

# Submission to the ASX Corporate Governance Council

## ASX Corporate Governance Council: Principles and Recommendations 5<sup>th</sup> Edition Consultation Draft

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### Introduction

This submission addresses issues raised by the consultation draft regarding the *Corporate Governance Principles and Recommendations* issued by the ASX Corporate Governance Council in February 2024. The aim of this submission is to provide an informed debate on the issues raised by the document. Some of the suggestions that have been provided are of a policy nature and the submission commands the recommendation put forward as they are designed to enhance transparency and moral legitimacy in corporate governance.

If any of the responses require further explanations, please contact Dr Marina Nehme at the UNSW Australia, Faculty Law and Justice at [m.nehme@unsw.edu.au](mailto:m.nehme@unsw.edu.au).

### General Observations:

The observations made in this submission can be summarised in the following manner:

- As recommendation 3.4 (from the 4<sup>th</sup> edition *Corporate Governance Standards and Principles*) is not adding red tape but promoting transparency and good practice in management, it should not be removed from the standards.
- As recommendation 3.3 (from the 4<sup>th</sup> edition *Corporate Governance Standards and Principles*) is not adding red tape but promoting transparency, moral legitimacy and good practice in management, it should not be removed from the standards;
- Support the promotion of diversity in all of its forms on the board;
- Support the explicit inclusion of stakeholders' consideration in the management of the corporation.

## Reducing Regulatory Overlap

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)?

While removing red tape is important, ensuring that a company discloses its anti-bribery and corruption policy is not an onerous task as companies with a high profile should already have such policies in place. The reality remains that the risk of exposure to bribery and corruptions for large ASX companies has increased over time.<sup>1</sup> Furthermore, a recent study has showed that the guidelines issued in the different reiteration of the *Corporate Governance Principles and Recommendations* regarding anti-bribery and corruption have led to increased disclosure in this sphere.<sup>2</sup> Consequently, this recommendation should remain part of *Corporate Governance Principles and Recommendations*. If the task is too onerous, a company can always explain why it is not complying with this requirement. But in view of the legal requirement, this is not likely to be the case.

Similarly, ensuring that the board or a committee of the board is informed of any material breaches of the policy is not an onerous standard. It is good practice.

While Recommendation 3.2 complements this provision, having express disclosure of the company's policy regarding anti-bribery and corruption is sending a message of the importance of taking this matter seriously.

Accordingly, as recommendation 3.4 is not adding red tape but promoting transparency and good practice in management, it should not be removed from the standards.

b. Recommendation 4.2 (CEO and CFO declaration for financial statements)?

This recommendation may be removed as most of it is already reflected under the law.<sup>3</sup> The deletion of this recommendation will remove duplication.

c. Recommendation 6.4 (substantive security holder resolutions on a poll)?

This recommendation is not required as the law provides checks and balances regarding this matter.<sup>4</sup>

d. Recommendation 6.5 (offering electronic communications to security holders)?

This recommendation is not required as it is already dealt with under the current legal corporate setting.<sup>5</sup>

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<sup>1</sup> Australian Council of Superannuation Investors, *Anti-Corruption and Bribery Practices in Corporate Australia: A Review of Exposure to Corruption and Bribery Risk Across the S&P/ASX 200* (Research Paper, 2011).

<sup>2</sup> Muhammad Azizul Islam, Barry Cooper, Shamima Haque and Michael John Jones, 'Morel versus Pragmatic Legitimacy and Corporate Anti-Bribery Disclosure: Evidence from Australia', (2022) 46(1) *Accounting Forum* 30, 45.

<sup>3</sup> See s 295A of the *Corporations Act 2001* (Cth).

<sup>4</sup> See for example s 250JA of the *Corporations Act 2001* (Cth).

<sup>5</sup> See for example ss 110D and 249J of the *Corporations Act 2001* (Cth).

e. Recommendation 8.2 (separate disclosure of remuneration policies for non-executive directors, other directors and senior executives)?

No comment.

f. Recommendation 8.3 (policy on hedging of equity-based remuneration)?

No comment

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?

Similarly to Recommendation 3.4 dealing with disclosure for anti-bribery and corruption policies, having ASX companies clearly disclosing their whistleblowing policies enhances transparency in the system. While under the current laws ASX companies are required to have mandatory policies regarding whistleblowing, these documents are not public facing. Section 1317AI(b) only requires the company to make the policy available to its officers and employees. Making the document public facing will enhance the transparency and moral legitimacy<sup>6</sup> attached to this practice. Furthermore, it is important to remember that ‘transparent whistleblower policies are essential to good risk management and corporate governance.’<sup>7</sup>

Accordingly, allowing outsiders to scrutinise these policies provides another level of accountability and legitimacy for organisations in this area. As such, this recommendation should be retained.

## **Board Skills**

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?

