

Submission to the ASX Corporate Governance Council on the consultation draft of the proposed 5th edition of the ASX Corporate Governance Principles and Recommendations

1 Introduction

- 1.1 Australian LGBTQ+ Board & Executive Inclusion (**ALBEI**) is a not-for-profit organisation with the purpose of fostering diversity and inclusion in Australian boardrooms, with a particular focus on enabling representation and access for people identifying as LGBTQ+.
- 1.2 We make the following submission to the ASX Corporate Governance Council (**Council**) in relation to the Corporate Governance Principles and Recommendations Consultation Draft, 5th edition (**Consultation Draft**), and in particular, proposed Recommendations 2.3 and 3.4. In this submission, we make reference to the other consultation materials on the ASX website, being the:
- (a) ASX Communique dated 27 February 2024 (**Communique**); and
 - (b) ASX Corporate Governance Principles and Recommendations 5th Edition Consultation Draft: Background Paper and Consultation Questions (February 2024) (**Background Paper**).

2 Recommendation 2.3

- 2.1 The consultation question posed in the Background Paper respect of Recommendation 2.3 is as follows:
- Women hold approximately 35% of all S&P/ASX300 directorships. This exceeds the existing measurable objective of at least 30% of each gender for those boards. Do you support raising the S&P/ASX300 measurable objective to a gender balanced board?*
- 2.2 We strongly support the proposed change to the measurable objective. While the fact that directorships held by women have increased beyond the existing measurable objective is reason enough to change the measurable objective in the way proposed, there is an additional, compelling reason to do so.
- 2.3 The present measurable objective (set out in Recommendation 1.5 of the 4th edition of the Principles) is that of “not less than 30% of its directors of **each gender** within a specified period”. The associated commentary focuses on increasing the proportion of women on the board relative to the number of men. While that has been an important objective, it is one which focuses on the binary and one which has indirectly excluded gender diverse directors from express consideration.
- 2.4 By contrast, the new measurable objective is put in terms of having a “gender balanced board (at least 40% women / at least 40% men / up to 20% **any gender**)” (**40:40:20 Rule**), and the associated commentary is less focused on the binary. In our submission, that terminology is more inclusive and encourages the appointment of persons to the board regardless of their gender identity (even if the intent may have been only to capture ‘either’ gender).

3 Recommendation 2.3(c)

3.1 The consultation question posed in respect of Recommendation 2.3(c) is as follows:

The Council already recommends disclosure of a board's approach and progress on gender diversity. Do you support the proposed disclosure of any other relevant diversity characteristics (in addition to gender) which are being considered for the board's membership?

3.2 At a principled level, our answer to this question is “**yes**”: we welcome the move by the Council to embrace broader forms of diversity on boards by encouraging disclosure of diversity characteristics beyond gender. However, we submit that while Recommendation 2.3(c) is a step in the right direction of achieving diversity in corporate boards in Australia, regrettably, it is a step much smaller than public and investor expectations would dictate.¹ We set out six issues below which we foresee with proposed Recommendation 2.3(c) as presently drafted, and why we submit it does not go far enough. The second of those issues also affects proposed Recommendation 3.4. We then propose alternative Recommendations 2.3(c) and 3.4 for consideration, which we submit will result in meaningful change.

I. Requirement limited to boards which are already “considering” diversity

3.3 First, we are concerned that the requirement to disclose is only imposed on boards who are “considering any other relevant diversity characteristics for its board membership”. We see two issues with this:

- (a) It unnecessarily limits the disclosure requirement to boards which have already decided to do the right thing and consider characteristics beyond gender. In our submission, the entities which most need to break out of their traditional board appointment processes and to explore a broader range of candidates are given no imperative (or at least, encouragement) to do so. Put another way, they are not entities which are “considering” other diversity characteristics, and therefore no disclosure requirements arise. We note the Consultation Draft acknowledges that the Recommendations establish a “leading standard on corporate governance for listed entities”.² Indeed, the Recommendations are said to set out recommended corporate governance practices which, in the Council’s view, are likely to achieve good governance outcomes and meet the reasonable expectations of most investors in most situations. Similarly, the Australian Institute of Company Directors notes that the Recommendations are “widely used as a general key benchmark of good corporate governance”.³

¹ Australian Financial Review, ‘Boards grapple with evolving ESG expectations and opportunities’ (27 November 2023) <https://www.afr.com/policy/energy-and-climate/boards-grapple-with-evolving-esg-expectations-and-opportunities-20231120-p5eldi>. See also Australian Human Rights Commission, ‘Equality across the board: Investing in workplaces that work for everyone’ (Report, June 2021), https://humanrights.gov.au/sites/default/files/document/publication/ahrc_equality_across_board_2021.pdf.

² Foreword to Consultation Draft.

³ ‘ASX corporate governance principles: About ASX corporate governance principles’, *Australian Institute of Company Directors* (webpage), <https://www.aicd.com.au/good-governance/asx-corporate/principles.html#:~:text=Although%20these%20ASX%20governance%20principles.many%20non%2Dlisted%20organisatio%20types>.

