

6 May 2024

Elizabeth Johnstone  
Chair  
ASX Corporate Governance Council  
c/o ASX Limited  
20 Bridge Street  
Sydney NSW 2000

By: Online submission

Dear Elizabeth

**Consultation Draft on fifth edition of the ASX Corporate Governance Council's Principles and Recommendations**

We refer to the ASX Corporate Governance Council's Communique dated 27 February 2024 and the Consultation Draft on the 5<sup>th</sup> edition of the ASX Corporate Governance Council's Principles and Recommendations (**Principles and Recommendations**).

Dentons Australia is pleased to have the opportunity to comment on the Consultation Draft on the Principles and Recommendations.

Dentons Australia welcomes the proposed amendments to the Principles and Recommendations recognising domestic and global issues in corporate governance.

We **enclose** with this letter our submissions relating to the Principles and Recommendations.

If you have any questions regarding this submission or would like further discussion, please contact Kym Livesley ([kym.livesley@dentons.com](mailto:kym.livesley@dentons.com)).

Yours sincerely



Kym Livesley  
**Partner**  
Dentons Australia

Enc

# Response to Consultation Draft on proposed fifth edition of the ASX Corporate Governance Council's Principles and Recommendations

6 May 2024



# Introduction

The ASX Corporate Governance Council's Principles and Recommendations (4<sup>th</sup> edition) are a benchmark of good corporate governance for successful and robust Australian and foreign companies listed on the Australian Stock Exchange. The Consultation Draft released by the ASX Corporate Governance Council (**Council**) in February 2024 for the 5<sup>th</sup> edition of the Principles and Recommendations (**Principles and Recommendations**) marks an evolution, addressing domestic and global issues in corporate governance.

The Council has invited all stakeholders to provide feedback on a Consultation Draft to ensure that the Principles and Recommendations strikes the right balance between the needs and interests of all stakeholders.

## Key themes in the proposed changes

- **Greater stakeholder engagement:** The proposed recommendations reflect a heightened focus on the interests of a listed entity's key stakeholders.
- **Board composition:** Consistent with a broader push towards gender diversity on Australian boards, the proposed recommendations are aimed at achieving gender diversity objectives for boards of listed entities.
- **Focus on management of material risks:** Listed entities are being asked to disclose and manage material risks, without limiting those disclosures to particular categories of risk.
- **Disclosure of processes and targets related to corporate and financial reporting:** There is an increased focus on the integrity of corporate reports, particularly concerning audit and assurance.
- **Accountability and transparency:** The proposed recommendations are generally focused on the growing demand for transparency and accountability in the procedures of listed entities.
- **Climate and sustainability reporting:** A number of changes to the 5<sup>th</sup> edition anticipate the increasing climate and sustainability reporting requirements in Australia.

## Our approach

In the interests of streamlining and for time efficiency purposes, we have not listed Principles and Recommendations where there are minimal changes to the equivalent content in the 4<sup>th</sup> edition or where we have no comment.

Recommendation	Description	Feedback
<b>Principle 1: Lay solid foundations for management and oversight</b>		
<b>1.6 Evaluations of senior management</b>	Expansion on the commentary relating to senior executive evaluations on page 23 of the mark-up of the Consultation Draft.	<p>We are in favour of the proposed amendments, noting the current market trend toward consideration of non-financial metrics during performance reviews.</p> <p>However, we note that concurrence between a listed entity’s culture or purpose and a senior manager’s non-financial performance is purely subjective. This may cause contention between the listed entity and the senior manager, as well as provide the listed entity with the opportunity to use the subjective nature of any analysis as a ‘stalking horse’ to facilitate the departure of a senior manager in circumstances that otherwise would not justify that action.</p>
<b>Principle 2: Structure the board to be effective and add value</b>		
<b>2.2 Board Skills Matrix</b>	Amendments to the recommendation and commentary relating to the board skills matrix.	<p>We are in favour of the proposed amendments.</p> <p>In particular, we agree that directors require a range of skills and that the entity should disclose its process for assessing the skills or experience of each director. This recommendation should help to shift the current market practice in predominately director-led self-assessments to a more robust process that will capture expertise more generally on a board, which in turn provides greater transparency for shareholders and investors.</p> <p>The push for greater disclosure also aligns more closely with Principle 2.</p>
<b>2.3 Board Gender Diversity</b>	Proposed new recommendation and commentary relating to achieving gender diversity in the composition of the board.	While we agree with prioritising gender diversity, setting a goal of 40% women and 40% men and 20% ‘any gender’ may not be the most appropriate benchmark. We understand that the Principles and Recommendations should not become overly political or contentious however suggesting that this board composition is a gender balanced board does not contemplate genders that are not women or men.

