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13 November 2013

Ms Mavis Tan
ASX Corporate Governance Council

Email: mavis.tan@asx.com.au

Dear Ms Tan,

Revised Corporate Governance Principles and Recommendations 3rd edition

The Australian Institute of Company Directors (Company Directors) welcomes the opportunity to comment on the draft revised Corporate Governance Principles and Recommendations 3rd edition (Principles and Recommendations).

Company Directors is the principal professional body representing directors in Australia and is the second largest member-based director association worldwide. We offer world class education services and provide a broad-based director perspective to current director issues in the policy debate. Our individual members are directors of a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, charities, and government and semi-government bodies. As at April 2013, around 43% of ASX200 directors are members of Company Directors. Around 50 ASX listed company directors currently serve on our national policy committees, which assist with the development of our policy positions.

While Company Directors is a member of the ASX Corporate Governance Council (the Council) and provided input into the drafting of the draft Principles and Recommendations, we have now had the opportunity to consult with our broader membership with respect to the proposed draft. This submission sets out the comments that we have received from this consultation.

1. Summary

In summary, Company Directors key comments are as follows:

(a) We are concerned that, overall, they are becoming overly-prescriptive and unnecessarily complex.

(b) A matter should only be a Recommendation under the Principles and Recommendation where there is a reasonable expectation that adopting the practice will lead to better corporate governance and therefore a better outcome for investors.

(c) It is our strong recommendation that an Implementation Review Group be convened to review the proposed draft Principles and Recommendations and that the group's recommendations be incorporated into the final document.

(d) The need to undertake "appropriate checks" for new board appointments should not be included as a Recommendation. It should also be made clear that the company does not need to undertake these searches for externally nominated candidates that do not have the support of the board.

(e) With respect to the assessment of a director's independence under Recommendation 2.1, Company Directors continues to oppose the inclusion of a list of indicative factors in Box 2.1 as this creates an unofficial "independence criteria". The wording of the revised Box 2.1 creates an even stronger impression that these factors are, as a matter of fact, indicators of a lack of director independence.
(f) The introduction of board tenure as a relationship that indicates a lack of independence should be removed from Box 2.1, as should the reference to indirect associations with a substantial shareholder.
(g) Risk committees should not be the subject of a Recommendation. How risk is dealt with at a board level varies greatly from company to company depending on their industry and business model. As there is no common need for most listed companies to have a risk committee or for such a committee to be composed in a particular way, it is a matter that should remain in the commentary only.
(h) The proposed Recommendation 7.2 has materially changed what is expected of directors with respect to risk and potentially blurs the roles of the board and of management. The clearer, more precise language used in the current version of Recommendation 7.2 should be retained.
(i) Recommendation 7.4, dealing with economic, environmental and social sustainability risks, should not be included as a Recommendation and should only refer to financial and non-financial risks, particularly as the term "social sustainability" is not a sufficiently well-understood term. Any such disclosures must also be made subject to an appropriate materiality threshold;
(j) Commentary to Recommendation 8.2 incorrectly states that Listing Rule 10.14 requires an employee equity scheme be approved if a director is eligible to participate. This needs be amended or deleted;
(k) While we agree that "clawbacks" are most appropriately dealt with in the Principles and Recommendations (and not mandated by law), in our view it should be included as commentary and not as a Recommendation. The commentary should also clarify that "clawback" arrangements can cover malus and/or clawback arrangements.

These issues are discussed in more detail below.

2. General Comments

Company Directors is committed to ensuring that corporate governance in Australia continues to be of a high standard and we encourage the development of clear, strong corporate governance principles that assist companies to implement efficient and effective governance practices.

As noted in our submissions on earlier editions of the Principles and Recommendations, we support the underlying objectives of the Principles and Recommendations, which we consider are to:

1. promote better disclosure and governance practices;
2. allow companies flexibility in adopting the governance arrangements that are the most appropriate for their circumstances; and
3. obviate the need for black letter law to be introduced relating to corporate governance.