- (b) The concept of “considering” diversity characteristics is a subjective one. How much consideration must be given before a company can purport to be considering certain characteristics? How does this consideration interact with its nominations committee?
- 3.4 It is in this context that the proposed Recommendation 2.3(c) must go further to encourage entities who are not already considering diversity characteristics beyond gender, to do so, and to prescribe precisely what consideration entails.
- II. No measurable objectives will result in no measurable improvement**
- 3.5 Second, requiring companies to disclose which characteristics their boards are considering without requiring disclosure against a measurable objective of any kind is a hollow amendment which, in our submission, has the risk of creating the illusion of progress without resulting in demonstrable change. We doubt that is what the Council intended.
- 3.6 The argument against measurable objectives is often premised upon their inflexibility. However, the ‘if not, why not’ model sufficiently allows for companies to avoid any requirements as to diversity beyond gender if it is inappropriate or unsuitable for their circumstances (although we submit those cases ought to be uncommon). With that in mind, proposed Recommendation 2.3(c) regrettably does not strike the balance between prescribing some level of diversity and allowing companies to adopt a tailored approach in respect of their board. It focuses entirely on the latter.
- 3.7 Disappointingly, when looking beyond the improved statistics relating to female board representation in Australia,⁴ meaningful progress in respect of other diversity demographics is largely absent. In the 2024 Watermark Search International board diversity index (**Watermark Index**), it was noted that:⁵
- (a) cultural diversity on ASX 300 boards has remained stagnant over the last three years, with 91% of board directors being from an Anglo-Celtic background;
 - (b) there is a disproportionately low number of LGBTQ+ individuals, with an estimated 4 people who openly identify as LGBTQ+ holding board director roles across the ASX 200 companies;
 - (c) while First Nations representation had doubled in the previous year, at a closer look, this is simply because the number of people who are directors is now four, across the ASX 300 companies, which is an increase from two people; and
 - (d) people with a disability were entirely unrepresented on boards in Australia (except on the board of the National Disability Insurance Scheme).

⁴ Fitzsimmons, T.W., Yates, M.S. & Callan, V.J. (2021). Towards Board Gender Parity: Lessons from the Past - Directions for the Future. Brisbane: University of Queensland Business School, [https://www.agec.org.au/wp-content/uploads/2021/07/2021-07-30%20UQ%20AICD%20&%20AGEC%20Towards Board Gender Parity Report.pdf](https://www.agec.org.au/wp-content/uploads/2021/07/2021-07-30%20UQ%20AICD%20&%20AGEC%20Towards%20Board%20Gender%20Parity%20Report.pdf).

⁵ Watermark Search International and Governance Institute of Australia, *2024 Board Diversity Index* (2024) p 6, 33, https://www.watermarksearch.com.au/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBcDhQSXc9PSIsImV4cCI6bnVsbCwicHVyIjoiYmxvYj9pZCJ9fQ==--d0c909b0ef43cd4a57829a789dacc9d53ddaac4/2024%20Board%20Diversity%20Index.pdf.

- 3.8 Our recently published research, ‘Australia’s Elite Business Leadership: Why are we Excluded?’⁶ also found that of the ASX 200:
- (a) 129 companies (64.5%) have broadly inclusive definitions of diversity within their policies;
 - (b) of those, almost all (127 companies) report only on gender with the addition of tenure and sometimes age or geographic location;
 - (c) only 67 companies (51.9%) apply these policies to their boards.
- 3.9 In our submission, that is at least in some part attributable to the lack of any requirement to set (and therefore the dearth of companies which actually set) measurable objectives to achieve a more diverse board. That point is no better illustrated than by considering the history of the drive to achieve gender diversity on Australian company boards.
- 3.10 In 2009, the percentage of Australian company directors on the ASX 200 who were women was just 8.1%.⁷ It was only after more specific and less qualitative measurable objectives were inserted into the Recommendations in 2014 that considerable progress was achieved. This development was described as a “*huge wake-up call for chairs of boards and senior executive teams, who had previously not taken the Recommendations seriously, because they suddenly had to publish the data*”.⁸ By the end of 2019, the number had more than tripled, to 30%.⁹
- 3.11 Indeed, the importance of measurable objectives in driving change is acknowledged in the commentary to the present 4th edition of the Corporate Governance Principles and Recommendations, wherein it is noted in the context of gender diversity that:
- “[n]on-numerical objectives such as “introducing a diversity policy” or “establishing a diversity council”, and aspirational objectives such as “achieving a culture of inclusion”, while individually worthwhile, are unlikely to be effective in improving gender diversity unless they are backed up with appropriate numerical targets”.*¹⁰
- 3.12 At the time when the requirement for gender-based measurable objectives had been recently introduced, KPMG, in its report for the ASX, observed that aspirational objectives (which we submit is the way merely ‘considering’ other diversity demographics should be characterised) make it difficult for entities to measure progress against their objectives both now and in future years.¹¹ KPMG stated that:

⁶ ALBEI, ‘Australia’s Elite Business Leadership: Why are we Excluded?’ (Web page, 1 March 2024), <https://board-diversity-governance-asx200.my.canva.site/accountability>.

⁷ ‘WOB welcomes ASX Corporate Governance Council’s gender balance recommendations’, *Women on Boards* (webpage, 8 March 2024), https://womenonboards.net/WOB/News-and-Media/News_Stories/News-2024/ASX_Corporate_Governance_Principles_Recommendations.aspx.

⁸ Fitzsimmons, T.W., Yates, M.S. & Callan, V.J. (2021). *Towards Board Gender Parity: Lessons from the Past - Directions for the Future*. Brisbane: University of Queensland Business School, p 23, https://www.agec.org.au/wp-content/uploads/2021/07/2021-07-30%20UQ%20AICD%20&%20AGEC%20Towards_Board_Gender_Parity_Report.pdf.

⁹ ‘Building Gender Diversity on ASX 300 Boards – Seven Learnings from the ASX 200’, *KPMG*, July 2020, p 3, <https://assets.kpmg.com/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf>.

