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Proposed 3rd edition of the Corporate Governance Principles and Recommendations & proposed amendments to the ASX Listing Rules

Thank you for the opportunity to comment on:

- the consultation draft of the 3rd edition of the *Corporate Governance Principles and Recommendations* ("Principles and Recommendations"); and
- the proposed amendments to the *ASX Listing Rules and Guidance Note 9: Corporate Governance Disclosures* ("Listing Rule Amendments").

AMP supports the continuing review of best practice in this area, although we believe that some of the proposals could be refined or improved. We also consider that any proposal which will have the effect of increasing the regulatory or administrative burden on listed entities should only be implemented where material benefits are expected to be delivered to listed entities, securityholders and market participants.

We understand that some of the leading professional and industry bodies are likely to make submissions that deal with many of our comments. We have therefore provided our comments in a relatively summary form in Annexures A and B to this letter, dealing with the Principles and Recommendations and the Listing Rule Amendments respectively.

We would be happy to discuss our comments with you in more detail.

Kind regards

David Cullen
Head of Secretariat and
Company Secretary, AMP Limited

Vicki Vordis
Senior Company Secretary

Annexure A - Principles and Recommendations

AMP recognises that the Principles and Recommendations have played an important role in improving corporate governance in Australian listed companies. AMP supports the ongoing refinement of these to ensure that they remain relevant and practical.

There are some high-level themes and principles that we consider are relevant to any re-write of the Principles and Recommendations:

- Appropriate emphasis and clarity should continue to be provided in the Principles and Recommendations that they operate on an "if not, why not" basis. We believe that this principle is paramount in the success of the Principles and Recommendations being adopted as the primary governance document in Australia.
- The Commentary to the Recommendations is to assist understanding and provide suggestions relating to the Recommendations and does not trigger a disclosure obligation.
- Regulatory duplication should be avoided wherever possible.

We have set out below our specific comments on the Principles and Recommendations:

1. Recommendation 1.4 (company secretary reporting line to the chairman)

Company secretaries often have additional roles beyond the pure officeholder role of company secretary, for example, management of a wider team or a dual legal/finance role. This could make prescribing a direct reporting line to the chairman difficult to accommodate within an entity's organisational design and management structures or, at least, introduce unnecessary complexity. Further, there is often more than one person holding the Corporations Act office of "company secretary" for an entity, for example for convenience if the "operational" company secretary is absent.

Give that the power to appoint the company secretary rests with the Board (s 204D), we would suggest that the more important issue is that there are clear and open communication lines between the Board and the company secretary on governance and board matters, rather than prescriptive reporting lines.

2. Box 2.1 (defining characteristics of an independent director)

In relation to the amendments proposed to Box 2.1, we make the following comments:

- close family ties: For the same reasons as detailed in Annexure B of these submissions on other proposals, we are concerned about the heightened emphasis on family relationships without evidence of any control by the director. We do not consider this issue should be included in the list of relationships. If this proposal is to proceed, clear and narrow definition of "close family ties" will be required.
- materiality: The current drafting whereby "material" is retained within some (but not all) of the example relationships in Box 2.1 but also including a general paragraph on materiality is likely to cause confusion.
- tenure: A specific length of tenure should not be included as an indicator of a loss of independence. Specifying a particular length of service is arbitrary, inappropriate and

unnecessary. Tenure is quite different to the other relationships dealt with in Box 2.1 and its inclusion is likely to engender a default public perception of a lack of independence. At best, tenure should be dealt with generically in the Commentary to the effect that there is no default period of service affecting independence but it is a factor that may need to be considered on a case-by-case basis.

- related entity: For the same reasons as detailed in Annexure B of these submissions on other proposals, we query the use of "related entity" to capture (presumably) the listed entity's corporate group.

3. Recommendation 2.6 (induction program)

It is not clear to us what benefit disclosure of the main features of induction and professional development programs will have for securityholders and other market participants.

While AMP has in place arrangements to allow its directors to maintain and develop their skills and knowledge, the Commentary to this Recommendation suggests an obligation on the entity more akin to that of an employer-employee relationship. Given the nature of directorships and the fact that many directors sit on multiple boards, such a prescriptive regime as is suggested in the Commentary seems unnecessary. In terms of general skills and knowledge, directors should be able (and expected) to drive their development with the benefit of limited resources provided by the entity. We agree, however, that the development and maintenance of familiarity with the entity and the particular issues facing it may require a more structured approach by the Board.