This Recommendation enhances transparency in the system and provide valuable information to members in the company. Accordingly, this submission supports the recommendation.

b. Recommendation 2.2(b): the entity’s process for assessing that the relevant skills and experience are held by its directors?

This Recommendation does not add red tape as an entity should already have these processes in place to assess the relevant skills and experiences held by the directors. Furthermore, companies adopting Recommendation 2.1 regarding having a nomination committee should not have any problems making the processes in place public facing.

Encouraging an organisation to have transparency around these processes promotes good corporate practice.

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<sup>6</sup> For consideration of moral legitimacy, see for example Mark Schuman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) *Academy of Management Review* 571.

<sup>7</sup> ASIC, *Regulatory Guide 270: Whistleblower Policies* (November 2019).

## Diversity

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?

It is heartening to see that S&P/ASX300 directorships have exceeded the existing measurable objectives regarding gender diversity. Representation of women on boards should reflect their participation in the workforce as such more can be done in term of gender quota.<sup>8</sup> Equality, parity and democratic legitimacy should be key considerations when considering quotes for gender diversity.<sup>9</sup>

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?

As noted earlier, the composition of the board should reflect the diversity in the workplace. Accordingly, consideration of other diversity characteristics is to be encouraged.

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?

This submission supports this recommendation as it enhances transparency of the system. It also is a positive move to ensure that the workplace is inclusive of diversity and meets the expectation of moral, and not just pragmatic, legitimacy.

## Corporate conduct and culture

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?

This addition to Recommendation 3.2 adds transparency and promotes legitimacy of the system. Reporting the consequences of the breach to the public highlights that the company is taking its Code of Conduct seriously and is proactively taking measures to remedy any deficiency in the organisation. This in turn enhances accountability and moral legitimacy of the organisation.

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<sup>8</sup> Peta Spender, 'Gender Diversity on Boards in Australia – Waiting for the Great Leap Forward' (2012) 27 *Australian Journal of Corporate Law* 22.

<sup>9</sup> Peta Spender, 'Gender Quotas on Boards – Is it Time for Australia to Lean In' (2015) 20(1) *Deakin Law Review* 95, 108.

## Stakeholder Relationships

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

This submission supports the additional reference to an entity's stakeholders.

This addition does not add any unreasonable burden on organisations but promotes good practice. When considering long term interests of the company, an organisation would normally consider stakeholders interests. The law has provided discretion to the board of directors to take account into a broader set of stakeholders when managing the corporations.<sup>10</sup> Furthermore, in its guide to effective governance, the Australian Institute of Company Directors noted the importance of recognising stakeholder voices in the management of the corporation.<sup>11</sup> One director in that guide noted that '[a] director's role is broader than just sitting around the board table. Directors must create opportunities to engage with community and stakeholders.'<sup>12</sup>

In summary, taking into account interest of stakeholders is in line with the legal expectation, practices of directors,<sup>13</sup> community expectation<sup>14</sup> and with developments overseas.<sup>15</sup>

**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."**

Recommendation 3.3 goes further than the law requires. However, encouraging companies to have processes to engage with stakeholders is a positive move that aligns organisations with community expectations. It moves beyond practical legitimacy to moral legitimacy. The Recommendation is broad and allows the board to reflect on the environment it operates in. It further encourages organisations to adopt their own processes as one size does not fit all.

Additionally, this recommendation provides the board with an opportunity to reflect on a range of key points:

- Which group of stakeholders is a priority for the corporation?
- What level of engagement is desirable with each group of stakeholders?
- How best to make that engagement meaningful?

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<sup>10</sup> See for example discussion of this matter in the context of reform: Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (June 2006); Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (December 2006).

<sup>11</sup> Australian Institute of Company Directors, *Elevating Stakeholder Voices to the Board: A Guide to Effective Governance* (2021) .

<sup>12</sup> Ibid 6.

<sup>13</sup> Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *UNSW Law Journal* 291.

<sup>14</sup> Jean Du Plessis, 'Corporate Social Responsibility and 'Contemporary Community Expectations'' (2017) 30 *Company and Securities Law Journal* 30.

<sup>15</sup> See for example development in New Zealand: s 131 of the *Companies Act 1993*.

- Is there a need for a formal stakeholder governance framework?

The Australian Institute of Company Directors guide also noted that, depending on the circumstances of the company, it may be desirable for the board to consider whether the composition of the board should include board members who understand the interests of particular groups of stakeholders.<sup>16</sup>

In the end of the day, maintaining a dialogue with stakeholders enhances transparency, accountability and moral legitimacy of an organisation.

## **Conclusion**

The proposed changes in this version of the Corporate Governance Principles and Recommendations are mostly welcomed as they continue to promote transparency and accountability. They also encourage moral legitimacy of corporations.

06/05/2024

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<sup>16</sup> Australian Institute of Company Directors, (n 11), 9.