

TO ASX Corporate Governance Council  
Via online submission portal

6 MAY 2024

Dear Council

## KWM's submission on the consultation draft of the fifth edition of the Corporate Governance Principles and Recommendations (Consultation Draft)

Thank you for the opportunity to make a submission in relation to the Consultation Draft released on 27 February 2024. We commend the Council's aspiration to maintain strong corporate governance standards and its efforts in continuing to develop and update these standards.

We are generally supportive of the proposed changes in the Consultation Draft but do not expect they will have a significant impact on the corporate governance practices of ASX-listed entities (specifically those in the S&P/ASX 300). In fact, in our view, many of the proposed changes in the Consultation Draft reflect best practices already adopted by a significant portion of entities and requirements imposed by certain regulators on entities in specific sectors.

Although we are generally supportive of the proposed changes, we have had the opportunity to review the submission prepared by the Business Council of Australia and we share the general concerns it has raised with the Corporate Governance Principles and Recommendations in section 2 of its submission. In particular, we strongly agree that the Corporate Governance Principles and Recommendations are seen as increasingly prescriptive and less 'principles-based', which has the risk of leading to a 'compliance first' approach by entities where the focus is on satisfying minimum requirements instead of encouraging boards to use their judgement to create shared value for stakeholders. We encourage the Council to have regard to this issue (and the others raised by the Business Council of Australia in its submission) when finalising the fifth edition.

Set out below are our specific submissions on certain questions you have sought feedback on through the consultation. We would welcome the opportunity to discuss these submissions further with you.

TOPIC	CONSULTATION QUESTIONS	KWM'S SUBMISSION
1 <b>Reducing regulatory overlap</b>	Do you support the deletion of certain specified Recommendations on the basis that there is significant regulation of those matters under Australian law?	Yes - we support the changes in the Consultation Draft to reduce regulatory duplication and overlap.  However, as outlined in more detail below, we think this approach could (and should) be taken further.
2 <b>Stakeholder relationships</b>	Does the proposed new Recommendation 3.3 appropriately balance the interests of security holders, other key stakeholders, and the listed entity:	As the Council is aware, directors of an Australian incorporated corporation have a duty to act in the best interests of the corporation. The scope of that duty has been the subject of significant consideration by the Courts over many years, and it is now well established that:

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	<p>“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.”?</p>	<ul style="list-style-type: none"> <li>• the duty requires directors to consider what is in the best interests of the shareholders of the corporation as a whole;</li> <li>• directors have considerable discretion to identify what is in the best interests of the corporation and its shareholders in relation to a particular matter, having regard to the relevant facts and circumstances; and</li> <li>• considering what is in the best interests of the corporation and its shareholders in a particular circumstance will often require the directors to have regard to the interests of other stakeholders.</li> </ul> <p>As a result, in our view, the introduction of the new Recommendation requiring an entity to have regard to the interests of its other stakeholders is inappropriate and unnecessary. That is because decisions as to whether, and the extent to which, the interests of other stakeholders need to be taken into account in any particular situation should be matters for the directors to determine having regard to their duties and it is not the Council’s role to attempt to reframe (in any way) the scope of that duty.</p> <p>In our view, it would also be inappropriate for this new Recommendation to apply to foreign incorporated entities, who will be subject to foreign laws in relation to fiduciary/directors’ duties.</p>
<p>3 Risk management</p>	<p>Recommendation 7.4: 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?</p>	<p>The Corporations Act already requires listed entities to include an operating and financial review (OFR) in their annual report. ASIC Regulatory Guide 247 <i>Effective disclosure in an operating and financial review</i> contains guidance on that requirement, including that the OFR should describe the entity’s material business risks, incorporating a discussion of environmental, social and governance risks. It specifies that each risk that is disclosed should be described in context (e.g. why it is important, and its potential impact on the entity’s financial prospects) and, where the risk relates to factors within the control of management, specify how these factors will be controlled or managed by the entity.</p> <p>The Corporate Governance Principles and Recommendations will not add value by duplicating established areas of law, particularly where they are</p>

