BCA
Business Council of Australia

BCA submission to consultation draft of the 5th edition of the ASX Corporate Governance Principles and Recommendations

May 2024

Contents

1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to make this submission to the consultation draft for the 5th edition of the ASX Corporate Governance Principles and Recommendations (the Principles). As a member of the ASX Corporate Governance Council and the drafting group for the 5th edition, the BCA aims to ensure that the Principles and Recommendations reflect best corporate governance practice, as well as supporting the growth of Australia's public markets as a major venue through which Australian companies raise the capital to fund their investment in Australia's future economic growth.

The BCA is supportive of the effort made in the 5th edition to streamline the recommendations and commentary to reflect developments in the Corporations Act and other statutory obligations and standards since the 4th edition was adopted. BCA members are also mindful of prospective developments in statutory reporting and disclosure obligations. The drafting for the 5th edition needs to anticipate and accommodate these future regulatory obligations where possible.

BCA members have concerns about the general role played by the Principles and Recommendations in corporate governance, as well as specific concerns about some of the changes proposed for the 5th edition. These issues should be addressed by the ASX Corporate Governance Council as it prepares the final version for endorsement by Council members. The Council should also be mindful of the need to adjust the timing for the adoption of the Principles and Recommendations to reflect any further delays in the drafting and endorsement process to ensure listed entities have time to incorporate them into their corporate governance practice against the backdrop of a wide range of soon to be legislated compliance and disclosure obligations.

2. General issues with the Principles and Recommendations

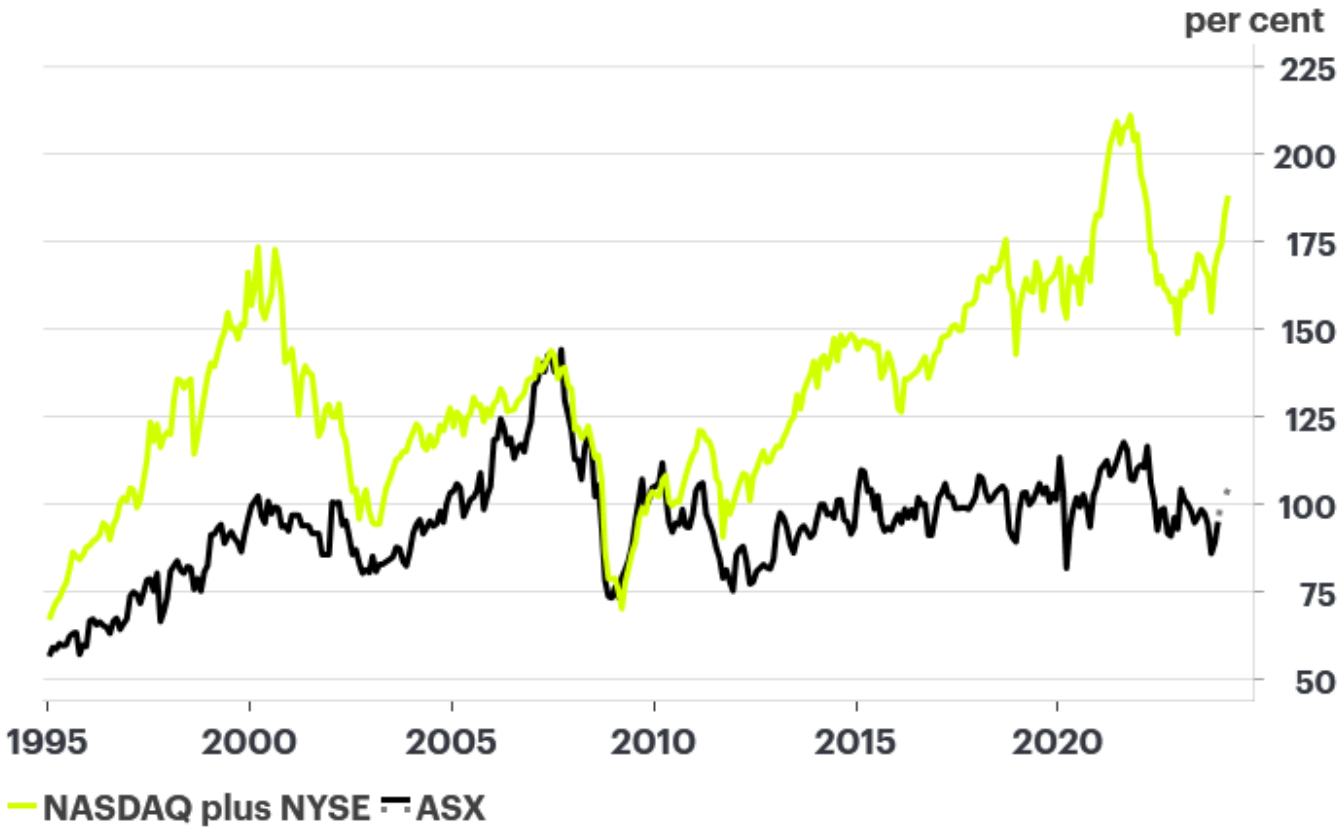
BCA members are concerned that the Principles create over-regulation, will act to deter listing and add to the already significant costs of being a listed company in Australia. According to the Australasian Investor Relations Association (AIRA), the median annual cost of being listed for:

- ASX 50 listed entities is $8.8 million
- ASX 51-100 listed entities is $9.8 million
- ASX 101-200 listed entities is $6.6 million
- ASX 200+ listed entities is $4.4 million.[1]

Growth in Australia's public markets is subdued, particularly relative to jurisdictions such as the United States that are in competition with Australia as potential listing and capital raising venues. Figure 1 shows that Australia's public markets have not grown as a share of GDP over the last decade, in contrast to public markets in the United States.

[1] Australasian Investor Relations Association (AIRA), The Cost of Being a Listed Entity in Australasia, https://www.australasianir.com.au/Public/Public/Resources/Reports/COBL-Reports.aspx

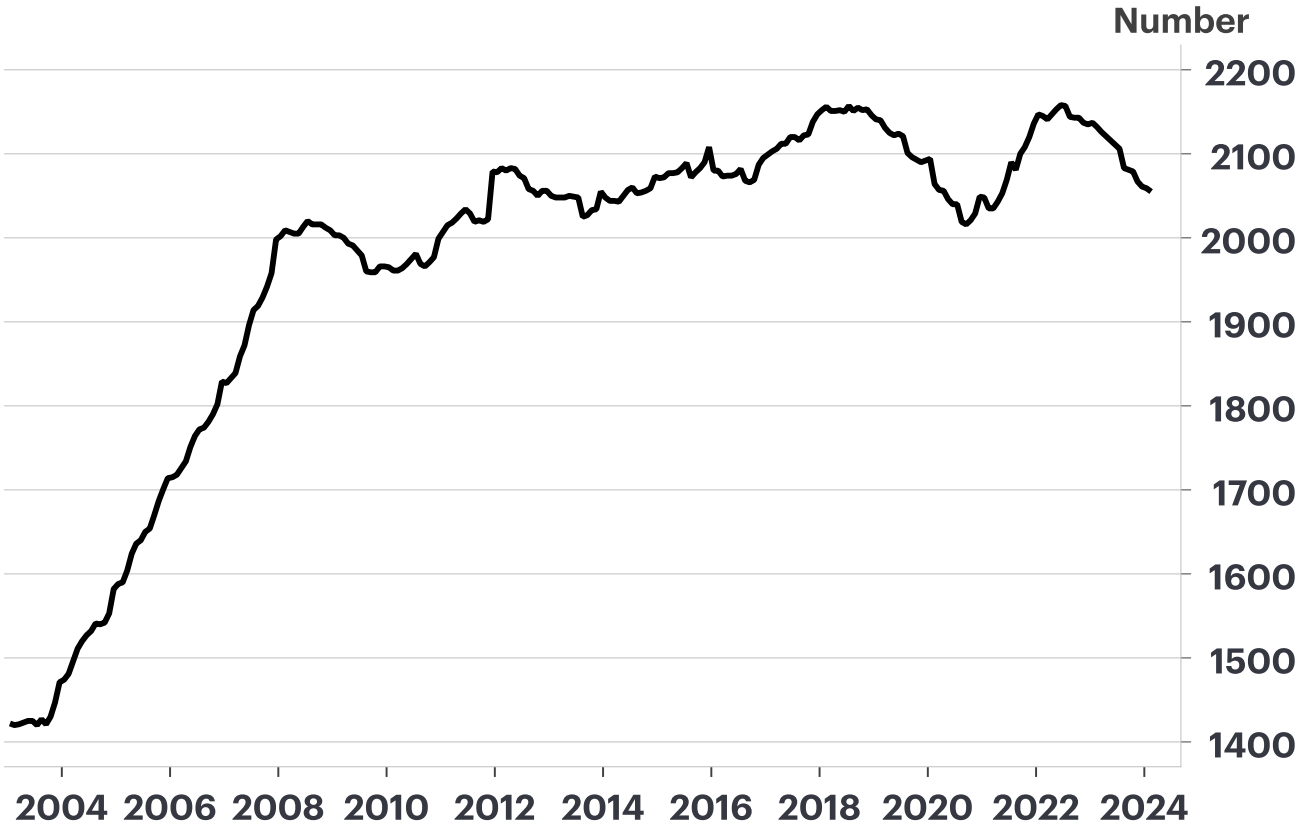
Figure 1. Public equity maket capitalisation as a share of GDP



Source: WFE

Figure 2 shows that the number of listed entities is also broadly unchanged over the last ten years and has declined more recently.

