Property Council of Australia ABN 13 00847 4422
A Level 7, 50 Carrington Street, Sydney NSW 2000
T +61 2 9033 1900
E info@propertycouncil.com.au
W propertycouncil.com.au
Property Council of Australia

6 May 2024

Ms Elizabeth Johnstone
Chair
ASX Corporate Governance Council Secretariat
20 Bridge Street
Sydney NSW 2000

By email only

Dear Ms Johnstone

Submission on ASX Corporate Governance Principles and Recommendations 5th Edition Consultation Draft

The Property Council of Australia (the Property Council) welcomes the opportunity to respond to the Australian Securities Exchange (ASX) Corporate Governance Council's (CGC) draft fifth edition of the Corporate Governance Principles and Recommendations (the Principles and Recommendations).

The Property Council is the peak body for owners and investors in Australia's $670 billion property industry. We represent owners, fund managers, superannuation trusts, developers, and investors across all four quadrants of property investments: debt, equity, public and private.

As a member of the CGC, the Property Council is proud to have contributed to the development of the fifth edition. We continue to strongly support the CGC's aims to encourage proper and modern corporate governance practices for ASX-listed entities.

Our organisation has a strong history of supporting good corporate governance – not just because we believe it is appropriate, but because it represents good business practice. Prudent corporate governance builds investor confidence, it encourages positive risk management and corporate compliance amongst listed entities. Additionally, it has addressed several social and sustainability obligations for business and has encouraged important environment, social and governance (ESG) alignment.

Property Council position
The Property Council has reviewed the Consultation Draft on the fifth edition and consulted with our ASX-listed members who make disclosures under the CGC's framework.

Four themes have been identified and are outlined further in the attached Appendix, which responds to the consultation questions presented in the February 2024 background paper. These four themes are:

- The recommendations, including associated commentary, are too prescriptive and should be principles-based,

- Some recommendations promote "soft law" which do not represent the legislative and regulatory requirements on listed entities,
- The fifth edition would represent additional regulatory burden on entities and increase associated costs, and
- There is a concern that these above issues represent a material risk to business and may inadvertently deter listing or promote de-listing.

Some of the matters to be addressed include the reporting of individual board directors' skills, concerns regarding the deidentified disclosure of code of conduct breaches and the disclosure of an entity's auditor tenure.

Prescriptive nature of recommendations, and "soft law" implications
The Property Council maintains its long-term position that the Principles and Recommendations have become too prescriptive and have denied entities the flexibility originally intended when the guidelines were developed.

The fifth edition maintains the approach that for entities who do not adopt a Recommendation, they must explain their reasoning (i.e. "if not, why not").

In practice for ASX200/300 companies it represents a "must do" – if it is contained within the Principles and Recommendations then it is an expectation by investors and other members of the investment community such as proxy advisers (that are often relied on by investors) that listed entities adhere and report on them.

These expectations are not limited to the recommendations themselves, but also the accompanying commentary which regularly reports a best practice scenario.

A fundamental principle of effective corporate governance is that boards are able to exercise their judgement to make decisions that are fit-for-purpose for their organisations and stakeholders, and excessive prescription restricts their ability in this regard.

As outlined previously, prudent corporate governance builds investor confidence, transparency and trust between entities, boards and investors, represents good risk management and shows business takes regulatory compliance seriously.

As such, the impact of suggesting one particular Recommendation or another is highly significant. In fact, in practice it is less a recommendation, but rather a requirement.

Given the wide-ranging influence the Principles and Recommendations have on listed companies, the CGC must work to ensure the recommendations are suitably flexible to promote genuine good governance practices, as opposed to burdensome compliance obligations or encourage "box-ticking" behaviour amongst reporters.

If, as the Consultation Draft suggests, that the "…[ASX Corporate Governance] Council recognises…that different entities may adopt difference governance practices, based on a range of factors", then the manner in which it drafts its Recommendations must reflect so.

The "soft law" implications of certain recommendations – being the expectation they are followed on a voluntary basis without legal or statutory obligations – goes against this approach.

The Principles and Recommendations should be more concerned with encouraging listed entities to maintain high standards of governance in line with their statutory obligations, rather than creating obligations themselves, in many cases overlapping or adding to existing regulation.