Recommendation	Description	Feedback
<p><b>2.4 Assessing director independence</b></p>	<p>Amendments to the commentary relating to the assessment of director independence.</p>	<p>Additionally, the words ‘women’ or ‘men’ could be removed and replaced with the words ‘female’ and ‘male’. We do however appreciate that this part of the recommendation does only apply to the S&amp;P/ASX 300 Index companies.</p> <p>We agree with the recommendation for boards to refer to relevant diversity characteristics rather than referencing general characteristics. However, what determines the relevance of a specific diversity characteristic should also be disclosed by the board, to allow for further transparency in the board’s identification of perspectives which are lacking and how the specific diversity characteristic can help bridge the gap.</p> <p>In our view, the substantial holder thresholds in Box 2.4 are consistent with common practice of boards when assessing independence and should be retained. The consequence of increasing this threshold to the proposed ‘10%’ is material and has the capacity to undermine the very foundation of director independence.</p>
<p><b>Principle 3: Instil a culture of acting lawfully, ethically and responsibly</b></p>		
<p><b>3.2 Acting lawfully, ethically and responsibly</b></p>	<p>Substantial amendments to the recommendation and commentary relating to the culture of a listed entity.</p>	<p>We are in favour of the proposed amendment.</p> <p>However, we recommend that the Council provides further guidance regarding the threshold of ‘material breaches’ that should be reported and disclosed, including the qualitative and quantitative metrics that an entity will need to take into account.</p> <p>The Council should also consider the potential privacy issues that may arise from disclosing breaches and outcomes. We note that the commentary has considered that an entity may exclude disclosure to the extent they relate to ‘matters which cannot be appropriately de-identified’, however we suggest that the practicality of disclosing breaches and outcomes on a de-identified basis is challenging. We suggest further guidance as to the minimum reporting and disclosing standards expected from listed entities.</p>

Recommendation	Description	Feedback
<p><b>3.4 Diversity and inclusion policy</b></p>	<p>Proposed new recommendation to have, disclose and monitor compliance with a diversity and inclusion policy.</p>	<p>We are in favour of this recommendation to the extent that it promotes diversity and equality within the organisation (including the executive senior management).</p> <p>In our view, the commentary and suggestions for the content of a diversity and inclusion policy outlined in Box 3.4 will encourage organisations to go beyond having artificial gender diversity targets and encourage entities to adopt a meaningful and effective approach to diversity and inclusion. Adopting the guidance stated in the commentary is likely to have genuine influence on the culture of the entity.</p> <p>However, the recommendation and commentary can be strengthened by considering gender diversity and inclusion targets and policies that extend beyond the binary framework.</p> <p>We also note that the Council considers the recommendation in the commentary for listed entities to collect data ‘to understand the demographics within its workforce’ may reinforce the gender biases that exist within the workforce. The current demographic of a company’s workforce may be skewed based on historical gendered discrimination, and limited opportunities in the workforce for non-male identities. Companies should be encouraged to look beyond the current demographics of their workforce and consider upskilling groups that are underrepresented in their workforce by providing training and development opportunities.</p>
<p><b>Principle 5: Make timely, balanced and accurate disclosure</b></p>		<p>We are in favour of the addition of the word ‘accurate’ in this core principle’s title, as it fittingly emphasises the need for all information provided by listed entities under their continuous disclosure obligations, whether it is a statement of opinion or statement of fact, to embody the qualities of being accurate, including but not limited to:</p> <ul style="list-style-type: none"> <li>• being unambiguous;</li> <li>• not misleading or deceptive;</li> <li>• verifiable and have a reasonable basis in fact; and</li> <li>• not afflicted with errors or distortion to the extent that a reasonable person would expect it to have a material effect on the price or value of a listed entity’s securities.</li> </ul> <p>We also suggest insertion of the word ‘and accurate’ in Principle 5’s</p>

