

6 May 2024

Ms Elizabeth Johnstone
Chair
ASX Corporate Governance Council

Dear Ms Johnstone

ASX Corporate Governance Council *Principles and Recommendations* 5th Edition Consultation Draft

Company Matters Pty Limited (**Company Matters**) welcomes the opportunity to provide feedback on the Consultation Draft (**Consultation Draft**) for a 5th Edition of the ASX Corporate Governance Council's (**Council**) *Corporate Governance Principles and Recommendations* (**Principles and Recommendations**).

About Company Matters

Established in 2006, Company Matters is part of Link Group and is an incorporated legal practice focussed on providing company secretarial and governance services to a range of ASX listed entities, as well as other organisations.

A Company Matters practitioner is currently the:

- statutory appointed secretary and/or ASX Listing Rule 12.6 appointed representative for over 30 ASX listed entities (including S&P/ASX 300 entities); and
- statutory appointed company secretary of over 300 Australian incorporated, non-listed ASX entities, many of which are subsidiaries or joint ventures of large ASX listed entities.

Company Matters provides consultancy and 'white-label' company secretary services to over an additional 60 ASX listed entities, ranging from S&P/ASX 20 to small-caps, across a range of industries and sectors.

As a result, Company Matters is uniquely placed to provide feedback on how the proposed changes to the Principles and Recommendations will impact listed entities.

In providing our views on the Consultation Draft, we have considered whether the proposed changes are of benefit to an organisation and a security holder reading an entity's corporate governance statement and whether the value to be added by the proposed amendment is otherwise already addressed as part of the entity's existing regulatory and compliance framework.

Our submission contains the following Parts:

- Part A – General Comments
- Part B – Responses to the specific questions in the Consultation Draft

Part A: General Comments

We strongly support the Council's preservation of the 'if not, why not' framework, which is particularly important for small to mid-cap ASX-listed entities and provides entities with the flexibility to adopt a 'fit-for-purpose' governance framework appropriate to the entity's circumstances from time to time.

We are concerned that some of the proposed amendments:

- are overly prescriptive;
- are difficult for small to mid-cap entities (in particular) to comply with – noting that the level of prescription is inconsistent with the intent of the Principles and Recommendations as a flexible disclosure based approach to corporate governance reporting; and
- contain elements of an increased regulatory burden with limited benefit to security holders and other stakeholders.

We have provided detail regarding our observations below, together with feedback on specific recommendations and/or commentary.

We also encourage the Council to consider the ongoing use of the Appendix 4G 'Key to Disclosures Corporate Governance Council Principles and Recommendations' as we query the value of the Appendix 4G to security holders and other stakeholders, noting that it could encourage a 'tick the box' approach to corporate governance.

The Principles and Recommendations are overly prescriptive

While it is important that there is clear guidance for entities to address the Principles and Recommendations, in some areas the Principles and Recommendations have moved beyond guidance to prescription and are less principles based than we consider appropriate.

Our concern is that listed entities may focus on simply trying to meet the requirements in the Principles and Recommendations without considering the reasons why these suggestions should be adopted and how they will change their practices to deliver a value add for the organisation, security holders and other stakeholders.

We also note that the 5th Edition of the Principles and Recommendations have increased in length to 63 pages, up 57% from 40 pages for the 4th Edition.

The impact of the Principles and Recommendations on small to mid-cap entities

The Principles and Recommendations apply to all listed entities. While acknowledging that the Principles and Recommendations are intended to be adopted on an 'if not, why not' basis, it is not practical for most small to mid-cap entities, with limited resources and compliance support, to be required to comply and report on an extensive suite of Recommendations.

The value of requiring this cohort of entities to comply with all the Recommendations is, in our view limited, and would add an additional cost and administrative burden to this group of entities with limited benefit to security holders and other stakeholders.

Company Matters is concerned about the additional burden placed on ASX listed entities, especially for small-caps where resources are limited and already stretched.

We question whether the significant number of proposed amendments will result in improved corporate governance practices and benefit security holders and other stakeholders or whether the amendments will add further pressure on ASX listed entities, many of which are struggling to comply with the already complex Australian regulatory environment.

An increased regulatory burden

A number of wide-ranging and significant legislative reforms are currently being considered in the Australian regulatory landscape, for example, legislation introducing the framework for a new mandatory climate disclosure reporting regime.

The additional compliance burden for entities, particularly on small to mid-cap entities with small company secretariat or compliance teams, to understand the amendments and comply with the amended Principles and Recommendations will be considerable and impose an unfair burden on this cohort of entities.

Part B Responses to the specific questions in the Consultation Draft

- 1. Do you support deletion of the following 4th Edition Recommendations, on the basis that there is significant regulation under Australian law?**
 - a. Recommendation 3.4 (disclosure of anti-bribery and corruption policy)?**
 - b. Recommendation 4.2 (CEO and CFO declaration for financial statements)?**
 - c. Recommendation 6.4 (substantive security holder resolutions on a poll)?**
 - d. Recommendation 6.5 (offering electronic communications to security holders)?**
 - e. Recommendation 8.2 (separate disclosure of remuneration policies for non-executive directors, other directors and senior executives)?**
 - f. Recommendation 8.3 (policy on hedging of equity-based remuneration)?**

Company Matters supports the deletion of the Recommendations set out above.

The above Recommendations are covered by existing Australian law and it is unnecessary and confusing to also include in the Principles and Recommendations.

In our submission dated 27 July 2018 (**2018 Submission**), regarding the draft (at that time) 4th Edition of the Principles and Recommendations, we suggested that an annexure (similar to the annexure for externally managed listed entities) could be included in lieu of additional Recommendations that overlap with Australian law for ASX listed entities that are incorporated in jurisdictions outside Australia.

We continue to support this approach as it would be helpful in reducing the administrative and reporting burden applicable to Australian incorporated entities and avoid unnecessary duplication, confusion and overlap.

- 2. In particular, the Council encourages feedback on the proposed deletion of Recommendation 3.3 (disclosure of whistleblower policy). Would you prefer to retain this Recommendation?**

Company Matters would not prefer to retain this Recommendation.

The requirement for a whistleblower policy is set out in the Corporations Act 2001 (Cth) (**Corporations Act**) and the ASIC Regulatory Guide 270 (Whistleblower policies) and it should not be duplicated in the Principles and Recommendations.

We note that in our 2018 Submission, we questioned whether the whistleblower related Recommendation was necessary for entities subject to the Corporations Act provisions relating to whistleblower laws and accordingly, we agree with the deletion of this Recommendation.

- 3. Recommendation 2.2: The Council already recommends disclosure of a board skills matrix or skills a board is looking for. Do you support disclosure of the following information about board skills?**
- a. Recommendation 2.2(a): current board skills and skills that the board is looking for?**
 - b. Recommendation 2.2(b): the entity's process for assessing that the relevant skills and experience are held by its directors?**

Company Matters partially supports this Recommendation.

Regarding Recommendation 2.2(a), Company Matters supports the disclosure of the current board skills on a collective basis and the skills that the board is generally looking for. It is important to retain the ability to exclude certain information that is commercially sensitive, as set out in the commentary to the Recommendation.

Regarding the commentary set out in Recommendation 2.2(b), Company Matters notes that the board skills matrix can identify gaps in the board's collective skills that should be addressed.

We note that the commentary to Recommendation 2.2 in the 5th Edition provides that "Better practice is to include information on the skills of individual directors, and to explain the entity's assessment methodology..."

In our view, noting that the practice is mixed regarding this Recommendation, it is unnecessary to reveal the skills of individual directors, given that the intention for a board skills matrix is to be reported on a collective basis.

Company Matters does not support the disclosure of the process for assessing that the relevant skills are held by individual directors.

