enforce the requirement to grant competent authorities access in a timely manner to information where held regarding trusts. Section 49 of the AML/CTF Act permits a number of agencies to issue notices subject to civil penalties (sections 49(2) and (3)); failure to comply with the ATO's information gathering powers under the *Income Tax Assessment Act 1936* may result in administrative penalties being applied; and the ACC Act and POCA contain criminal penalties where the relevant agencies are not allowed access.

### *Weighting and Conclusion*

a7.27. There is no obligation for trustees to hold and maintain information on trusts or to keep this information up-to-date and accurate. In the absence of such obligations, the transparency of legal arrangements cannot be guaranteed. **As a result, Recommendation 25 is rated non-compliant.**



## Table of Acronyms

ABN	Australian business number
ABR	Australian business register
ACA	Australian Central Authority
ACBPS	Australian Customs and Border Protection Service
ACC	Australia's Crime Commission
ACNC	Australian Charities and Not-for-Profits Commission
AFP	Australian Federal Police
AGD	Attorney General's Department
AIC	Australian Intelligence Community
AML	Anti-money laundering
APG	Asia/Pacific Group on Money Laundering
APRA	Australian Prudential Regulation Authority
ARSN	Australian registered scheme number
ASIC	Australian Securities and Investment Commission
ASIO	Australian Security Intelligence Organisation
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CACT	Criminal Asset Confiscation Taskforce
CDD	Customer due diligence
CDPP	Commonwealth Director of Public Prosecutions
CFT	Countering the financing of terrorism
CotUNA	Charter of the United Nations Act
CT	Combat terrorism
DAR	Dealing with assets regulation
DFAT	Department of Foreign Affairs and Trade
DNFBP	Designated non-financial businesses and professions
FIU	Financial intelligence unit
FTR	Financial transaction report
IDC	Interdepartmental Committee
IFTI	International fund transfer instructions
ILGA	Independent Liquor and Gaming Authority

## TABLE OF ACRONYMS

IMP	Information management policy
IOSCO	International Organisation of Securities Commissions
KYC	Know your customer
MACMA	Mutual Assistance in Criminal Matters Act 1987
ML	Money laundering
MLA	Mutual legal assistance
MMOU	Multilateral memoranda of understanding
NOCRCP	National organised crime response plan
NPO	Non-profit organisations
NRA	National risk assessment
NTA	National threat assessment
OCTA	Organised crime threat assessment
OSAS	Online sanctions administration system
PEPs	Politically exposed persons
PSPF	Protective security policy framework
REG	Reporting entity group
REs	Reporting entities
RNP	Remittance network provider
SMR	Suspicious matter report
SUSTR	Suspect transactions
TF	Terrorist financing
TFIU	Terrorism financing investigations unit
TFS	Targeted financial sanctions
TTR	Threshold transaction report
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution