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3 May 2024

Ms Elizabeth Johnstone
Chair
ASX Corporate Governance Council

By electronic submission on the ASX website

Dear Ms Johnstone

Submission in response to 5th Edition Consultation Draft

Thank you for meeting with our Chair, Philip Chroncian, Group Executive Legal & Commercial Services, Sharon Cook, and me on 18 April to discuss the Consultation Draft on the 5th Edition of the CGC's ASX Corporate Governance Principles and Recommendations (the Consultation Draft).

I am writing to you on behalf of NAB to summarise our concerns about the proposals in the Consultation Draft.

While we broadly support the spirit and intent of changes proposed in the Consultation Draft, we have concerns about certain new recommendations or updated disclosure expectations and about the timing of the proposed effective date. Our concerns are summarised below.

In relation to **Recommendation 2.2** on board skills matrix:

- 2.2(b) recommends a company disclose its process for how it assesses that the relevant skills and experience are held by its directors. In our experience, skills and experience is generally based on self-assessment overlaid with calibration for consistency. We are concerned that this new recommendation may push companies towards a formulaic response or result in an industry of assessment systems being created to comply with the recommendation (that is, it may drive a compliance mindset).
- We support the current commentary that there is no prescribed format for the board skills matrix. We are concerned, however, with the new Consultation Draft commentary that states that better practice is to include information on the skills of individual directors, and to explain the entity's assessment methodology. We challenge that assertion for several reasons. Disclosing individual director's skills and experience (beyond what is already disclosed in their biographical information) could easily distort stakeholders understanding that a board operates as a collective of directors, as enshrined in law and fundamental corporate governance concepts in Australia. Individual disclosure could also lead to directors and boards being risk-averse and having a conservative bias when describing and assessing skills because of risks in potentially over-stating an individual director's experience. Further, it is the duty of each board to prepare their skills matrix but for individual directors on multiple boards, it is challenging to see how consistency could be achieved in relation to that individual when each entity undertakes different assessment processes and methodology. This could lead to confusion, rather than improving the utility of such disclosures.
- While it could be argued that commentary does not carry the same weight as recommendations, we believe investors and proxy advisors hold the commentary in high regard and will expect entities to meet that standard particularly if something is described as best practice in commentary.

We strongly believe a board skills matrix should focus on the collective profile of the board, not directors individually, and that entities should not be required to disclose their assessment process beyond what is currently required in the 4th edition.

In relation to **Recommendation 2.3** on board diversity, 2.3(c) recommends a company disclose if it is considering any other relevant diversity characteristics for its board membership and disclose those. While we respect the spirit and intent of this new recommendation, we are concerned that this may potentially lead towards a check-box approach to board composition. Board composition and the identification of suitable director candidates is far more nuanced than actively recruiting for a director that ticks a diversity facet box. While a board may be seeking to achieve a diverse mix of ethnicity, for example, it may take considerable time to achieve that when considering the mix of skills and experience the board needs, while also bearing gender diversity in mind. We feel that is acknowledged in the Consultation Draft commentary but are concerned the new recommendation in 2.3(c) could be taken more literally. We are particularly concerned that it could directionally lead to the potential for biases and/or assumptions. The desire for increased disclosure needs to be balanced with director privacy considerations and whether directors are comfortable disclosing to the public the personal information that forms part of these diversity characteristics.

In relation to **Recommendation 3.2** on culture, 3.2(c) recommends a company disclose (on a de-identified basis) the outcomes during the last reporting period of actions taken by the entity in response to material breaches of the code of conduct. While this point is recognised in the Consultation Draft commentary, disclosure will need to carefully consider obligations under applicable laws, a key example being the confidentiality requirements under the whistleblower regime and privacy laws. The ability to de-identify cases will assist with this, but much care will be required. Material breaches may result in legal proceedings or regulatory action, which take time to resolve. Disclosure could inadvertently interfere with proceedings and/or regulatory actions and could result in inadvertent disclosure of identities. For those reasons, we are concerned with the new recommendation. We also question how materiality is assessed and whether there will be wide inconsistency in materiality concepts across listed companies on a topic such as this. For instance, is the intended meaning that 'material breaches' are only those code of conduct breaches that are reported to a board in specific detail? Our preference regarding this new recommendation is discussed further below.

On another human capital-related recommendation, **Recommendation 8.3** on remuneration clawback and other provisions, 8.3(b) proposes entities disclose (on a de-identified basis) the use of clawback provisions during the reporting period. The commentary recognises that an entity may exclude disclosure of outcomes to the extent that actions are not finalised or cannot be appropriately de-identified. While supporting the concept of clawback provisions in performance-based remuneration, our concerns relate to disclosure. The requirement to disclose remuneration clawback on a de-identified basis is likely to be problematic and difficult to manage when the cohort of 'senior executives' in each reporting period is small. In addition, although the Consultation Draft commentary recognises that an entity may exclude disclosure of outcomes to the extent that actions are not finalised or cannot be appropriately de-identified, we feel that the recommendation needs more work to clarify what needs to be disclosed. We also note the terminology in the Consultation Draft is different to defined terms in Accounting Standards, which creates potential for confusion. Our preference regarding this new recommendation is discussed further below.

The Consultation Draft seeks to remove duplication with other requirements in many respects. However, for APRA regulated entities who need to comply with prudential standard CPS 511 *Remuneration* (**CPS 511**), the new Consultation Draft **recommendations 3.2(c) and 8.3(b)** create potential duplication and inconsistencies that could be avoided. Under CPS 511, APRA-regulated entities need to annually publish information on their remuneration frameworks, design, governance and outcomes. Larger and more complex entities must disclose additional quantitative information, including total downward adjustments applied to variable remuneration during the financial year and a description of the main triggers leading to downward adjustments to variable remuneration as a result of consequence management. This information is on a

cohort basis except for the CEO where the information is on an individual identifiable basis. The requirement is not prescriptive about outlining the reasons for downward adjustments; for instance it does not specify that breaches in the code of conduct be a main trigger. Our preference is that the new recommendations 3.2(c) and 8.3(b) not be added as the existing recommendations already provide a strong platform for good governance disclosures for listed companies, regardless of size.

In relation to **Recommendation 4.3** on disclosures regarding (a) tenure and (b) review of a company's external auditor, we are concerned that the proposed new recommendations pre-empt the outcome of live international debate on audit firm tenure. We are particularly concerned that readers of such disclosures may not adequately understand Australian market context, particularly the limited number of viable external audit firms a company may have access to, where scale and sector expertise are very important considerations.

On **timing**, we are concerned that the proposed effective date of the 5th edition is when companies are already digesting significant changes required by Australian Sustainability Reporting Standards (ASRS), as well as other regulatory changes impacting governance (such as CPS 511 disclosures referenced earlier). It would be preferable if companies were able to focus on delivering the significant changes to reporting those mandatory requirements will bring without needing to manage other reporting changes, like those resulting from the Consultation Draft, in the same period.

We appreciate the opportunity to share our concerns on the Consultation Draft with you.

Yours sincerely

Louise Thomson
Group Company Secretary
National Australia Bank Limited