Additional regulatory burden and compliance costs
Further to the prescriptive nature of the recommendations, and its "soft law" application on listed entities, the new and updated recommendations outlined in the fifth edition represent additional regulatory burden and associated compliance costs for listed entities.

Our members have reported that many in the director community are increasingly frustrated with the excessive compliance obligations associated with being an ASX-listed company, with some expressing the benefits of an unlisted status in delivering shared value for stakeholders.

The CGC must quantity the impact any changes to its recommendations may have on the listed community, in particular smaller or international companies without appropriate or mature processes who may need to employ external advisers at significant cost to their business.

Deterring listing and promoting de-listing
The implications of "soft law" recommendations, and its associated regulatory burden and compliance costs on companies, may inadvertently deter entities to list on the ASX or promote de-listing as remaining listed may represent a material risk.

Global economic conditions have seen a decline in initial public offerings (IPOs), including in Australia, and the ASX must ensure the compliance burden of its corporate governance recommendations do not contribute to negative market sentiment.

The ASX must remain an attractive and competitive listing venue, and that includes the requirement it places on its listed entities through its Principles and Recommendations – a focus on compliance (or "box-ticking") over performance diverts finite resources from core business activities and can result in significant opportunity cost and negatively impact shareholder value.

By focusing on the legal and statutory obligations on entities, rather than prescribing governance practices which in effect act as quasi-regulation, the ASX can instead build confidence in entities with a lower market capitalisation and encourage them to list.

In much the same way as ASX200/300 companies in practice must implement the recommendations as prescribed, largely due to investor expectations, smaller entities commonly deploy a "can't do" approach, largely due to resourcing issues or immaturity of systems and practices. Smaller entities that are not listed can be deterred from listing, until such a time that they can overcome the costs or risks associated with the additional regulatory burden.

The CGC must reconnect with the central purpose of the stock exchange, that is in part to provide listing services and facilitate trading. These can only occur when listing, or remaining listed, is attractive and beneficial overall for entities.

Implementation date
Concerning the implementation date for the fifth edition, we acknowledge the substantive nature of the changes, with ten new and updated disclosure expectations on listed entities. As consultation with broader stakeholders continue, the CGC should consider at least a 12-month lead time to properly implement any changes to disclosures to limit business disruptions and allow implementation, in addition to an appropriate timeframe for consultation.

In the event the final version of the fifth edition is released in early 2025 in accordance with the proposed timetable, the adoption date should be no earlier than the first full financial year commencing 1 January 2026. This lead time will be important to secure buy-in from stakeholders including listed entities, particular as they undertake a number of other new, additional or emerging disclosures, such as climate-related financial disclosures, or potential new regulatory requirements, such as the expansion of the anti-money laundering and counter terrorism financing regime.

We would welcome the opportunity to discuss this submission in more detail. Please reach out to Dan Rubenach, Policy Manager at drubenach@propertycouncil.com.au to arrange a meeting.

Yours sincerely

Antony Knep
Executive Director – Capital Markets
Property Council of Australia

Property Council of Australia ABN 13 00847 4422
A Level 7, 50 Carrington Street, Sydney NSW 2000
T +61 2 9033 1900
E info@propertycouncil.com.au
W propertycouncil.com.au
Property Council of Australia

Appendix – consultation questions

1. 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)? b. Recommendation 4.2 (CEO and CFO declaration for financial statements)? c. Recommendation 6.4 (substantive security holder resolutions on a poll)? d. Recommendation 6.5 (offering electronic communications to security holders)? e. Recommendation 8.2 (separate disclosure of remuneration policies for non-executive directors, other directors and senior executives)? f. Recommendation 8.3 (policy on hedging of equity-based remuneration)?	**Support.** The Property Council supports the removal of these six fourth edition Recommendations. As part of its long-standing advocacy on behalf of members to the ASX, the Property Council has supported a re-examination of the document to ensure its language is not overly prescriptive, ambiguous or in conflict with legislative or other statutory obligations, wherever possible and appropriate. On the basis these recommendations are covered by significant regulation under Australian law, it is appropriate they are removed from the document to reduce its length and improve readability.

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?	**Support**. As outlined the background paper, a number of recommendations have been removed in the fifth edition where there is significant regulation by Australian law. As per our response to Question 1, the Property Council supports this approach and the proposed deletion of Recommendation 3.3.
3. 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? b. Recommendation 2.2(b): the entity's process for assessing that the relevant skills and experience are held by its directors?	**Do not support.** The Property Council does not support mandating further disclosure of board skills, including board skills and the manner in which entities assess the appropriate skills of individual directors. This recommendation undermines the concept of collective responsibility, that is the idea that all board members together share responsibility for actions and decisions made by the board. All members are accountable for these decisions. By further focusing on individual skills, shared accountability and joint decision making are deemphasised, and individual directors may be reported to the investment community as nominated experts which may expose them to liability. Further, there are a number of different reporting styles amongst listed entities, including collective reporting, binary reporting, and graded reporting. The Property Council supports the drafting of the commentary, which states that there is no prescribed board skills matrix. Listed entities should retain the discretion of which reporting style to use.

	Consideration must be given that for some reporting styles, where it refers to the particular skills of individual directors, there may be an unintended influence of overstating particular skills in order to not reflect poorly on the individual director. As such, it is important that no prescribed board skills matrix be implemented.
4. 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?**	**Comments.** The Property Council has taken a leading role in promoting gender diversity in the property industry through a number of programs and initiatives, including through the establishment of the Champions of Change Property Group in partnership with the Champions of Change Coalition, the 500 Women in Property Group and our Girls in Property program targeting high school students. The Property Council implemented 40:40:20 targets for its Committees in 2016. Since then, those targets have been met. Currently, 47 per cent of Committee members are women. Having said that, we reiterate our general view that the Principles and Recommendations should be principles-based rather than prescriptive.
5. 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?**	**Comments.** Clarity is required to establish what level of disclosure is appropriate for other relevant diversity characteristics. The recommendation should be re-worded to acknowledge that the reporting of other relevant characteristics, such as age or geography, may not necessarily be at the same level of maturity as reporting on gender.

	Listed entities, in order to encourage them to engage with diversity of thinking and perspectives, should be encouraged to enact a phased implementation of reporting for some other diversity characteristics if it is appropriate and desired by the listed entity. Privacy issues for individual directors, including the right not to disclose diversity characteristics, should also be considered.
6. 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?**	*See responses to questions 5 and 6.*
7. Recommendation 2.4: Do you support increasing the security holding reference included in Box 2.4 (factors relevant to assessing the independence of a director) from a substantial holder (5% or more) to a 10% holder (10% or more)?	**Do not support.** A rationale for amending the substantial holding threshold from five per cent to 10 per cent has not been established. The *Corporations Act 2001* defines the threshold at 5 per cent – as outlined previously the Principles and Recommendations should where possible reflect existing legislation and regulation.
8. 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?**	**Do not support.** The Property Council holds significant concern that disclosure of code of conduct outcomes on a de-identified basis will allow back-solving to identify individuals, either alleged offenders or victims. We strongly support entities seeking to encourage a speak-up culture to identify conduct issues. However, this recommendation may discourage reporting, cause entities to not act and inadvertently inhibit a speak up

	culture, as individuals are concerned their matters may end up reported in a corporate governance disclosure at a later stage. Employees may be less likely to raise issues if they know breaches will be disclosed, in which case their identity may be established, even if disclosures are de-identified. Further, clarity is required to establish whether only significant breaches, or allegations, or formal investigations would require disclosure, and what the threshold would be. The CGC must seek legal advice on whether this disclosure could inadvertently impact on legal proceedings or regulatory action. The current recommendation, that listed entities should have a code of conduct and must report material breaches to either its board or an appropriate board committee, is sufficient and should be retained.
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?** 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."*	**Comments.** Recommendation 3.3 would require entities to have formal processes for engaging with each of the entity's key stakeholders. The commentary identifies a list of potential stakeholders who would require their own formal process. The benefits to shareholders or entities of creating exhaustive processes or documents has not been identified. The CGC should also consider the interaction between this recommendation and the *Corporations Act 2001* which refers only to the interests of security holders, and whether it elevates other stakeholders to an equivalent status with security holders.

11. Recommendation 4.2: Do you support the proposed disclosure of processes for verification of all periodic corporate reports (including the extent to which a report has been the subject of assurance by an external assurance practitioner)?	**Support.**
12. Recommendation 4.3: Do you support the proposed disclosure of an entity's auditor tenure, when the engagement was last comprehensively reviewed and the outcomes from that review?	**Do not support.** On 9 March 2023 the Senate referred an inquiry into the management and assurance of integrity by consulting services to the Senate Finance and Public Administration References Committee. On 18 March 2024, the Senate agreed to extend the presentation of the final report until 31 May 2024. Until such a time as the Australian Government can consider the final report, issue a government response, and implement any legislative or regulatory changes, it would not be appropriate for the ASX to prescribe further obligations on listed entities.
13. Recommendation 7.4: The Council is seeking to enhance the quality of existing reporting of material risks to an entity's business model and strategy, such as in the operating and financial review in its directors' report. **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?**	**Comments.** The CGC must ensure this recommendation does not duplicate regulation or pre-empt the legislative process, such as for climate-related financial disclosures.

14. Recommendation 8.2: This proposed Recommendation reflects and simplifies existing commentary in the 4th Edition. Do you support this proposed Recommendation that non-executive directors not receive performance-based remuneration or retirement benefits? **15. Recommendation 8.3: Do you support the following proposed clawback Recommendations?** a. Recommendation 8.3(a): remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration? b. Recommendation 8.3(b): disclosure of the use of those provisions (on a de-identified basis) during the reporting period?	**Do not support.** The issue of director independence and the appropriate remuneration of non-executive directors has been an ongoing matter in the evolution of the Principles and Recommendations. It is accepted that performance-based remuneration may tie compensation too closely to short-term performance, a significant conflict of interest for listed entities. However, consistent with the Property Council's submission to the fourth edition, a contribution-style or salary sacrifice plan does not give rise to the same governance concerns regarding conflicts of interest. These plans allow a non-executive director to gain exposure to an entity's securities through regular contributions (and at cost to the director). There is a growing trend amongst listed entities to encourage non-executive directors to own shares in the companies they serve, to ensure their interest aligns with shareholders. Some entities impose minimum shareholding requirements. The CGC should clarify that these contribution-style plans are not captured by this recommendation. Section 200B of the *Corporations Act 2001* also provides for termination benefits if shareholder approval is received. The Principles and Recommendations should not seek to amend the existing legislative framework. Further, the recommendation refers to 'senior executives' whereas remuneration reports refer to key management personnel (KMPs). Any recommendation including definitions should be consistent with the

	relevant regulatory or legislative frameworks, for example the *Corporations Act 2001*. Lastly, and further to question 8, there is significant concern that individuals' identities may be back-solved and impact on the integrity of making de-identified disclosures.
16. Do you support the inclusion of the following new Recommendations for entities established outside Australia, on the basis that these Recommendations generally reflect expectations under Australian law? a. Recommendation 9.3 (CEO and CFO declaration for financial statements)? b. Recommendation 9.4 (substantive security holder resolutions on a poll)? c. Recommendation 9.5 (offering electronic communications to security holders)? d. Recommendation 9.7 (policy on hedging of equity-based remuneration)?	**Support**. As outlined in response to question 1, on the basis these recommendations generally reflect expectations under Australian law, it is appropriate they are moved to the section of the document reserved for entities established outside Australia.
17. Should any new or amended Recommendations in the Consultation Draft apply differently to externally managed entities, compared to the manner proposed in the application of the Recommendations to externally managed listed entities?	No comment.
18. Do you support an effective date for the Fifth Edition of the first reporting period commencing on or after 1 July 2025?	**Do not support.** As outlined previously, the Property Council supports a minimum 12-month implementation period from the time of adoption of the final fifth edition to the first reporting period.

	This 12-month lead time will allow for buy-in from stakeholders including listed entities, particularly as they undertake a number of either new, additional, or emerging disclosures, such as climate-related financial disclosures, or potential new corporate governance requirements, such as the expansion of the anti-money laundering and counter terrorism financing regime.
19. Do you wish to provide any other comments on the content of the Consultation Draft, including any other changes you would propose?	**Comments.** Recommendation 7.2 refers to board reviewing "internal control frameworks", whereas reviewing the risk management framework should be sufficient. Reporting can be made on an exceptions basis, or through an internal audit or compliance reporting mechanism.