Figure 2. ASX listed entities



Source: WFE

With the continuing growth of private sources of capital (including private equity and direct investment by superannuation funds) that are not subject to the same obligations, the Council should be cautious about any reforms that will add to the regulatory burden and cost of listed entities and push companies away from public listing in Australia.

A concerning implication of reduced listing activity is that transparency and accountability that would otherwise be obtained when companies list is being lost, such that increasingly prescriptive governance requirements for public companies reduces transparency in the corporate sector overall.

The Principles are widely relied upon by investors and other stakeholders as providing best practice guidance and are highly influential in creating accountability for listed and other entities. Reliance on the Principles and Recommendations and associated commentary in this way means that compliance with the Principles has become an essential component of corporate governance.

Our members report that the 'if not, why not' approach embodied in the Principles affords very little flexibility in practice. Companies are reluctant to not follow any recommendations because doing so may be detrimental to how investors perceive and assess companies. This includes whether companies comply with suggestions in the commentary supporting the recommendations.

Presently, Australian companies, particularly listed companies and APRA regulated entities, are facing an onslaught of regulatory change, including the introduction of mandatory climate-related financial disclosures.

Against this backdrop, the Principles are perceived as increasingly prescriptive and less principles-based. This brings the risk of a 'compliance first' approach, focused on satisfying minimum requirements instead of encouraging boards to use their judgement to create shared value for stakeholders.

BCA members maintain that the Principles need to strike an appropriate balance between the promotion of good corporate governance and enhancing confidence in public markets, without creating unnecessary barriers to listing.

The Principles, alongside other existing and anticipated regulation from government, will prescribe a level of disclosure and compliance that is excessive and risks diverting resources and attention away creating shared value for shareholders and customers.

Notwithstanding these general concerns, BCA members are committed to updating and improving the existing Principles to ensure they remain fit for purpose.

3. Specific issues with the consultation draft for the 5th edition

There are several areas where the Principles and Recommendations create additional or slightly different requirements which are already or are about to be covered in legislation or other standards. The Council should give careful consideration to these draft recommendations to ensure consistency and avoid duplication with other obligations.

- Proposed Recommendation 3.2 (c) provides for disclosure on a de-identified basis of the outcomes during the last reporting period of actions taken by the company in response to material breaches of the code of conduct.
  - BCA members note that material code of conduct breaches may give rise to legal proceedings and possible regulatory action. Disclosure even on a de-identified basis could lead to the inadvertent disclosure of individuals' identities. This could apply to both the alleged wrongdoer and to any victims of wrongdoing and could also interfere with any legal proceedings or regulatory actions. There are also potential conflicts with privacy legislation and whistleblower protections in the Corporations Act.
- Proposed Recommendation 8.3 in relation to claw back or other limitation of remuneration outcomes.
  - There is already significant regulation, including the Accounting Standards, relating to remuneration disclosure. The term 'senior executive' rather than the term used in the legislation and the Accounting Standard 'Key Management Personnel' creates an additional reporting obligation that may be at odds with existing requirements. Again, there is a concern that disclosure on a de-identified basis could lead to disclosure of individuals' identities and raise issues in terms of privacy legislation.
- Proposed Recommendation 2.2(a) - disclosure by a listed company 'of its process for how it assesses that the relevant skills and experience are held by directors.'
  - The associated commentary refers to it being 'better practice' to include information on the skills of individual directors. However, our members report that this is not generally the existing practice and where individual directors are identified as having particular skills they are not identified by name. A focus on individual director's skills potentially detracts from the collective responsibility of boards. In an increasingly litigious environment, it may also expose directors to liability. The reference to 'better practice' in the draft should be removed or amended to reflect existing market practice.
- Recommendation 4.3 - Proposal for disclosure of tenure of auditor and when that was last comprehensively reviewed.
  - Given there are existing standards dealing with auditor independence, the draft Principles must be compatible with these standards. The meaning of 'comprehensively reviewed' is not clear in this context. Our members understand that legislation in relation to the review of external auditor arrangements is imminent, which will potentially lead to an overlap between the Principles and the law.

4. Timing of adoption

The final version of the 5th edition is unlikely to be available until late in 2024. The adoption date is currently proposed as the first full financial year commencing on or after 1 July 2025. This is insufficient time for listed entities to prepare and comply with the new 5th edition, particularly given some boards may only meet three times during that period. This is also a time when boards will be dealing with a considerable body of legislation creating new compliance and disclosure obligations.

The BCA submits that the adoption date should be deferred to the first full financial year commencing on or after 31 December 2025 or 1 July 2026, depending on when the 5th edition is finalised and endorsed. As with previous editions, it is open to the Council to encourage early adoption by those companies in a position to do so.

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