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Dear Sir/Madam

Submission on Consultation Draft

Background

Corrs Chambers Westgarth (**Corrs**) is an independent Australian corporate law firm that acts for corporate and government entities throughout Australia on a broad range of legal issues. We regularly advise proprietary and public companies (including ASX listed companies) of different sizes and sectors (including, among others, energy and resources, technology and charity sectors) on a range of corporate governance matters.

The views expressed in this submission are those of Corrs and do not necessarily reflect the views of our clients.

We make this submission in response to an invitation from the ASX Corporate Governance Council (**Council**) for feedback on its *Consultation Draft for a 5th Edition of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (Consultation Draft)*.

Good governance generally

As a general matter, we think that the Council needs to consider if the overall conduct by boards has been enhanced by the rise of the 'governance industry'. The *Corporate Governance Council Principles and Recommendations (ASX Principles)* have been widely adopted, yet there continues to be numerous examples of aberrant corporate behaviour. The key consideration should be whether the Consultation Draft is going to substantially enhance governance, or if listed entities will merely respond to it with tokenistic compliance. In 2019, we proposed that a human rights approach could address this challenge.¹

In general terms, we proposed that organisations consider a human rights-based approach to governance that was in line with Commissioner Hayne's recommendations outlined in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Final Report**). Since then, we remain of the view that this is a preferable approach to governance design. We believe that this could help develop a corporate culture that considers the

¹ Phoebe Wynn-Pope and Andrew Lumsden, 'Corporate governance and ethics post-Banking RC: could a human rights approach be the answer?', *Corrs Chambers Westgarth* (Insight Article, 12 June 2019) <<https://www.corrs.com.au/insights/corporate-governance-and-ethics-post-banking-rc-could-a-human-rights-approach-be-the-answer>>.

human impact of the organisation's activities. It would necessitate a governance policy that commits to treating people with respect, dignity, fairness and equality. This would help organisations obtain or maintain basic human rights standards of individual safety, security, health and welfare.

Defining 'acting lawfully, ethically and responsibly'

In our view, directors and other officers should adopt policies that specifically allow them to factor in human rights matters. This is especially true in the current environment. Directors are increasingly required to steward their organisations while remaining cognisant of the organisation's impact on individuals inside and outside of the business. There is a plurality of actors, within the organisation and along the value chain, that are attentive to incidents of misconduct. Any perception of misconduct, whether deliberate or otherwise, can inflict great costs on an organisation but particularly if there is also a perception that the misconduct was caused by the absence of an ethical culture within the organisation.²

Experience demonstrates that promoting and nurturing ethical corporate culture remains a significant governance challenge. It can be challenging for Boards to get real and meaningful oversight of cultural change or emerging challenges. The ASX Principles should reflect internationally accepted guidance and best practice. Such international guidance and best practice should operate as a framework for future recommendations that shape the ASX Principles.

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (**OECD Guidelines**) is an internationally recognised framework that should provide a reference point for any definition of 'acting ethically and responsibly'.

Directors must exercise their powers and discharge their duties in good faith, in the best interests of the corporation and for a proper purpose. While the corporation is the focus of these duties, there is generally a high degree of correlation between the best interest of the corporation and the best interests of the community (including shareholders).³

Accordingly, directors need to take into account community norms if they are to preserve their corporate reputation.

The duty of care and diligence obliges a director to obtain knowledge and sufficiently place themselves in a position to guide and monitor management of the organisation. In *Australian Securities and Investments Commission (ASIC) v Healy*⁴, this was described as a 'core, irreducible requirement'.⁵ Directors must become familiar with the fundamentals of the business in which their organisation is engaged and are under a continuing obligation to keep informed about their organisation's activities and 'the effect that a changing economy may have on [its] business'.⁶ The Final Report redefines this duty to be:⁷

... consideration of more than the financial returns that will be available to shareholders in any particular period. Financial returns to shareholders (or 'value' to shareholders) will always be an important consideration but it is not the only matter to be considered.

² Andrew Lumsden and Saul Fridman, 'Corporate Social Responsibility: The Case for a Self Regulatory Model' (2007) 25(3) *Company & Securities Law Journal* 147, 175-7.

³ This idea was explored in some detail by the court in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No. 9)* (2008) 39 WAR 1, [4388]-[4395] in the context of the interests of the shareholder and the corporation.

⁴ (2011) 278 ALR 618.

⁵ *Ibid* [16].

⁶ *Ibid* [119].

⁷ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 402.

What is certain is that no current director can ignore the possible impact on their organisation of poor corporate culture and its reputational consequences.

We suggest that international standards like the OECD Guidelines provide a basis for practical understanding of what is ethical, efficient, honest and fair, and of what is 'the right thing to do'.

Response to Consultation Draft questions 9 and 10 (*Stakeholder relationships*)

Question 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?

For the reasons we have mentioned above, we do not support the reference to 'stakeholders' as contemplated in the Consultation Draft. We would prefer to see language that encourages organisations to audit their impact and then to assess an appropriate group of actors with whom they will engage.

Question 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."

As mentioned above, we do not support the Consultation Draft's approach to 'stakeholders'. We would rather see the Consultation Draft focus on the processes and procedures necessary to enable organisations to:

- identify material actors in the community with which the organisation interacts;
- develop a plan about how it proposes to engage with them to enable an understanding of their (sometimes competing) interests; and
- consider those interests (which the commentary makes clear should be considered in the context of long-term sustainable value for security holders).

The inclusion of consideration of the creation of long-term sustainable value is a welcome addition to the ASX Principles. However, for the purpose of the ASX Principles, and particularly ASX Principle 3, there should be a very clear concept of materiality and, in the context of responsible business conduct, 'double-materiality'. The European Corporate Sustainability Reporting Directive regime achieves this by requiring organisations to report material environmental and social *risks* to the business as well as the material environmental and social *impacts* the business is having on the community. An effective application of this would require a due diligence system that provides a framework for the identification, assessment and management of material risks and impacts on the community. It also requires a strong sense of engagement.

If you have any questions regarding this submission or wish to discuss it further, please contact us.

Your faithfully
Corrs Chambers Westgarth


Andrew Lumsden
Partner