

26 April 2024

Ms Elizabeth Johnstone
Chair
ASX Corporate Governance Council
c/- ASX Limited
PO Box H224
Australia Square NSW 1215

Submitted online

AUSTRALIAN SHAREHOLDERS' ASSOCIATION – CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 5TH EDITION, CONSULTATION DRAFT

Dear Ms Johnstone

The Australian Shareholders' Association (ASA) represents its members to promote and safeguard their interests in the Australian equity capital markets. The ASA is an independent not-for-profit organisation funded by and operating in the interests of its members, primarily individual and retail investors, self-managed superannuation fund (SMSF) trustees and investors generally seeking ASA's representation and support. ASA also represents those investors and shareholders who are not members, but follow the ASA through various means, as our relevance extends to the broader investor community.

Overview

ASA supports the changes introduced in the consultation draft of the 5th edition of the Corporate Governance Principles and Recommendations (Consultation Draft). We support the retention of the 8 Principles.

ASA has been a member of the Council since its inception in 2002 and has developed its own governance guidelines, which it uses when engaging with ASX200 companies. In many instances these accord with the Corporate Governance Principles and Recommendations, but they often go further to ensure that boards of listed entities take account of the needs of their retail shareholders to the same degree as the needs of wholesale investors. ASA refers to both our own guidelines and those issued by Council when engaging with listed companies. It is therefore of importance to ASA that the Corporate Governance Principles and Recommendations continue to evolve, that they are easy to apply and that they acknowledge when regulation catches up.

ASA supports the 'if not, why not' approach of the Corporate Governance Principles and Recommendations, as it allows boards to disclose to the market their decisions in relation to a governance framework. Investors expect boards to fully explain why the governance framework they have implemented is appropriate to the circumstances of the company and it supports their

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stewardship responsibilities. Investors require genuine transparency as to how directors are fulfilling their stewardship responsibilities and providing accountability for their decisions.

We are disappointed when we see boilerplate disclosures. We expect the framework will vary with the maturity and size of the company, while noting an explanation of “we are too small” to follow this recommendation, must be accompanied by an explanation as to how the company addresses the intent of the principles and recommendations.

ASA considers providing transparency about Australian listed companies’ accountability frameworks maintains investor confidence.

Many not-for-profit and public sector bodies use the Corporate Governance Principles and Recommendations as a model for the development of sector-specific governance guidelines, but we note the Corporate Governance Principles and Recommendations must meet the needs of investors in listed entities to maintain their relevance.

The proposed changes in the Consultation Draft, which seek to take into account developments in public policy and regulation, and evolving community expectations, as well as enhancing clarity and reducing replication of regulation are supported by ASA in their application to listed entities.

Our detailed comments follow.

Where we have not commented on a particular recommendation, it can be taken that we support that Recommendation as drafted.

Reducing regulatory overlap

We support the deletions above on the basis of the significant regulation is in place. Companies should ensure they comply with the spirit of the relevant regulations.

Respect shareholder communication preferences

In the case of Recommendation 6.5, despite the requirements of sections 110C, 110D and 110K of the Corporations Act, many shareholders complain that they are unable to receive their company communications by post, no matter whether they have registered their preferred method or they have made an ad hoc request. We have further complaints that shareholders preferences are being switched to electronic delivery at any opportunity.

Deletion is only supported with the inclusion of the wording at Recommendation 6.2 "Listed entities should also support the communication choices of their security holders. Security holders should be notified at least annually of their right to elect to receive electronic or physical documents or to change that election at any time. For annual financial reporting, security holders may elect not to receive the document at all."

Companies should respect their shareholders' delivery preference for communication.

Disclosure of whistleblower policy

We consider the observance of the relevant legislation is at an early stage and the retention of this Recommendation 3.3 (disclosure of whistleblower policy) would underline this.

We are supportive Recommendation 3.2 highlighting the importance of fair treatment of whistleblowers in a code of conduct and appropriate reporting of whistleblowing incidents to the board, but it is an area that needs focus.

Companies should respect their shareholders' delivery preference for communication.

Board skills matrix at an individual director level

ASA's FY24 Focus Issue "Building better oversight - directors and boards" states:

Boards should comprise directors with the diverse skills as required to fulfill the company's strategic plan. The required skills and accredited skills attributed to each director should be communicated in a board skills matrix which supports the shareholders' decisions on voting for a director's election or re-election.

We consider the proposed addition to Recommendation 2.2, that a company discloses its process for how it assesses that the relevant skills and experience are held by its directors which is disclosed in a boards skills matrix, is a step in the right direction. However, we consider a board skills matrix that does not attribute accredited skills to individual directors to be next to useless.

ASA considers that it is important that companies provide enough information to help shareholders make an informed decision when voting on the election or re-election of a director. We also expect the matrix to aid the Board with succession planning and determining professional development initiatives for Directors.

Please see [page 81 of the Spark NZ Limited annual report](#) for an example of a skills matrix showing individual director skills.

The operation of boards is opaque and the contributions of individual directors to the effective working of the board is not known outside the board. A well-constructed skills matrix will indicate what the board considers each director brings to the table.

