

SUBMISSION

Submission to Treasury — Public Beneficial Ownership Register: Consultation paper

16 December 2022

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16 December 2022

Dear Sir/Madam

Public Beneficial Ownership Register: Consultation paper

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Treasury Consultation Paper on a Public Beneficial Ownership Register.

About ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.3 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

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If you have any queries or comments in relation to the content of our submission, please contact Andrew Craston on 0401 016 587, or by email acraston@superannuation.asn.au.

Yours sincerely

Andrew Craston
Director of Economics

General comments

ASFA supports the general policy intent of the proposed beneficial ownership register as set out in the Consultation Paper – that is, to increase transparency and discourage the use of certain legal vehicles to obscure tax liabilities and avoid legislative requirements.

With respect to the proposed treatment of registrable superannuation entities (RSEs), ASFA supports the exemption from the requirement to disclose trust beneficiaries. ASFA agrees that the alternative would impose a regulatory burden on relevant trustees, while the additional transparency would be unlikely to give rise to significant benefits.

With respect to the requirement (for RSEs) to disclose their beneficial ownership in other entities, ASFA considers that the definitions of, and thresholds for, ownership should – to the degree that it is practicable – be consistent with other reporting regimes. Consistency across reporting regimes also relates to the specific information fields that RSEs are required to report. In this regard, the development of the beneficial ownership register provides an opportunity for government to harmonise the broader set of RSE reporting.

ASFA supports the proposed approach for implementing the beneficial ownership register, including the proposed phased timeframe. A phased timeframe recognises the required changes to, and development of, systems for collecting, verifying, storing and reporting beneficial ownership information. A phased approach would not only support the entities that will be required to set up and maintain registers, but also their counterparties (including institutional superannuation funds).

Specific comments

Registrable superannuation entities

Broadly speaking, APRA-regulated superannuation funds (or registrable superannuation entities - RSEs) constitute the intermediated or institutional superannuation fund sector, with total assets of \$2.3 billion as of 30 September 2022. The latest APRA data reports that there are 118 (APRA-regulated) institutional superannuation funds.^{1,2}

For any APRA-regulated superannuation fund, the fund's trustees have ultimate responsibility for operating the fund.

Under general trust law, the overarching function of a fund's trustees is to ensure that the fund is managed for the benefit of all of the members of that fund. In this regard, fundamental trustee duties (under trust law) include the duty to ensure that all trust beneficiaries of the same class are treated equally. The broader set of powers, duties and responsibilities of trustees, as well as the interests of trust beneficiaries, are a function of general trust law and the provisions of a fund's trust deed and other governing rules.

In addition, some trust law principles are codified in the *Superannuation Industry (Supervision) Act 1993* (the SIS Act), which specifies covenants to be contained in a fund's governing rules. This includes that each trustee perform the trustee's duties and exercise the trustee's powers in the best financial interests of the fund beneficiaries.

¹ APRA distinguishes between those APRA-regulated funds with more than 6 members, and those with 6 or less (the later includes 'small APRA funds', and 'single member approved deposit funds').

² Based on APRA Annual fund-level superannuation statistics, June 2022.

Beneficial ownership register: Proposed reporting requirements relating to RSEs

(1) RSEs: disclosure of trust beneficiaries

ASFA supports the proposed exemption of RSEs from the requirement to disclose trust beneficiaries.

ASFA agrees with the rationale put forward in the Consultation Paper for exempting RSEs from this disclosure requirement. ASFA agrees that if RSEs were not made exempt, this would impose a regulatory burden on relevant trustees, while the additional transparency would be unlikely to give rise to significant benefits.

For a typical institutional superannuation fund, it is unlikely that a beneficiary would satisfy any one of the proposed thresholds. The proposed thresholds (in the Consultation Paper) for a natural person to be registered on a beneficial ownership register are that if, as a trust beneficiary, the person either:

- holds, directly or indirectly, 20 per cent of the shares or units in the RSE
- holds, directly or indirectly, 20 per cent of the voting rights in the RSE
- has the right to exercise, or actually exercises, significant influence or control over the RSE.