Australia has been well-served by the high standards of governance amongst its listed companies since the introduction of the Principles and Recommendations. This strong governance culture is evidenced by the fact that Australia did not experience the same

level of corporate failures during the global financial crisis as occurred overseas, and particularly in the financial services industry. Following the global financial crisis, there has been a world-wide trend (most notably the US and the UK) to react to these corporate failures through the introduction of new or expanded regulation to address corporate governance concerns. While such a reaction may have been appropriate for these jurisdictions, a similar reaction is not warranted in Australia, which already has in place adequate and effective corporate governance regulation (if not over-regulation). For this reason, we are of the view that the extensive redrafting of the Principles and Recommendations, especially where they add new and more prescriptive Recommendations, is not, in most instances, warranted.

While we note that there are some improvements in the revised draft (in particular introducing the ability to make corporate governance disclosures on the company's website instead of the annual report and including alternatives in the recommendations relating to board committees to recognise that committee structures may not suit smaller listed companies), we have serious concerns regarding other aspects of the revised draft.

Increasingly, we feel the Principles and Recommendations are moving away from their original objective. Historically, the Principles and Recommendations were intended to provide "*an industry-wide, supportable and supported framework for corporate governance which could provide a practical guide for listed companies, their investors, the wider market and the Australian community*"[1]. By requiring increased transparency around listed company governance practices, the Principles and Recommendations enhanced corporate accountability, but were intended to do so in a way that did not unreasonably impinge on the company's ability to maximise performance and shareholder returns and to make good business decisions that lead to more jobs and investment.

The revised Principles and Recommendation do not seem to have been drafted in line with this objective. Instead, the draft Recommendations and their accompanying commentary have been drafted in a way that is overly-prescriptive and, in places, unnecessarily complicated and legalistic (such as the use of numerous levels of sub-clauses in Recommendations 1.5, 2.4, 4.1, 7.1 and 8.1).

Of particular concern is the number of matters previously only referred to in the commentary (and therefore not triggering an "if not, why not" reporting requirement) that have now been elevated to Recommendations (and therefore now requiring "if not, why not" reporting where a company has chosen to depart from them).In our view, a matter should only be included as a Recommendation where it represents a practice that could reasonably be expected lead to better corporate governance and therefore a better outcome for investors. This is consistent with the stated purpose of the Principles and Recommendations, being to "*set out recommended corporate governance practices for entities listed on the ASX that, in the Council's view, are likely to achieve good governance outcomes and meeting the reasonable expectations of most investors in most situations*"[2]. A matter should not be set down as a Recommendation under the Principles and Recommendations where there exists reasonable conjecture as to whether the matter does, in fact, deliver better corporate governance outcomes for most companies.

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[1] Foreword to the ASX Corporate Governance Council, Princples of Good Corporate Governance and Best Practice Recommendations, 1st edition.

[2] Page 3, draft revised Corporate Governance Principles and Recommendations, 3rd edition.

While we appreciate that the flexibility of the "if not, why not" regime means that companies are not required to comply with any particular practice, the reality is that the practices set down as Recommendations in the Principles and Recommendations are treated by most market participants (in particular proxy advisory firms and the media) as being the practices that listed companies must ascribe to. This has the effect of making them quasi-prescriptive in nature – ultimately resulting in companies being less inclined to choose the practices that are most suited to their particular organisation and, instead, treat the Principles and Recommendations as a corporate governance check-list.

This does not encourage boards to put in place the best corporate governance arrangements for their companies' particular circumstances – it encourages conformance and stifles the development of alternative practices that could produce better outcomes. For this reason, we are of the view that the matters that have been elevated to Recommendations under the new edition of the Principles and Recommendations be reconsidered and that most revert to being included in the commentary only, particularly Recommendation 1.2 (undertaking checks and information to be provided for election of directors), Recommendation 1.3 (written contracts for appointment of directors and senior executives), Recommendation 1.4 (company secretary reporting line), Recommendations 2.4(a)(1) and 2.4(a)(2) (composition of nomination committee), Recommendation 6.4 (facilitating electronic communications with shareholders), Recommendation 7.1 (risk committee) and Recommendation 7.3 (role of internal audit).