¹⁰ Commentary to Recommendation 1.5, p 9.

¹¹ KPMG and ASX, ‘ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended between 1 January 2015 and 31 December 2015’, p 4, <https://www.asx.com.au/documents/asx-compliance/asx-corp-governance-kpmg-diversity-report.pdf>.

*“Entities can meet the minimum criteria with this aspect of the Diversity Recommendations by setting objectives to implement programs or initiatives. However, it is difficult to demonstrate the effectiveness of these diversity policies unless entities set targets to directly address the underlying issue the programs are intended to address...Entities that report on their progress against their diversity targets and outline their quantitative targets for female participation in future years create greater accountability for achieving results”.*¹²

3.13 In their July 2020 report ‘Building Gender Diversity on ASX 300 Boards – Seven Learnings from the ASX 200’, KPMG noted that *“explicitly adopting diversity targets focuses the board on progressing at each opportunity – an absence of targets most likely leads to no progress”*.¹³ In our submission, the very same argument applies with respect to diversity characteristics beyond gender. Not only does proposed Recommendation 2.3(c) not require the setting of any quantitative targets for diversity beyond gender on a board, it does not even require measurable objectives. In our submission, proposed Recommendation 2.3(c) in its present form will result in little to no measurable improvement.

3.14 The concept of implementing measurable objectives for diversity characteristics beyond gender is not a new one, and there has been ample time for Australian companies to adjust to the idea that a recommendation of this kind would be introduced. Their objectives set in relation to gender can be easily adapted to characteristics beyond gender. Indeed, KPMG observed in 2015 with respect to Recommendation 1.5 that:

“- The vast majority of measurable objectives focused on gender diversity. As these gender initiatives become established, we encourage entities to consider whether they would benefit from ‘beyond gender’ initiatives.

*- Many of the initiatives designed to address gender diversity may be applied to improve diversity in ‘beyond gender’ areas. This should **reduce the lead in time for entities to establish quantitative objectives for broader diversity areas.**”*

3.15 **Proposed Recommendation 3.4** suffers from the same problem. Although proposed Recommendation 3.4 requires the entity to disclose certain objectives (and progress towards them) in relation to the composition of its workforce and board from a *gender* perspective, it does not require the setting and disclosure of objectives for diversity characteristics *beyond* gender. We note that despite this, the accompanying commentary mentions diversity characteristics beyond gender, stating that:¹⁴

(a) the focus on gender diversity “should not detract from the importance of fostering other forms of diversity within an organisation”;

¹² KPMG and ASX, ‘ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended between 1 January 2015 and 31 December 2015’, p 6, <https://www.asx.com.au/documents/asx-compliance/asx-corp-governance-kpmg-diversity-report.pdf>.

¹³ ‘Building Gender Diversity on ASX 300 Boards – Seven Learnings from the ASX 200’, KPMG, July 2020, p 15, <https://assets.kpmg.com/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf>.

¹⁴ Consultation Draft, pp 28-29.

- (b) listed entities “should consider the appropriateness of setting and disclosing measurable objective for other diversity characteristics within the whole or any part of its workforce”; and
 - (c) the references in the proposed recommendation to a diversity and inclusion policy also include the board.
- 3.16 Particularly in relation to paragraph 3.15(c), our research shows that 129 of the ASX 200 companies have fully inclusive definitions of diversity, as set out at paragraph 3.8 above.¹⁵ In order to provide further encouragement for publicly listed companies to apply their wider, diversity and inclusion policies to their boards, the principles should more explicitly set out, within the wording of Recommendation 3.4, rather than the commentary, that any diversity and inclusion policy which applies to the workforce, ought to apply to the board.
- 3.17 In our submission, omitting measurable objectives for diversity characteristics beyond gender from the proposed recommendations (whether that be proposed Recommendation 2.3(c) or 3.4) and largely relegating the setting of measurable objectives for diversity characteristics beyond gender to the commentary only, is a missed opportunity to illustrate and encourage best practice. Commentary doesn’t have the status of a recommendation and thus does not fall into the ‘if not why not’ requirement.
- III. Lagging behind comparable jurisdictions**
- 3.18 Third, the proposed changes are, comparatively speaking, much narrower and less progressive than those made in other jurisdictions overseas, such as those made to the Nasdaq Stock Market LLC Rules (**Nasdaq Rules**) in the United States and to the Financial Conduct Authority Listing Rules (**FCA Rules**) in the United Kingdom. Australia ought to be in lock step with these jurisdictions when it comes to corporate governance, but proposed Recommendation 2.3(c) will see us lag behind.
- 3.19 Before turning to the specifics of these rules (which have informed our proposed alternative Recommendation 2.3(c) provided at paragraph 5.1 below), we wish to comment briefly on the justification provided in the Background Paper¹⁶ for the Council electing not to adopt a similar approach. While the Background Paper acknowledges that the listing rules in some international jurisdictions have provisions relating to board diversity beyond gender (and expressly refers to the Nasdaq Rules and the FCA Rules), it posits that this “may reflect particular diversity priorities within their jurisdictions”. With respect, we submit that this is an unhelpful distinction to make, and removing this language from the commentary would avoid some unintended consequences. As set out in further detail below, the requirements in those jurisdictions relate to ethnicity and minority group representation. Accordingly, we are uncertain what is meant by “diversity priorities”, and indeed why these priorities would be meaningfully different in an Australian context, particularly in light of the high level of underrepresentation of other diverse groups as set out at paragraph 3.7 above.
- 3.20 On the contrary, the Australian Council of Superannuation Investors (**ACSI**) identify that “[a] properly structured board should include appropriately skilled directors and draw on a

¹⁵ ALBEI, ‘Australia’s Elite Business Leadership: Why are we Excluded?’ (Web page, 1 March 2024) <https://board-diversity-governance-asx200.my.canva.site/accountability>.