Recommendation	Description	Feedback
		description on page 51 of the draft to reflect the amendment to its title, and so that it is also consistent with the amendment on Principle 5's description as shown in page 2 of the draft.
<b>5.1 Continuous disclosure obligations</b>	Amendments to the commentary to have and disclose an entity's written policy for complying with its continuous obligations.	<p>We are in favour of the proposed changes to Recommendation 5.1, and listed entities should take particular care in providing clarification in disclosures on subject-matter that are still undergoing development and evolution, with the avoidance of greenwashing being provided as an example.</p> <p>We note that the commentary does not provide guidance regarding market releases/reporting and the use of artificial intelligence. We appreciate that market releases/reporting should have verifiable sources however artificial intelligence is a significant tool and we would expect the Council to refer to artificial intelligence in Principle 5 (in particular, the commentary).</p> <p>We also suggest including an example in the commentary, along with greenwashing, the avoidance of 'artificial intelligence - washing', in which listed entities should take care to not exaggerate the benefits of artificial intelligence use or implementation, or understate its risks and operational reliability which may mislead investors in assessing the performance capability of the listed entity.</p>
<b>Principle 6: Respect the rights of security holders</b>		
<b>6.1 Provision of information to investors</b>	Amendments to the commentary relating to the provision of information about a listed entity and its governance to investors.	We agree with the proposed changes, noting that the disclosure requirement of ASX Listing Rule 3.1 requires the listed entity to disclose all information concerning it that it becomes aware of from any source and of any character if a reasonable person would expect the information to have a material effect on the price or value of its securities. In our view, this captures the essential element of the information that should be provided by the listed entity.
<b>6.2 Investor relations program</b>	Amendments to the commentary relating to a listed entity's investor relations program.	We agree that listed entities should be more compelled to engage with security holders, especially in a context where shareholder activism in

Recommendation	Description	Feedback
		<p>Australia is high, including as compared to international jurisdictions.</p> <p>We further support the connecting of the listed entity's investor relations program and broader risk/crisis management and communication. This follows an emerging theme in this and other updated recommendations that are concerned with increasing focus on supporting stakeholders.</p>
<p><b>6.3 General meetings of security holders</b></p>	<p>Updates to the commentary reflect a greater use of technology in the holding of general meetings for security holders.</p>	<p>Post-covid, the use of technology has increased and the presence of a hybrid workplace is more common such that hybrid meetings have become part of the corporate landscape. We agree that listed entities should facilitate hybrid meetings and ensure that security holders can attend and vote as well as submit questions online before or during the general meeting.</p> <p>The previous 4<sup>th</sup> edition only asks listed entities to consider what technologies could best be used to facilitate engagement at meetings. The draft commentary is stronger in stating that 'investors expect' listed entities to use technology to facilitate hybrid general meetings.</p>
<p><b>Principle 7: Recognise and manage risk</b></p>		
<p><b>7.1 Risk committee</b></p>	<p>Amendments to the recommendation and commentary refer to the listed entity's internal control frameworks with respect to its risk committee.</p>	<p>We agree with this change, as it supports the view that internal controls are an important compliment to risk management frameworks, including insofar as they encourage a view of risk that more thoroughly considers internal actions.</p> <p>We recommend the Council clarify that it is expected that the listed entity will have both a risk management framework and an internal control framework.</p>
<p><b>7.4 Disclosure and management of material risks</b></p>	<p>Amendments to the recommendation and commentary in relation to the disclosure and management of material risks.</p>	<p>We agree with the changes insofar as they make the language of this Recommendation consistent with changes to other Recommendations.</p> <p>However, we are concerned that the high-level, methodological guidance regarding the appropriate scope of sustainability disclosures will create uncertainty for listed entities.</p> <p>We recommend that the Council consider simplifying the guidance given in this Recommendation or consider whether it would be more helpful to listed entities if industry-specific guidance (where possible) be issued.</p>