It is important to note that, under Australian laws, corporations are required to maintain a "culture of compliance". Failure to do so may result in criminal culpability for the company pursuant to section 12.3 of the *Criminal Code Act 1995* (Cth). Under section 12.3, a company can be found to have authorised or permitted a criminal offence if it is proven that "a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision". While this section only applies to criminal offences, the now Chief Justice of the High Court, Robert French in determining an appropriate penalty in the decision of *ASIC v Chemeq Limited* [2006] FCA 936, noted that listed companies must not only ensure that they have appropriate and effective policies and procedures in place, they must also have a "culture of compliance", that is, there must be "a degree of awareness and sensitivity to the need to consider regulatory obligations as a routine incident of corporate decision-making"[3].

While the Principles and Recommendations can provide useful, high-level guidance to listed companies with respect to their corporate governance frameworks, given that companies must have a "culture of compliance" as a matter of law, we do not see that there is a pressing need to introduce more prescriptive requirements into the Principles and Recommendation that listed companies will then be expected to meet (albeit on an "if not, why not" basis). The possible criminal and civil implications of not having a "culture of compliance" should be sufficient to ensure companies take their governance arrangements seriously. Introducing these Recommendations will only serve to increase the compliance costs of listed companies as well as decreasing the likelihood that companies will adopt corporate governance practices that differ from the Recommendations but are most appropriate for their particular circumstances.

Elevating these matters to Recommendations will also mean that, for those companies who have chosen not to adopt one of the Recommendations because it does not suit

[3] *ASIC v Chemeq Limited* [2006] FCA 936 at [86].

their company's particular circumstance, they will now need to provide details of these departures in the proposed Appendix 4G. While we do not have any particular issue with the introduction of the Appendix 4G, it should be recognised that, by requiring companies to indicate whether or not they have followed a recommendation on a form that is lodged with ASX and announced to the market, this is likely to create an even greater impression that compliance with the Principles and Recommendations is expected, in addition to imposing greater compliance and administrative burdens on companies.

We are also concerned that the Council does not intend to have the revised Principles and Recommendations reviewed by an Implementation Review Group, as it has done with previous revisions. As the Implementation Review Group usually comprises experienced professionals with a working knowledge of the Principles and Recommendations, their role in advising the Council on any practical implementation issues that might arise out of the revised Principles and Recommendations is a crucial step in minimising any unintended, negative consequences. It is our strong recommendation that an Implementation Review Group be convened to consider the draft revised Principles and Recommendations and that their recommendations be taken on board before they are finalised.

3. Recommendation 1.2(a) – undertaking checks for directors

We query the need for this to be introduced as a Recommendation. For the vast majority of ASX listed companies, the appointment of a new director will only be made following an extensive due diligence process. The process undertaken is not appropriately captured by the words "undertake appropriate checks". While the specific checks referred to in the commentary to this Recommendation would certainly be carried out if there was a particular concern regarding a candidate's background, the due diligence that is required before a candidate is asked to join a board to ensure his or her suitability goes far beyond these checks.

While we do not object to a reference being made in the commentary of the need for appropriate due diligence processes to be in place (which may include the obtaining of certain checks) and followed for all new director appointments, we do not believe that this is a matter requiring disclosure as a Recommendation. The commentary should also make it clear that a company only needs to undertake such checks for board endorsed candidates standing for election, and not for any externally nominated candidates that do not have the support of the board.

4. Recommendation 1.3 – written agreements with directors and senior executives

While we agree that it is important for there to be a clear understanding of what the terms of a director's appointment are, we do not agree that this needs to be captured in the form of a formal written agreement.

The terms on which a director is appointed to the board of a company is first and foremost governed by the company's constitution and the Corporations Act 2001 (Cth) – all of which will override, to the extent of inconsistency, any agreement (written or otherwise) that may exist between the director and the company.