¹⁶ ASX Corporate Governance Council, *Principles and Recommendations 5th Edition Consultation Draft: Background paper and consultation questions* (February 2024), p 7.

range of criteria, including gender, ethnicity and age, in addition to core skills and experience”.¹⁷ That is, characteristics beyond gender ought to be taken into account when considering board composition.

- 3.21 In our submission, there is a strong case for inserting more rigour around diversity beyond gender in order to encourage ASX listed entities to prioritise it (to the extent they are not already doing so).¹⁸ The underrepresentation faced by demographic groups on ASX 300 boards can be quantified by the following formula (**Underrepresentation Multiple**):

$$\frac{\text{Percentage of group in the Australian population}}{\text{Percentage of group on ASX boards}} = \text{Underrepresentation Multiple for Group on ASX Boards}$$

- 3.22 In the table below, we set out the Underrepresentation Multiple for three demographic groups in Australia. The higher the multiple, the less that demographic group is represented on ASX 300 boards. In our submission, these multiples highlight the need to prioritise diversity characteristics beyond gender in a substantive way in Recommendation 2.3. Due to an absence of data regarding people with one or more disabilities, the Underrepresentation Multiple was unable to be applied for the purposes of the table below.

¹⁷ ACSI, *Board Diversity* (webpage) <https://acsi.org.au/our-issues/gender-diversity/>.

¹⁸ See also Watermark Search International and Governance Institute of Australia, *2024 Board Diversity Index* (2024) p 37.

Demographic Group	Percentage of group in Australian population	Percentage of ASX 300 board seats held by group	Underrepresentation Multiple
Women	50.7% ¹⁹	37% ²⁰	1.37x
Culturally diverse people	46% ²¹	8.8% ²²	5.22x
LGBTQ+ people	8% ²³	0.2% ²⁴	40x
Indigenous people	3% ²⁵	0.2% ²⁶	15x

- 3.23 Further, it is not clear to us why in most instances there ought to be any prioritisation of one diversity characteristic over another, or how doing so would benefit a company.
- 3.24 As foreshadowed above, several jurisdictions have made moves to formalise board diversity targets or disclosure requirements across a range of demographics.
- 3.25 **First, in the United Kingdom**, the FCA Rules impose binding obligations to report on progress against gender identity and ethnic background targets. In particular, the FCA Rules require a statement setting out:
- (a) whether the listed company has met certain targets on board diversity, including that at least one individual on its board of directors is from a minority ethnic background;²⁷ and

¹⁹ Australian Bureau of Statistics, 'Population: Census, Information on Sex and Age 2021' (media release, 28 June 2022) <https://www.abs.gov.au/statistics/people/population/population-census/latest-release#:~:text=Media%20releases-Key%20statistics,age%20of%2039%20years%20old>.

²⁰ Watermark Search International and Governance Institute of Australia, *2024 Board Diversity Index* (2024) p 9.

²¹ This figure is based on data released by the Australian Bureau of Statistics in 2021 regarding the population of Australians from non-Anglo Celtic background. See Media Diversity Australia, University of Sydney and University of Technology Sydney, 'Who Gets to Tell Australian Stories 2.0' (2022), 51 <https://www.mediadiversityaustralia.org/who-gets-to-tell-australian-stories-2-0/>. See also Australian Human Rights Commission, 'Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited' (2018). Whilst this data is based on the 2016 census, it is clear from the 2021 census that there is a marginal decline in Anglo-Celtic ancestries as a proportion of the Australian population which suggests that the non Anglo-Celtic proportion of the population would have experienced a marginal increase. Accordingly, we consider the calculation of the Underrepresentation Multiple for cultural diversity, as set out in this table, would be an underestimate of the current position.

²² We note that due to the difficulty in obtaining consistency in the scope of "culturally diverse" cohorts in publicly available statistics regarding ASX 300 directors and members of the Australian population, the figure used here of 6.6% refers to the percentage of total board directors who are culturally diverse, rather than a percentage of total board seats held by culturally diverse directors. Watermark Search International and Governance Institute of Australia, *2024 Board Diversity Index* (2024) p 7.

²³ While the 8% figure is derived from the 2024 ASX Watermark Report, upon further inspection, this is based on the 2021 census data conducted by the Australian Bureau of Statistics on the number of same-sex couples living together. We note that this is a skewed statistic because not all people who identify as LGBTQ+ live together nor are in a relationship. Ibid p 6.

²⁴ Ibid. We note this figure is confined to directors who are publicly open in company literature, as identifying as LGBTQ+.

²⁵ Ibid.

²⁶ Ibid.

²⁷ FCA Listing Rule, LR 9.8.6(9)(a)(iii). "Minority ethnic background" means "from one of the following categories of ethnic background, as set out in the tables in LR 9 Annex 2.1R(b) and LR 14 Annex 1.1R(b), excluding the category "White British or other White (including minority-white groups)": (1) Asian/Asian British; (2) Black/African/Caribbean/Black British; (3) Mixed/Multiple Ethnic Groups; and (4) Other ethnic group, including Arab".