Recommendation	Description	Feedback
<p><b>Principle 8: Remunerate fairly and responsibly</b></p>	<p>A listed entity should ensure that its director and executive remuneration policies and practices are fair and reasonable. Remuneration of executives should align their interests with the entity's values, strategic objectives and risk appetite, and the creation of long-term sustainable value for security holders.</p>	<p>We are generally in support of the proposed amendments.</p> <p>In particular, we agree that the remunerations policies and practices for directors and executives should be fair and reasonable. We consider that removing the reference to the remuneration being 'sufficient to attract and retain high quality directors' may reduce the likelihood that a listed entity uses this as motivation/approval for paying unreasonably above market remuneration under the guise of attracting 'high quality directors'.</p> <p>However, we submit that further guidance should be provided to assist listed entities in determining what will be considered fair and reasonable. For instance, should a benchmarking process be involved and if so, should this information be disclosed as parties of the considerations made by the listed entity's remuneration committee or other decision making processes.</p>
<p><b>8.2 Remuneration of non-executive directors</b></p>	<p>Proposed new recommendation and commentary relating to the remuneration of non-executive directors.</p>	<p>We are in favour of the emphasis on this recommendation (which was previously part of the suggested guidelines for non-executive remuneration).</p> <p>However, we submit that the recommendation to disclose the policies and practices relating to the remuneration of both executive and non-executive directors should be retained as this acted to encourage listed entities to:</p> <ol style="list-style-type: none"> <li>1. be more transparent in their remuneration of both non-executive and executive directors; and</li> <li>2. consider the various types of remuneration and the appropriateness for different roles within the board.</li> </ol>
<p><b>8.3 Remuneration clawbacks and limits</b></p>	<p>Proposed new recommendation and commentary relating to remuneration and clawback limits.</p>	<p>We are in favour of this new recommendation 8.3, however do not consider that it should replace the current recommendation 8.3.</p> <p>An express recommendation that remuneration structures be designed to incorporate these types of clawback or limitation creates greater motivation for listed entities to use these types of structures, thereby deterring the types of behaviours which would result in a clawback.</p> <p>With regards to the previous recommendation 8.3, we consider that this recommendation should be retained, perhaps as a new recommendation 8.4 with a slight adjustment to reflect that the relevant policies should only be required with respect to non-executive director</p>

Recommendation	Description	Feedback
		<p>remuneration. Executives and other employees who receive equity-based remuneration may fairly wish to limit the economic risk of such schemes as this equity remuneration to provide greater security that their payment for services is at market rate. Comparatively, where non-executive directors receive equity-based remuneration, this is intended to provide 'skin in the game' motivation and allowing them to hedge or otherwise limit the economic risk of participating in such a scheme would counter such motivations.</p>

# Contributors



**Kym Livesley**  
Partner, Sydney

D: (02) 9931 4894  
E: [kym.livesley@dentons.com](mailto:kym.livesley@dentons.com)



**Caroline Snow**  
Partner, Brisbane

D: (07) 3074 1169  
E: [caroline.snow@dentons.com](mailto:caroline.snow@dentons.com)



**Urvashi Seomangal**  
Managing Associate, Sydney

D: (02) 9931 4872  
E: [urvashi.seomangal@dentons.com](mailto:urvashi.seomangal@dentons.com)



**Kurt Thiam**  
Managing Associate, Melbourne

E: [kurt.tiam@dentons.com](mailto:kurt.tiam@dentons.com)



**Kyla Brose**  
Special Counsel, Brisbane

D: (07) 3074 1170  
E: [kyla.brose@dentons.com](mailto:kyla.brose@dentons.com)



**Scott Colvin**  
Managing Associate, Melbourne

E: [scott.colvin@dentons.com](mailto:scott.colvin@dentons.com)



**Shenaye Ralphs**  
Associate, Sydney

E: [shenaye.ralphs@dentons.com](mailto:shenaye.ralphs@dentons.com)



**Cynthia Van**  
Associate, Melbourne

E: [cynthia.van@dentons.com](mailto:cynthia.van@dentons.com)

## Contributors (continued)



**Anthony Drew**  
Solicitor, Melbourne

E: [anthony.drew@dentons.com](mailto:anthony.drew@dentons.com)



**Jon McArthur**  
Solicitor, Melbourne

E: [jon.mcarthur@dentons.com](mailto:jon.mcarthur@dentons.com)



**Becky McKay**  
Solicitor, Brisbane

E: [becky.mckay@dentons.com](mailto:becky.mckay@dentons.com)



**Annie Xiao**  
Solicitor, Sydney

E: [annie.xiao@dentons.com](mailto:annie.xiao@dentons.com)



**Harry Cross**  
Law Graduate, Brisbane


E: [harry.cross@dentons.com](mailto:harry.cross@dentons.com)



**Talia Gokyildirim**  
Law Graduate, Sydney

E: [talia.gokyildirim@dentons.com](mailto:talia.gokyildirim@dentons.com)



 Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. [www.dentons.com](http://www.dentons.com)