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		<p>already the subject of detailed ASIC guidance. As a result, in our view, the Recommendation should only apply to foreign incorporated entities.</p>
<p><b>4 Clawback</b></p>	<p>Recommendation 8.3: Do you support the following proposed clawback recommendations?</p> <p>a. Recommendation 8.3(a): remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration?</p> <p>b. Recommendation 8.3(b): disclosure of the use of those provisions (on a de-identified basis) during the reporting period?</p>	<p>Clawback is an area already shown to be within the remit of regulators and parliament (e.g. as illustrated in APRA's prudential standard CPS 511 (CPS 511), and the Financial Accountability Regime Act 2023 (Cth) (FAR), regulated by ASIC and APRA).</p> <p>In our view:</p> <ul style="list-style-type: none"> <li>it is not the role of the Corporate Governance Principles and Recommendations to be making recommendations regarding remuneration structures and 'tools' to be incorporated as part of those structures; and</li> <li>extending clawback requirements beyond entities caught by CPS 511 or the FAR should be a matter for Parliament/ASIC.</li> </ul> <p>In addition, there are a number of practical limitations in connection with an entity's ability to use clawback rights and therefore recommending entities include those rights in their remuneration structures is unlikely to result in a significant increase in the use of those rights.</p> <p>If these Recommendations are not removed altogether, they should at least be limited to entities not already subject to CPS 511 or the FAR, to reduce duplication.</p>
<p><b>5 Board skills</b></p>	<p>Do you support disclosure of the following information about board skills?</p> <p>a. Recommendation 2.2(a): current board skills and skills that the board is looking for?</p> <p>b. Recommendation 2.2(b): the entity's process for assessing that the relevant skills and experience are held by its directors?</p>	<p>In our experience, many listed entities spend considerable time preparing and assessing their board skills matrices.</p> <p>Generally, we think the proposed changes to the Consultation Draft and the associated commentary are helpful and will increase the utility of the matrices for investors and other stakeholders. In our view, best practice in this space is already to include how a board assesses the relevant skills and experience of directors and the changes are simply requiring all entities to meet that best practice standard.</p> <p>However, we do query the statement that it is better practice to include information on the skills of individual directors. In our experience, matrices are likely to be more accurate and useful where information is prepared on a 'deidentified' basis</p>

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		<p>because directors may be (naturally):</p> <ul style="list-style-type: none"> <li>on the one hand, apprehensive about publicly disclosing that they lack certain skills the listed entity regards as being important; and</li> <li>on the other hand, wary of being exposed to additional liability as a result of being held out as having particular skills.</li> </ul> <p>We do not think the disclosure of skills held by a board is any less rich where a matrix notes that, for example, 2 directors are or are not skilled in 'IT matters' instead of specifically naming those 2 directors.</p> <p>From our perspective, we think this is also an area where the commentary in the Consultation Draft could be more helpful to both boards and stakeholders by suggesting a uniform scale to define director skill levels so that all stakeholders are comparing 'apples with apples' when preparing and reviewing board skills matrices.</p>
<p><b>6 Diversity</b></p>	<p>Recommendation 2.3: Do you support raising the S&amp;P/ASX300 measurable objective to a gender balanced board?</p> <p>Recommendation 2.3(c): 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?</p>	<p>We support the proposed increased diversity requirements for boards of listed entities in the S&amp;P/ASX 300 Index which are consistent with the 40:40 Vision Initiative proposed by HESTA in 2020. They demonstrate a stronger stance by the Council on gender diversity matters and the addition of a 'timeframe' ensures that boards are actively working towards achieving their board gender diversity requirements.</p> <p>However, appropriate flexibility needs to be included for the full range of board sizes (e.g. boards of 3 directors cannot attain the 40:40:20 ratio).</p> <p>Disclosure of relevant diversity characteristics beyond gender is, in our view, fraught. It gives rise to complications regarding how people identify, and whether they want that to be public, as well as the fact a whole range of characteristics may be considered as part of assessing whether an individual is suitable as a candidate, and these may vary from one individual to the next.</p> <p>If this Recommendation is not removed altogether, we submit it should be limited in scope to disclosure of any relevant diversity characteristics beyond gender</p>

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		that the board has adopted as a measurable objective in the composition of its board.
<b>7 AGMs</b>	The commentary to recommendation 6.3 provides that listed entities with geographically diverse registers should consider holding hybrid AGMs.	In our recent experience, the utilisation of the online component of hybrid AGMs by securityholders has been low and in many cases insufficient to justify the effort and expense of conducting a hybrid meeting.  As a result, care should be taken in recommending the use of hybrid AGMs.
<b>8 Code of Conduct</b>	N/A	The proposed change to Recommendation 3.2(b) effectively recommends that an entity have in place a process for ensuring that the entity's board (or a committee of the board) is informed of any material breaches of the entity's code of conduct.  While we understand the rationale for that proposed change, the Recommendation should be amended so that it only applies to material breaches that have been identified.

We would be happy to discuss if you have any questions in relation to our submission.

Please contact one of us in the first instance.

Yours sincerely

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