- (b) in cases where the listed company has not met all of the targets, which of the targets it has not met and the reasons for not meeting those targets.²⁸
- 3.26 The FCA Rules also require the reporting of numerical data on the ethnic background and the gender identity or sex of the individuals on the listed company's board and its executive management, set out in tabular format.²⁹
- 3.27 **Second, in the United States**, the Nasdaq Rules require each company to:
- (a) have, or explain why it does not have, at least two members of its board of directors who are diverse, including at least one director who self-identifies as female; and at least one director who self-identifies as an underrepresented minority or LGBTQ+.³⁰ The Nasdaq Rules define 'diverse'³¹ to mean an individual who self-identifies in one or more of the categories of female,³² underrepresented minority³³ or LGBTQ+³⁴.
- (b) publicly disclose board-level diversity statistics on a standardised template tracking "Gender Identity", and "Demographic Background" (which encompasses Indigenous and other ethnic backgrounds, and LGBTQ+ status). The information is gleaned from each director's voluntary self-identified characteristics.³⁵
- 3.28 Companies have been given a transition period to adjust to the new requirements. Companies must have, or explain why it does not have, at least one Diverse director by 31 December 2023, and at least two Diverse directors by 31 December 2025 (or 2026 for the Capital Market).
- 3.29 The Nasdaq Rules also provide for the consequences of failing to comply with the requirements, including a 'cure period' (permitting the company until the later of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency), and a 'grace period' (where a company previously satisfying the objectives ceases to meet them due to a vacancy on the board, permitting the company until the later of one year from the date of the vacancy, or the date the company files its proxy statement or its information statement to satisfy the requirements).³⁶

²⁸ FCA Listing Rule, LR 9.8.6(9)(b).

²⁹ FCA Listing Rule, LR 9.8.6(10), LR 9 Annex 2.

³⁰ Nasdaq Rule 5605(f)(2), subject to exceptions as described in rules 5605(f)(2)(B), (C) and (D). There are more limited requirements for Foreign Issuers, Smaller Reporting Companies and Companies with Smaller Boards as set out in rule 5605(f).

³¹ Nasdaq Rule 5605(f)(1).

³² Defined in Nasdaq Rule 5605(f)(1) as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth".

³³ Defined in Nasdaq Rule 5605(f)(1) as "an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities." In turn, "Two or More races or Ethnicities" is defined to mean "a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander".

³⁴ Defined in Nasdaq Rule 5605(f)(1) as "an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community".

³⁵ Nasdaq Rule 5606.

³⁶ Nasdaq Rule 5605(f)(6).

- 3.30 It is apparent from research in this area that there is a strong link between the requirements implemented in the Nasdaq Rules, increased regulation, and measurable change, which can be contrasted with the lack of such requirements in Australia:
- (a) The Watermark Board Diversity Index 2023 noted that Australian boards were lagging on diversity compared to US boards and that this was “partly due to increased legislative action in some parts of the United States to improve diversity on boards, as well as activism among institutional investors”.³⁷
 - (b) Our research³⁸ found that Block Inc appeared to be the only company in the ASX 200 which has clear targets for diversity that go beyond gender at the board level and reports against them. We suggest this is due to Block Inc also being listed on the Nasdaq Stock Market in the United States.
 - (c) In April 2023, Out Leadership released a report which noted that 50% of companies listed on the Nasdaq have LGBTQ+ inclusive board diversity policies, and suggested that the uptake of such policies for companies is due to the new requirements under the Nasdaq Rules.³⁹ Our research, released in October of the same year, found that 16 (or, 32%) of the top 50 ASX companies, had broadly inclusive board diversity policies, accounting for LGBTQ+ diversity.⁴⁰
- 3.31 **Third, in Canada**, companies are required to disclose statistics regarding the number of directors and executives in each of four designated categories: women, Indigenous people, people with disabilities, and members of visible minorities.⁴¹ They must also disclose whether or not they have targets in place to enhance representation within these four groups, and if they do not have these targets, they must explain why.⁴²
- 3.32 In short, we should be doing our best in Australia to stay in step with the corporate governance frameworks in other jurisdictions, in order to encourage the listing of multinational entities on the ASX. Research by Watermark Search International and the Governance Institute of Australia in 2021 noted that based on current trends, it would take 18 years for the boardroom to be reflective of Australia’s cultural diversity,⁴³ and by 2023

³⁷ Watermark Search International and Governance Institute of Australia, *2023 Board Diversity Index* (2023), p 13, https://www.watermarksearch.com.au/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6KjBaHBBejV4SFE9PSIsImV4cCI6bnVsbCwicHVlIjoiYmxvY19pZCJ9fQ==--53818c89bc8bc1472c58a68bf4f7d7c49fa46c91/Watermark%20Board%20Diversity%20Index%202023.pdf.

³⁸ ALBEI, ‘Australia’s Elite Business Leadership: Why are we Excluded?’ (Webpage, 1 March 2024), <https://board-diversity-governance-asx200.my.canva.site/accountability>.

³⁹ Out Leadership, ‘OutQUOROM LGBTQ+ Board Diversity: Progress and Possibility’ (Report, 12 April 2023) pp 18-19, <https://outleadership.com/driving-equality/board-diversity-2023-progress-possibility/>.

⁴⁰ Mark Baxter, ‘32% of ASX50 companies have inclusive board policies. Is this moving the dial on true diversity?’, *ALBEI* (Blog post, 9 October 2023) <https://www.albei.org/post/32-of-asx50-companies-have-inclusive-board-policies-is-this-moving-the-dial-on-true-diversity>.