The vast majority of institutional superannuation funds (greater than 99 per cent) have a quantum of member accounts greater than 100, which suggests a very low likelihood of a fund beneficiary satisfying the first criteria. Furthermore, fund members generally do not have voting rights (with the possible exception of being able to vote for member trustees – which is relatively rare), and tend not to have influence or control.

If RSEs were not made exempt from the requirement to disclose trust beneficiaries, then it might be the case (depending on the ultimate legislation and accompanying guidance) that RSEs – irrespective of the likelihood of a beneficial owner (as defined) – would be required to set-up and maintain a register. The cost ultimately would be borne by all members of that fund.

Conversely, the disclosure of trust beneficiaries (if they existed) would be unlikely to advance the overarching policy intent of the beneficial ownership register, and unlikely to provide additional benefits to the Australian community including policy makers.

RSEs are already subject to significant regulation and oversight. This is recognised within other reporting regimes – for example, under the *Anti-Money Laundering and Counter-Terrorism Financing* (AML/CTF) regime where an RSE is the customer of a reporting entity (note, RSEs are also reporting entities under AML/CTF). Specifically, the AML/CTF rules provide an exception for reporting entities from the requirement to collect information on trust beneficiaries where the trust is subject to the regulatory oversight of a Commonwealth statutory regulator.

(2) RSEs: disclosure of beneficial ownership in other entities

Through their investments, institutional superannuation funds hold interests in a range of listed and unlisted entities, held either directly or indirectly via investment vehicles. The latter includes pooled investment trusts that can hold assets on behalf of a number of superannuation funds and other institutional investors.

From the perspective of entities in which RSEs have interests, the Consultation Paper notes that those entities would be expected to take reasonable steps to identify and verify their beneficial owners. By the same token, the Consultation Paper notes that (from the perspective of RSEs) there would be obligations on RSEs to identify themselves as beneficial owners in other entities and, once confirmed by the counterparty, to provide relevant beneficial ownership information to those entities. The proposed approach appears to be similar to the current approach with respect to the substantial holding notices regime that currently applies

to listed entities. While this is broadly appropriate, for funds with extensive investments in unlisted entities, the self-identification obligation would be likely to create a substantial compliance burden.

A broader issue relates to the proposed thresholds for designating and reporting beneficial ownership, and whether these can be harmonised with the ownership definitions thresholds under other regimes (against which RSEs also report). Harmonisation would help limit the administrative burden on RSEs.

Under the proposed beneficial ownership regime, the relevant thresholds for beneficial ownership in an entity are where the RSE either:

- holds, directly or indirectly, 20 per cent of the shares, units, voting rights in the regulated entity
- hold the right, directly or indirectly, to appoint or remove
 - a majority of the board of directors of the regulated entity (where the regulated entity is an unlisted proprietary or unlisted public company)
 - appoint or remove the regulated entity's responsible entity (where the regulated entity is a MIS)
 - appoint or remove the regulated entity's corporate director (where the regulated entity is a CCIV)
- has the right to exercise, or actually exercises, significant influence or control over the regulated entity.
 - 'Significant influence' would include having decision rights over the operations of a regulated entity, such as rights to alter the nature of the entity's business, arrange credit or loans on behalf of the entity, and grant options under a share option or other share-based incentive scheme.

Other (current) reporting requirements for RSEs relate to both the *AML/CTF* and the *Security of Critical Infrastructure* regimes. When considering the proposed beneficial ownership register, each of the three reporting regimes entail similar, though inconsistent, definitions of ownership that relate to disclosure, and different thresholds for disclosure.

Development of the beneficial ownership register provides an opportunity for government to harmonise the broader set of RSE reporting requirements. Potential harmonisation also relates to the specific information fields that RSEs are required to report. Again, each of the three reporting regimes entail similar, though inconsistent, information sets.