- 4. Recommendation 2.3: 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?

Company Matters strongly supports diversity and inclusion at all levels of an organisation, including board level.

The analysis of board diversity data released by the Australian Institute of Company Directors (**AICD**) in March 2024 reveals that the ASX 20 and ASX 50 have at least 40 per cent women on boards¹.

The AICD further provided that "The ASX 100 and ASX 200 are close to reaching 40 per cent, which is considered a best practice gender equality goal, at 39.3 per cent and 37.4 per cent respectively."

While noting that the composition of a board must fundamentally be determined by reference to the strategy and business needs of the entity, not a philosophical aspiration and broad-brush approach to diversity, Company Matters strongly supports the continued focus on diversity.

¹ <https://www.aicd.com.au/news-media/media-releases/2024/australias-top-boards-reaching-40-per-cent-women.html>.

Smaller listed entities are often resource constrained and generally have smaller boards, comprised of directors with specific industry knowledge. Accordingly, in certain circumstances, change may be led by S&P/ASX300 entities, given they generally have greater resources and the ability to attract a diverse range of directors.

Company Matters strongly supports the continued focus and improvement of diversity on ASX listed boards.

5. Recommendation 2.3(c): 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?

Company Matters strongly supports diversity and inclusion at all levels of an organisation, including board level.

The commentary in Recommendation 2.3 of the Consultation Draft includes "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."

Further, the commentary in Box 3.4 "Suggestions for the content of a diversity and inclusion policy" in the 5th Edition includes reference to equity and inclusion at all levels of an organisation, regardless of marital or relationship status, family or caring responsibilities, sexual orientation, gender identity, inter-sex status, age, disabilities, race, religious beliefs, cultural background, socio-economic background, circumstances, perspective and experience."

We agree with this commentary in-principle and strongly support the need for, and importance of, diversity at board and senior management level and throughout an entity's workforce more generally. However, diversity should not be achieved at the expense of board performance and having the appropriate skills on the board.

The inclusion of the Recommendation 2.3(c) is problematic in our view and is unlikely to lead to fulsome disclosure by listed entities, given potential sensitivities with the personal information relating to individual directors.

6. Recommendation 3.4(c): The Council already recommends disclosure of an entity's diversity and inclusion policy and disclosure of certain gender metrics.

Do you support the proposal to also recommend disclosure of the effectiveness of an entity's diversity and inclusion practices?

Company Matters does not support the proposal to also recommend disclosure of the effectiveness of an entity's diversity and inclusion practices, given that effectiveness of certain practices is difficult to quantify and therefore to measure and is generally subjective.

As an alternative, Company Matters requests that the Council consider including in the commentary (rather than as part of the Recommendation) commentary that suggests that entities may consider disclosing prior year comparative or trend data on any meaningful metrics to support the entity's disclosure regarding diversity and inclusion.

7. Recommendation 2.4: Do you support 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)?

Company Matters supports increasing the security holding reference included in Box 2.4 from a substantial holder (5% or more) to a 10% holder (10% or more).

This aligns with the ASX's definition of 'substantial (10%+) holder'.

8. Recommendation 3.2(c): The Council already recommends that a listed entity should have a code of conduct and report material breaches of that code to its board or a board committee.

Do you support the proposed disclosure (on a de-identified basis) of the outcomes of actions taken by the entity in response to material breaches of its code?

Company Matters does not support the proposed disclosure (even on a de-identified basis) of the outcomes of actions taken by the entity in response to material breaches of its code for the following reasons:

- Although we acknowledge the Recommendation provides that actions should be disclosed on a de-identified basis, in reality it is possible that the disclosure of this information could inadvertently identify the individuals involved (including any "wronged" party) potentially leading to breaches of legal obligations or confidentiality (for example, in whistleblower situations).
- This may lead to situations where breaches of the code of conduct are not readily reported if there was a concern that identification could be made. This would seem to achieve the opposite of what the Recommendation is attempting to achieve, namely, to instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly.
- We note that Recommendation 3.2(b) substantially remains unchanged and requires that the board or a board committee is informed of any material breaches of the code of conduct. We are of the view that this is adequate so that the board/board committee is provided with relevant information to oversee appropriate actions and outcomes and the Recommendation should not go further than this requirement.

9. Principle 3: Do you support the proposed amendments to Principle 3 (acting lawfully, ethically and responsibly), to include references to an entity's stakeholders?

Company Matters supports the proposed amendments to Principle 3 to include references to an entity's stakeholders, but we do not support Recommendation 3.3 (as outlined below) because of the impact on small to mid-cap entities and the limited value this Recommendation would have.

Company Matters questions why it is necessary to include in Principle 3 the additional words "to create long-term sustainable value". The Principle would stand alone without these words. It would be preferable to say in the commentary that one of the reasons for having the Principle is that it is considered that acting in accordance with the Principle will support the creation of long-term sustainable value.

10. Recommendation 3.3: Does this new Recommendation appropriately balance the interests of security holders, other key stakeholders, and the listed entity?

A listed entity should have regard to the interests of the entity's key stakeholders, including having processes for the entity to engage with them and to report material issues to the board.

We do not consider this Recommendation necessary and note that any material issues impacting the organisation should be reported to the board in the ordinary course.

11. Recommendation 4.2: Do you support the proposed disclosure of processes for verification of all periodic corporate reports (including the extent to which a report has been the subject of assurance by an external assurance practitioner)?

Company Matters does not support the proposed disclosure of processes for verification of all periodic corporate reports because of the impact on small to mid-cap entities and the limited value of this Recommendation.

ASX listed entities are already obliged to ensure that any announcement is accurate, includes all material information that would influence security holders in deciding whether to buy or sell the entity's securities and is not misleading.

Under Australian law, announcements made to ASX must be accurate, complete and not misleading. Giving materially false or misleading information to ASX potentially breaches the Corporations Act.

This amendment may also raise issues regarding the terms of the engagement between the entity and the external assurance practitioner in relation to the external assurance practitioner's potential liability; if the ASX listed entity was required to publicly name and detail the role of the external assurance practitioner (this comment does not apply to the engagement of the external auditor, given this information is public as part of the entity's financial reporting regime).

12. Recommendation 4.3: Do you support the proposed disclosure of an entity's auditor tenure, when the engagement was last comprehensively reviewed and the outcomes from that review?

Company Matters partially supports this Recommendation.

Company Matters supports the proposed disclosure of an entity's auditor tenure, given this information is already generally publicly available – although Company Matters questions the value of this amendment.

Company Matters does not support the inclusion of information about when the engagement was last comprehensively reviewed and the outcomes from that review due to overlap with existing legislation. This is generally a matter for the audit committee and/or board.

We consider that most entities would undertake a regular ongoing review of the external auditors as part of the normal review and monitoring responsibilities by a company's audit committee and that including an obligation to publicly disclose the detail of any comprehensive review is not required.

Auditor independence and rotation is also dealt with as part of the Corporations Act and applicable accounting standards and should not be included in the Principles and Recommendations.

13. Recommendation 7.4: The Council is seeking to enhance the quality of existing reporting of material risks to an entity's business model and strategy, such as in the operating and financial review in its directors' report.

Do you support the proposal that the entity identify and disclose its material risks, rather than identifying specific risks for all entities to disclose against?

Company Matters supports the proposal that an entity identify and disclose its material risks, rather than identifying specific risks for all entities to disclose against on the basis that the commentary mentions the ability of an entity to satisfy this Recommendation by referencing other (existing) disclosures.

14. Recommendation 8.2: This proposed Recommendation reflects and simplifies existing commentary in the 4th Edition.

Do you support this proposed Recommendation that non-executive directors not receive performance-based remuneration or retirement benefits?