⁴¹ *Canada Business Corporations Act*, RSC 1985, c C-44; *Canada Business Corporations Regulations*, SOR/2001-512, s 72.2(1) (definition of ‘designated groups’); *Employment Equity Act*, SC 1995, c 44, s 3 (definition of ‘members of visible minorities’). ‘Members of visible minorities’ denotes persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour.

⁴² Government of Canada, *Diversity of Boards of Directors and Senior Management* (Webpage), [https://ised-isde-canada.ca/site/corporations-canada/en/business-corporations/diversity-boards-directors-and-senior-management](https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/diversity-boards-directors-and-senior-management); *Canada Business Corporations Regulations*, SOR/2001-512, s 72.2.

⁴³ Watermark Search International and Governance Institute of Australia, *2021 Board Diversity Index* (2021) p 3, https://www.watermarksearch.com.au/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6KjBaHBBejdGQXc9PSIsImV4cCI6bnVsbCwicHVlIjoiYmxvY19pZCJ9fQ==--53818c89bc8bc1472c58a68bf4f7d7c49fa46c91/Watermark%20Board%20Diversity%20Index%202021.pdf.

noted that the rate of change had stalled,⁴⁴ with this position remaining unchanged in the 2024 Watermark Index.⁴⁵ The Council should not be waiting until the next version of the Recommendations in four to seven years' time to implement requirements analogous to other jurisdictions when the Australian framework will be, by that time, significantly lagging.

IV. Create a hierarchy of priorities

- 3.33 Fourth, we submit that requiring boards to disclose which characteristics their boards are “considering” creates a hierarchy of priorities, and at the very least impliedly suggests that boards could or should be prioritising or considering some minority groups over others. The only foreseeable reason such prioritisation might be justified is if the intention of proposed Recommendation 2.3(c) is to merely capture instances where otherwise diverse boards are considering particular diversity characteristics in order to fill identified gaps or to fill vacancies created by the resignation of other diverse board members. For example, a board which does not have a person with a disability but otherwise includes directors of different ethnicities, sexual orientation, age, and gender identity, might consider prioritising the appointment of a director with a disability.
- 3.34 However, we do not consider that to be the problem with which most Australian companies are grappling. Rather, it is frequently reported that board candidate pools in Australia are insular, and indeed a news article in 2021 reported that six individuals together hold positions that give them access to almost half of the ASX top 200 companies.⁴⁶ The same article also outlined that “[t]he ASX 200 companies have a total of 1305 non-executive directors. But the total number of unique directors (counting a director just once even if they are on multiple boards) is materially less at only 1005”, which appears indicative of the concentration of board positions held by some cohorts of directors. Our research⁴⁷ supports that there is a problem of largely homogenous boards in Australian companies, with many (some 133 of the ASX 200) lacking board diversity policies addressing diversity characteristics beyond gender. Put another way, proposed Recommendation 2.3(c) is seemingly addressing an issue which will largely not arise until Australian company boards are at least more diverse than they presently are.
- 3.35 Accordingly, we submit that this recommendation ought to be supplemented with one which encourages boards to consider all diversity characteristics in its composition, and to take active steps to achieve a more diverse board as a whole.

[Cl6bnVsbCwicHVlIjoieYmxvY19pZCJ9fQ==--56fb7ee4b231db6c73229d9acd4c2ec1bff86/2021%20Board%20Diversity%20Index.pdf?source=linkedin.com](https://www.watermarksearch.com.au/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6KjBaHBBEjV4SFE9PSIsImV4cC16bnVsbCwicHVlIjoieYmxvY19pZCJ9fQ==--56fb7ee4b231db6c73229d9acd4c2ec1bff86/2021%20Board%20Diversity%20Index.pdf?source=linkedin.com).

⁴⁴ Watermark Search International and Governance Institute of Australia, *2023 Board Diversity Index* (2023), p 12, https://www.watermarksearch.com.au/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6KjBaHBBEjV4SFE9PSIsImV4cC16bnVsbCwicHVlIjoieYmxvY19pZCJ9fQ==--53818c89bc8bc1472c58a68bf4f7d7c49fa46c91/Watermark%20Board%20Diversity%20Index%202023.pdf.

⁴⁵ Watermark Search International and Governance Institute of Australia, *2024 Board Diversity Index* (2024), p 16, https://www.watermarksearch.com.au/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6KjBaHBBEjV4SFE9PSIsImV4cC16bnVsbCwicHVlIjoieYmxvY19pZCJ9fQ==--d0c909b0ef43cd4a57829a789dacc9d53d4daac4/2024%20Board%20Diversity%20Index.pdf.

⁴⁶ See Donald Hellyer, “Inviting six directors to lunch would give you access to almost half the ASX 200”, *Crikey* (online, 2 March 2021) <https://www.crikey.com.au/2021/03/02/six-directors-lunch-half-asx-200/>.

⁴⁷ ALBEI, ‘Australia’s Elite Business Leadership: Why are we Excluded?’ (Web page, 1 March 2024), <https://board-diversity-governance-asx200.my.canva.site/accountability>.

3.36 As canvased above, other comparable jurisdictions already have in place measurable objectives and targets. This presents a correlation between increased board diversity and requirements focused on quantitative target settings.⁴⁸

3.37 As to the intention of proposed Recommendation 2.3, we note for completeness that the background paper indicates that proposed Recommendation 2.3 seeks to “*balance disclosure which may assist security holders’ understanding of how a board is seeking to develop its range of perspectives, the promotion of board succession planning, and flexibility for board recruitment processes*” and that “[i]t is not intended as disclosure of general diversity characteristics sought across the entity’s workforce (diversity and inclusion policies are the subject of new Recommendation 3.4)”.⁴⁹ Whilst we understand the intention not to capture the workforce, it is not apparent to us why proposed Recommendation 2.3 should not encourage a more comprehensive disclosure of diversity characteristics beyond gender at the level of a company’s board.