In our view, the references in the commentary in current 2nd edition of the Principles and Recommendations to there being "*a letter of appointment... setting out the key terms*" of a director's appointment is preferable. This more accurately reflects what is

commonly accepted as good corporate practice for listed companies. Accordingly, we recommend the wording be amended to read: *"A listed entity should have a letter of appointment in place for each non-executive director, and a written agreement with each senior executive, setting out the terms of their appointment"*.

5. Recommendation 2.1 – director independence

With respect to the assessment of a director's independence, Company Directors continues to oppose the inclusion of indicative factors based on the director's relationship with the company, as stated in our previous submission on an earlier edition of the Principles and Recommendations[4]. While we do agree that these relationships are likely to be relevant to the board's consideration of a director's independence, by listing them in Box 2.1 (which, where they exist, must be reported against under Recommendations 2.1 if the board determines that the director is nonetheless independent), this can create an unofficial "independence criteria".

We do not believe that a director's independence can be assessed strictly against set criteria, or that it can be based on any one factor. There are a number of factors that may impact on a director's independence and many of these are captured in Box 2.1 of the Principles and Recommendations; however, a director's independence is ultimately a function of attitude, diligence and mindset. A board can be expected to take into account all relevant interests, positions, associations and relationships that could impact on a director's ability to exercise independent judgement – but the board's assessment should ultimately be made based on whether the director is in fact independent of management and in practice exercises their judgement in an unfettered and independent manner.

We are concerned that the new wording of the introduction to Box 2.1 creates an even stronger perception that the relationships in the list provided are being provided not merely as factors to be taken into account by the board in making its assessment, but are as a matter of fact indicators of a lack of independence. For example, it is no longer clear that independence is a matter for the board to judge – instead, by referring to relationships that "*might influence, or reasonably be perceived to influence*", it suggests that a third-party's assessment of the relationship could be a determining factor. Further, the absolute terms of the phrase "*free of <u>any</u> interest, position...*" does not account for materiality or likelihood that a particular relationship would in fact impair a director's independent judgement (which is contrary to the final paragraph of Box 2.1 that states that materiality should be taken into account). The determination of director independence should be left to the judgement of the board and cannot be mandated or enforced through the application of set criteria, and the references that suggest the contrary in Box 2.1 should be removed or amended.

Our preference would be for the wording of the introduction to Box 2.1 in the 2nd edition of the Principles and Recommendations ("*When determining the independent status of a director, the board should consider whether...*") be retained in the 3rd edition in place of the redrafted introduction. This wording more accurately reflects the fact that the existence of such relationships is just one consideration to be taken into account and that independence is ultimately a matter for determination by the board.

In addition to the changed introduction, we also take issue with the introduction of board tenure as being a relationship that can indicate a lack of independence. The majority of ASX listed companies do not apply arbitrary limits on tenure. While the

[4] See AICD submission dated 9 February 2007.

continuing independence of a long-serving director may warrant closer scrutiny, the mere fact that an arbitrary number of years have passed since a director was first elected does not indicate that the director can no longer be regarded as independent. It also fails to acknowledge the benefits that can be derived for boards by having directors with longer lengths of tenure, for example continuity of organisation-specific knowledge (which will be of particular importance for companies that operate in more complex environments), greater board stability and improved board dynamics and collegiality. Reference to length of tenure should, in our view, be removed from Box 2.1.

We also question the appropriateness of including indirect associations with a substantial shareholder as a relationship that indicates a lack of independence in Box 2.1. Previously, only direct associations with a substantial shareholder were referred to in Box 2.1. Given that an indirect association is unlikely to give rise to a relationship of substantial influence over a director that could possibly impact on his or her independence, we recommend removing the reference to indirect associations.

6. Recommendation 7.1 – risk committees

We do not agree with the introduction of a new Recommendation regarding the use of a risk committee.

Committees are established by boards to more effectively deal with complex or specialised issues and to use directors' time more efficiently. The role of these committees is to make recommendations to the full board, which retains collective responsibility for decision making.