Company Matters does not support the proposed Recommendation that non-executive directors do not receive performance-based remuneration or retirement benefits, on the basis that in some limited circumstances (particularly in small to mid-cap entities), performance-based remuneration for non-executive directors may be appropriate. The entity would need to consider the impact on the director's independence status.

For Australian incorporated entity, any performance-based remuneration would continue to be disclosed to security holders as part of the annual Remuneration Report and security holders would have an opportunity to express their views as part of the annual general meeting resolutions.

Company Matters considers the current guidelines set out in Box 8.2 of the 4th Edition to be appropriate and does not support the addition of Recommendation 8.2.

Retirement benefits are covered by the Corporations Act and ASX Listing Rule 10.18 and it is unnecessary to include in the Principles and Recommendations.

15. Recommendation 8.3: Do you support the following proposed clawback Recommendations?

- a. Recommendation 8.3(a): remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration?**
- b. Recommendation 8.3(b): disclosure of the use of those provisions (on a de-identified basis) during the reporting period?**

Company Matters generally supports Recommendation 8.3(a) to have remuneration structures which can clawback or otherwise limit performance-based remuneration outcomes of senior executives after award, payment or vesting. However, we note there may be practical difficulties with actually clawing back any award following payment or vesting.

Company Matters does not support Recommendation 8.3(b) to disclose of the use of those provisions (on a de-identified basis) during the reporting period because of the difficulty in effectively de-identifying any clawback provisions that have been implemented.

16. Do you support the inclusion of the following new Recommendations for entities established outside Australia, on the basis that these Recommendations generally reflect expectations under Australian law?

- a. Recommendation 9.3 (CEO and CFO declaration for financial statements)?
- b. Recommendation 9.4 (substantive security holder resolutions on a poll)?
- c. Recommendation 9.5 (offering electronic communications to security holders)?
- d. Recommendation 9.7 (policy on hedging of equity-based remuneration)?

Company Matters in-principle supports these Recommendations on the basis that the Recommendations generally reflect existing obligations under Australian law.

17. Should any new or amended Recommendations in the Consultation Draft apply differently to externally managed entities, compared to the manner proposed in *The application of the Recommendations to externally managed listed entities*?

Company Matters has no comment to make on this question.

18. Do you support an effective date for the Fifth Edition of the first reporting period commencing on or after 1 July 2025?

Company Matters does not support the effective date for the 5th Edition of the first reporting period commencing on or after 1 July 2025 on the basis that it is expected that the proposed changes will require an increase in disclosure requirements for listed entities during a time when listed entities are already subject to increasing regulatory change and complexity.

Company Matters recommends that the effective date be extended to the first reporting period commencing on or after 31 December 2025 (assuming the final changes are made public by the end of 2024) to allow listed entities time to assess the impact of any proposed amendments and update corporate governance practices as required. ASX listed entities can of course early adopt the changes if they are able to do so.

19. Do you wish to provide any other comments on the content of the Consultation Draft, including any other changes you would propose?

Company Matters provides the following additional comments on the content of the Consultation Draft:

a) The Purpose of the Principles and Recommendations

We note that the “purpose of the Principles and Recommendations” (on page 5 of the consultation draft) has replaced the following words in the 4th Edition “For that reason, the Principles and Recommendations are not mandatory and do not seek to prescribe the corporate governance practices that a listed entity must adopt” with the proposed wording “For that reason, if an entity does not adopt a Recommendation, it must explain why – the “if not why not” approach”.

Company Matters is of the view that removal of the phrase that the Recommendations “are not mandatory” imposes a compliance burden on all listed entities and will be especially detrimental to small to mid-cap entities and therefore should not be removed. The corporate governance framework of an entity must be ‘fit-for-purpose’ and will change from time to time.

Please do not hesitate to contact us if you wish to discuss any of these matters in more detail.

Yours sincerely

Company Matters

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