V. Diversity characteristics not expressly listed

3.38 Fifth, proposed Recommendation 2.3(c) does not specify the types of diversity characteristics beyond gender which Boards should consider. We submit that it should. In discharging its role of exemplifying best practice, the Recommendations should explicitly list the full spectrum of characteristics which companies should be considering. In our submission, the following characteristics ought to be listed as examples:

- age;
- cultural and linguistic diversity;
- disability;
- ethnicity;
- First Nations;
- gender identity;
- neurodiversity;
- parental status.
- religious beliefs;
- sexual orientation; and
- socioeconomic background.

3.39 In our submission, a failure to expressly include those characteristics in the Recommendations leads to them being indirectly *excluded* from consideration.

VI. Neglects intersectionality

3.40 The implication from Recommendation 2.3(c)’s treatment of gender diversity and other diversity characteristics is that they are discrete issues. This neglects possible areas of

⁴⁸ See generally, Alice Klettner, ‘Corporate Governance Codes and Gender Diversity: Management-Based Regulation In Action’ *UNSW Law Journal* 39(2) (2016) 715.

⁴⁹ ASX Corporate Governance Council, *Principles and Recommendations 5th Edition Consultation Draft: Background paper and consultation questions* (February 2024), p 7.

intersection, such as where a director identifies as both female and as a person of colour. Rather than viewing an issue as strictly a gender issue, a race issue or a class or LGBTQ+ issue, intersectionality highlights how the overlap between two or more characteristics act as a barrier to individuals who identify as such.⁵⁰

- 3.41 The oversight of intersectionality considerations to date has manifested in the concentration of board roles, whereby 19% of all female directors hold 45% of board seats occupied by women.⁵¹ Based on the current nature of underrepresentation on ASX boards as explored at paragraphs 3.21 and 3.22 above, it can be hypothesised that women who hold other diversity characteristics including but not limited to, their cultural background, sexuality, gender identity, age or socioeconomic circumstances, may benefit at a disproportionately lesser rate than women who do not.
- 3.42 In 2017, the Diversity Council of Australia reported that only 2.5% of all 7,491 ASX directors were culturally diverse women. This was compared to 5.7% who were non-culturally diverse women, 27.8% who were culturally diverse men and 64.0% who were non-culturally diverse men. This, in effect, meant that culturally diverse women experience a ‘double jeopardy’ of underrepresentation on company boards. There is a dearth of more recent research since 2017.
- 3.43 By setting measurable objectives for gender diversity but not for the other diversity characteristics (as we have explained in Section II above), Recommendation 2.3(c) artificially compartmentalises potential directors.
- 3.44 For the continual growth of diversity and inclusion across ASX Boards to be achieved and sustained, intersectionality should be duly reflected in Recommendation 2.3(c) so as to not indirectly exclude certain individuals and encourage a more equitable approach.

4 Concluding remarks

- 4.1 Regrettably, it is our view that proposed Recommendation 2.3(c) will do little to advance the landscape of the diversity of Australian boards where it is needed most, and on a broad scale. As Watermark Search International put it:

“Over the past decade, progress has been made in female representation, but broader diversity including cultural background, disability and mix of skills remain stubbornly fixed. Governance Institute of Australia, a proud partner of the Watermark Board Diversity Index, hopes this report will encourage ASX Top 300 companies to prioritise transparency, accountability, and a culture of inclusivity on their boards, leading the way to unlock the full potential of their workforce and contribute to a more productive society and economy.”⁵²

- 4.2 We echo those comments and implore the Council to make that long overdue change by expanding the scope of proposed Recommendation 2.3(c) for the reasons set out above, and in the terms we propose below.

⁵⁰ See ‘Kimberlé Crenshaw on Intersectionality, More than Two Decades Later’, *Columbia Law School* (7 June 2017), <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later>.

⁵¹ Watermark Search International and Governance Institute of Australia, *2024 Board Diversity Index* (2024), p 11.

⁵² Watermark Search International and Governance Institute of Australia, *2024 Board Diversity Index* (2024), p 7.

5 A proposed alternative

- 5.1 We consider that a recommendation which mandates that Boards consider an express list of diversity characteristics in their appointment processes, set measurable objectives for the diversity of their board with respect to characteristics beyond gender, and in turn disclose their progress towards those objectives would be far more likely to deliver meaningful change. In Annexure A, we propose some amendments to proposed Recommendations 2.3(c) and 3.4.
- 5.2 ALBEI welcomes the opportunity to provide further submissions and to further participate in consultation in respect of the Consultation Draft.