Currently the skills matrices of many ASX listed companies address the skills of the board as a whole, and some assert all directors are experienced in all skills. There is often little evidence provided to support a claim of expertise of a director in a particular area.

Meanwhile investors need to vote for or against the election of individual directors. We consider disclosing a standardised matrix with the disclosure of individual director skills and disclosure of the process to determine director skills will assist in those voting decisions.

There are some specialists in board and director skills assessment who have built skill ladders (from 'is familiar with' to 'has demonstrated expertise in') for each of the relevant skills required on a board, with the requirement for proof that each step of the ladder has been mastered before the director can claim that level.

Board diversity

We agree with the proposed change to Recommendation 2.3, raising the S&P/ASX300 measurable objective to a gender balanced board. When we see a homogenous board, we are concerned about their governance, the risk of group think, and capacity to engage with diverse employees and

customers. The group think risk extends to the homogenous board's director selection and ability to attract and retain directors who would broaden the board's diversity.

Diversity expands the pool of available directors who have adequate time to carry out the role and leads to better explanations and processes within the company.

ASA supports the proposed disclosure of any other relevant diversity characteristics (in addition to gender) which are being considered for the board's membership, as an adjunct to the skills that are required and present on the board. Diversity characteristics extend beyond gender, and the mindset of the board should be wary of a tendency to recruiting directors who are just like us.

Independence of directors

Recommendation 2.4 outlines indicators that may impact a director's independence. ASA considers companies should voluntarily adhere to tenure limits of no more than 12 years for independent directors and this should be formalised in board protocols and disclosed. The commentary under this recommendation suggests tenure may be seen as a governance risk by shareholders if a director becomes too close to management or significant security holder. We also see there is a risk of becoming too close to prior decisions made while on the board. Whilst ASA will not automatically vote against a long-serving director, we will not classify them as "independent" after 12 years of service and we will encourage companies to maintain a majority of independent directors.

We understand the increasing the security holding reference included in Box 2.4 (factors relevant to assessing the independence of a director) from a substantial holder (5% or more) to a 10% holder (10% or more) well harmonise with other laws signifying potential for conflict. With most large listed companies, ASA will consider a substantial shareholding of 5% or more to be a risk to independence.

We underscore the final comment in Box 2.4 - Factors relevant to assessing the independence of a director: In each case, the materiality of the interest, position or relationship needs to be assessed by the board to determine whether it might interfere, or might reasonably be seen to interfere, with the director's capacity to bring independent judgment to bear on issues before the board. We further comment that labelling a director as independent when they are not, or can be perceived as not, reduces trust in the boards application of its conflicts of interest policies.

Disclosure of the outcomes of actions taken for material breaches of its code

We consider that the big banks manage to disclose consequence management adequately by listing the number of matters involving conduct or policy breaches raised during the year, that resulted in formal consequences. The breaches are not confined to KMP. They are categorised as type of breach such as Code of Conduct appropriate workplace behaviour related and other policy matters such as technology breaches, and the consequences are outlined, ranging from additional training, remuneration impacts to termination. We understand that there will be privacy concerns where a single executive has been disciplined or their employment terminated, but we would not expect these to be isolated behaviours, nor will these be trivial events and they should be disclosed.

Stakeholder relevance to the entity

ASA supports the inclusion of the reference to key stakeholders, as those stakeholders who have the capacity to impact a company and therefore its return to shareholders over the longer term. We consider companies need to identify the key stakeholders and have in place processes to escalate concerns to the board.

Entity's auditor disclosures

ASA considers boards need to ensure the audit meets shareholders' needs, which includes trust in the auditor's independence and capability. The proposed disclosure of an entity's auditor tenure, when the engagement was last comprehensively reviewed and the outcomes from that review will assist that trust. We have called for the enactment of the recommendations contained in the [Parliamentary Joint Committee on Corporations and Financial Services' Regulation of Auditing in Australia: final report](#).

Management of risk

Materiality is key for investors to consider the longer term risks and potential returns of the entities they invest in. We support enhancing the quality of reporting, and consider reporting against a generic list of specific risk can lead to boilerplate replies that reduce transparency.

Non-executive directors not to receive performance-based remuneration or retirement benefits

The prior wording was unclear and led to misinterpretation by a small cohort of companies. Performance-based remuneration and retirement benefits corrupt independence of directors. We welcome the clarification.

Remuneration structures

Remuneration receives a strong focus by investors due to historic practices which allowed executives to profit from poor behaviour or unsustainable practices, as long as the timing was lucky for them and an exit was possible as soon as the reward was in hand. We object to executives benefitting from poor behaviours, as well as considering incentive schemes drive a poor culture if they are lottery-like by nature. As we learned from the Financial Services Royal Commission, transparency improves culture as does communication of a consequence for poor behaviour.

Summary

In summary, we are supportive of the current consultation draft, and the application of the principles and recommendations by companies.

If you have any questions about these comments or other matters, please do not hesitate to contact me ceo@asa.asn.au , or Fiona Balzer, Policy & Advocacy Manager, policy@asa.asn.au.

Yours sincerely



Rachel Waterhouse
Chief Executive Officer
Australian Shareholders' Association