The Commentary to this Recommendation is an example of what we perceive to be a trend for the Commentary in the Principles and Recommendations generally to be drafted in a more prescriptive style – ie a greater emphasis in the Commentary to the effect that the entity "should" have this or "should" do that. When this is combined with the absence of clear statements in the introductory sections of the Principles and Recommendations as to the purpose of each of the Principles, the Recommendations and the Commentary, the impression may be given that the Commentary is, in effect, the only way to comply with a Recommendation. We suggest that clear statements of the kind found on page 5 of the 2nd edition be included in the 3rd edition, rather than (or in addition to) in the Glossary.

4. Recommendation 4.3 (auditor at AGM)

Given the requirements of Division 8 of Part 2G.2 of the Corporations Act, this Recommendation should not apply to those listed entities which are companies incorporated under the Corporations Act. Regulatory duplication should be avoided wherever possible.

5. Recommendation 7.4 (economic, environmental and social sustainability risks)

We do not consider this Recommendation should apply to those listed entities which are companies incorporated under the Corporations Act given the terms of paragraphs 63 and 64 of ASIC Regulatory Guide 247 ("Effective disclosure in an operating and financial review"). Regulatory duplication should be avoided wherever possible.

To the extent it is proposed to retain this Recommendation, clarification of what is intended by “economic risks” should be included. Arguably, consideration of economic risks is part of all business and strategic decision-making.

6. Recommendation 8.3 (executive remuneration)

To the extent that this Recommendation is intended to suggest that paid (as opposed to unvested or vested but unpaid) remuneration be clawed back (ie repaid), this is likely to be highly complex, impractical and cumbersome to administer. For example, the executive may have left the entity. The Recommendation and its Commentary should be amended to remove this suggestion.

Annexure B - Listing Rule Amendments

1. LR 3.16

While we support the amendments proposed to this LR, we suggest that the use of the term "related entity" in this LR be reconsidered. That is an extremely broad term under the Corporations Act. We would have thought a term capturing the corporate group is more appropriate (for example, child entities or subsidiaries).

As noted in item 3 below and for similar reasons to those noted in Item 2 below, we also do not believe the use of "related party" as a term to extend beyond a natural person is appropriate in this context.

2. Proposed LR 3.19B[1] (continuous disclosure of on-market acquisitions for share schemes)

It is not clear to us that a compelling rationale exists for introducing another specific head of continuous disclosure under Chapter 3. We would have thought that the requirements of LR 3.19A and the requirements of the Corporations Act in relation to remuneration reports provide sufficient disclosure in this area. To the extent that additional disclosure is required of the kind proposed in LR 3.19B.1 and 3.19B.2, we query the benefit of *continuous* disclosure, as opposed (for example) to disclosure in the annual report.

If LR 3.19B is to be introduced:

- LR 3.19B.3 should not extend to related parties of directors, but only their associates (using the tests in ss 12 and 16 of the Corporations Act). The extensive definition of related party in Chapter 19 of the Listing Rules would mean, for example, that an award to a director's daughter's de facto spouse who happens to be an employee of the entity would be caught even though the director has no control or influence over this person. To the extent this is intentional, we consider any trend to extend director-related "regulation", per se, to members of directors' families to be inappropriate as a matter of principle in the modern era. Further, the listed entity may have no knowledge of the family connection, making compliance very difficult.
- It should be made clear that disclosure via Appendices 3X, 3Y and 3Z will constitute sufficient compliance with LR 3.19B.3.

3. Definition of "Associate" and use of "Related Party"

Where the Listing Rules seek to regulate actions by or benefits provided to natural persons (for example, directors) and (quite rightly) extend the regulation to other persons or entities associated with the natural person, in our view the appropriate test should be their associates as determined under ss 12 and 16 of the Corporations Act. Automatic extensions to their family are both inappropriate in the modern era and, for the listed entity who must comply with the listing rules, difficult to monitor and enforce.

[1] Query this proposed rule numbering as there is already a LR 3.19B.

We do not, therefore, agree with the various proposals to use “related party” as the “extension” tool or the proposal to include related parties as automatic associates of a natural person in the proposed new definition of “associate”.

4. Proposed Appendix 4G

We query the benefits of introducing this new administrative burden on listed entities.

We would have thought it simpler for the Principles and Recommendations to encourage or require all relevant disclosures to be in the Corporate Governance Statement, the Annual Report or a designated Corporate Governance section of the entity’s website. Indeed, this seems to be the intent of page 6 (“Where to make corporate governance disclosures”) in the Principles and Recommendations. The Appendix should only be required where an entity chooses to publish disclosures outside these locations.

Corporate websites get updated or revamped from time to time which is likely to make URL disclosures in the Appendix 4G checklist out of date.