Yours faithfully

The Directors



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Eora Country

Annexure A - ALBEI's suggested changes to the Consultation Draft

Current Draft	Proposed amendment (deletions in red and additions in green)
<p>Recommendation 2.3</p> <p>The board of a listed entity should:</p> <ul style="list-style-type: none"> (a) have and disclose a measurable objective and timeframe for achieving gender diversity in the composition of its board; (b) disclose the entity's progress in achieving the measurable objective in the reporting period; and (c) if it is considering any other relevant diversity characteristics for its board membership, disclose those diversity characteristics. <p>If the entity was in the S&P/ASX 300 Index at the commencement of the reporting period, the measurable objective for achieving gender diversity in the composition of its board should be to have a gender balanced board (at least 40% women/ at least 40% men / up to 20% any gender)</p>	<p>Recommendation 2.3</p> <p>The board of a listed entity should:</p> <ul style="list-style-type: none"> (a) have and disclose a measurable objective and timeframe for achieving gender diversity in the composition of its board; (b) (c) if it is considering <u>have and disclose measurable objectives and timeframes for any other relevant</u> diversity <u>in other</u> characteristics for its board membership <u>consistent with the entity's diversity and inclusion policy (as set out in Recommendation 3.4); and</u> disclose these diversity characteristics. (c) (b) disclose the entity's progress in achieving the measurable objectives <u>outlined in paragraphs (a) and (b)</u> in the reporting period. <p>If the entity was in the S&P/ASX 300 Index at the commencement of the reporting period, the measurable objective for achieving gender diversity in the composition of its board should be to have a gender balanced board (at least 40% women/ at least 40% men / up to 20% any gender).</p>
<p>Recommendation 2.3</p> <p>Commentary</p> <p>An entity's board benefits from a diversity of thinking and perspectives, in addition to skills such as knowledge of the sector in which the listed entity operates. In particular, having directors of different ages, race, backgrounds and personal circumstances can help bring different perspectives and experiences to bear and avoid "groupthink" or other cognitive biases in decision-making...</p> <p>...Different entities will have different diversity priorities for their boards. Disclosures for the purposes of paragraph (c) of this Recommendation should refer to the relevant diversity characteristics which may be considered rather than referencing general diversity characteristics sought across the entity's workforce under its diversity and inclusion policy. Disclosure of these priorities can assist</p>	<p>Recommendation 2.3</p> <p>Commentary</p> <p>An entity's board benefits from a diversity of thinking and perspectives, in addition to skills such as knowledge of the sector in which the listed entity operates. In particular, having directors of different ages, race, backgrounds, disability and personal circumstances can help bring different perspectives and experiences to bear and avoid "groupthink" or other cognitive biases in decision-making...</p> <p>...Different entities will have different diversity priorities for their boards. Disclosures for the purposes of paragraph (c) of this Recommendation should refer to the relevant diversity characteristics which may be considered rather than referencing general <u>specific diversity characteristics, such as age, cultural and linguistic diversity, disability, ethnicity, First Nations, gender identity, neurodiversity,</u></p>

<p>security holders' understanding of how a board is seeking to develop its range of perspectives...</p> <p>...Diversity characteristics present within a board may also model diversity for the organisation. Diversity and inclusion is discussed further at Recommendation 3.4. An entity may combine its disclosures under this Recommendation with disclosures under Recommendation 3.4.</p>	<p><u>parental status, religious beliefs, sexual orientation, and socioeconomic background, and these should be aligned to the</u> diversity characteristics sought across the entity's workforce under its diversity and inclusion policy. <u>This both reinforces the value of diversity in the entity and recognises how diversity is also integral to its leadership and board functions.</u> Disclosure of these priorities can assist security holders' understanding of how a board is seeking to develop its range of perspectives...</p> <p>...Diversity characteristics present within a board may also <u>should</u> model diversity for the organisation. Diversity and inclusion is discussed further at Recommendation 3.4. An entity may combine its disclosures under this Recommendation with disclosures under Recommendation 3.4.</p>
<p>Recommendation 3.4</p> <p>A listed entity should:</p> <ul style="list-style-type: none"> (a) have and disclose a diversity and inclusion policy; (b) through its board or a board committee set measurable objectives for achieving gender diversity in the composition of its workforce (including in its senior executive team); and (c) disclose in relation to each reporting period the effectiveness of its diversity and inclusion practices, including: <ul style="list-style-type: none"> 1. the measurable objectives set for that period to achieve gender diversity. 2. the entity's progress towards achieving those objectives; and 3. either: <ul style="list-style-type: none"> A. the retrospective proportions (by gender) of members of the board, in senior executive positions and across the whole workforce (including how the entity has defined "senior executive" for these purposes); or B. if the entity is a "relevant employer" under the Workplace Gender Equality Act, the entity's most recent "Gender Equality Indicators", as defined in and published under that Act. 	<p>Recommendation 3.4</p> <p>A listed entity should:</p> <ul style="list-style-type: none"> (a) have and disclose a diversity and inclusion policy <u>which applies to both its workforce and its board;</u> (b) through its board or a board committee set measurable objectives for achieving gender diversity <u>the following</u> in the composition of its workforce (including in its senior executive team): <ul style="list-style-type: none"> <u>1. gender diversity; and</u> <u>2. diversity of other characteristics (such as age, cultural and linguistic diversity, disability, ethnicity, First Nations, gender identity, neurodiversity, parental status, religious beliefs, sexual orientation, and socioeconomic background); and</u> (c) disclose in relation to each reporting period the effectiveness of its diversity and inclusion practices, including: <ul style="list-style-type: none"> 1. the measurable objectives set for that period to achieve <u>both</u> gender diversity <u>and diversity in other characteristics;</u> 2. the entity's progress towards achieving those objectives; and 3. either: <ul style="list-style-type: none"> A. the retrospective proportions (by gender) of members of the board, in senior executive positions and across the whole workforce



	<p>(including how the entity has defined “senior executive” for these purposes); or</p> <p>B. if the entity is a “relevant employer” under the Workplace Gender Equality Act, the entity’s most recent “Gender Equality Indicators”, as defined in and published under that Act.</p>
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