There are certain issues that, for the vast majority of listed companies, warrant the establishment of a board committee as a general principle of good governance, for example audit, nominations and remuneration. As the efficiencies that such committees can provide to the board of a listed company are well-established, and they deal with issues that are common to most, if not all, listed companies (particularly amongst the larger listed companies), it is reasonable for their establishment, composition and use to be addressed in the Principles and Recommendations.

How risk is dealt with at a board level, however, varies considerably from company to company and means different things in different contexts. As such, it is not the case that risk committees will, as a general principle, provide similar efficiencies that can be expected to be derived from an audit committee or remuneration committee for all or most listed companies. Nor is it widely accepted that all listed companies should, as a general principle of good governance, have a risk committee in place (even as part of a combined audit/risk committee). There is even less agreement as to the appropriate composition or responsibilities for risk committees.

The need for certain companies to have a risk committee may be appropriate in particular industries where there are complex regulatory and other risks that can be more efficiently dealt with through the utilisation of a dedicated risk committee, such as financial services (and, indeed, this is recognised in the APRA standards). This does not, however, mean that these same efficiencies will be created by risk committees for listed companies more generally. Indeed, for some companies, depending on their industry or business model, it may be far more important from a shareholder value perspective to have other types of standing committees in place, such as an intellectual property, technology, strategy or product development committee. It is for this reason that the Principles and Recommendations should only recommend the establishment of committees where there are clear, accepted governance grounds to expect that they are

appropriate for most listed companies, with the expectation being that the board will establish any other committees that are relevant and appropriate for its company's circumstances.

While the proposed Recommendation 7.1 does provide an option for companies to not have a risk committee in place (so long as they disclose the processes they employ to identify, measure, monitor and manage material business risks), the commentary makes it clear that this option is intended to be used by the boards of smaller listed companies only. In our view, the circumstances that may give rise to the need for a risk committee to be established are more likely to relate to the nature of its business than its size. The only practice that could be considered appropriate for most (if not all) listed companies with respect to risk would be having an adequate risk framework in place and for appropriate review and updates being undertaken (which is currently covered by Recommendation 7.2). Beyond this, we are of the view that the Principles and Recommendations should not be recommending any one particular risk governance practice over others.

Given that the inclusion of a Recommendation dealing with risk committees in the Principles and Recommendations is likely to create a standard that most, and particularly larger, listed companies will be expected to meet, we are of the view that Recommendation 7.1 should be removed. The use of risk committees is more appropriately dealt with in the commentary to Principle 7 as is the case under the current edition of the Principles and Recommendations.

7. Recommendation 7.2 – risk management framework

The changes made in the reformulated Recommendation 7.2 seem, in our view, to have materially changed what is expected of directors with respect to risk. It could also potentially blur the roles of the board and of management.

The new Recommendation 7.2 recommends that boards review the company's "risk management framework with management..." This is conceptually quite different from the former 7.2 which recommended that boards take a number of concrete steps, namely:

1. require management to implement a risk management and internal control system to manage material business;
2. require management to report whether those risks are being managed effectively; and
3. disclose that management has reported to it in accordance with 2 above during the relevant reporting period.

The proposed change was made, according to the Consultation Paper, to:

> *"strengthen this recommendation to suggest that the board of a listed entity review its risk management framework with management at least annually so as to satisfy itself that the framework is sound and whether there have been any changes in material business risks to ensure that they remain within the risk appetite of the board".*

The new Recommendation focusses on risk matters being reviewed rather than the board receiving a report from management on the effectiveness of the risk management and internal control systems. Due to the use of the less precise term "risk management framework" (rather than "risk management and internal control system"), there is a risk that this could be interpreted as requiring boards to only being concerned with risk at a policy level, rather than also being concerned with overseeing the content and outcomes

of these policies. It is not clear whether this change in meaning is intentional. We do, however, note that the phrase "risk management framework" has also been used in the draft *APRA Prudential Standard CPS 220 – Risk Management*.

The suggestion that the board or a committee of the board should review the risk management framework "*to ensure that [material business risks] remain within the appetite set by the board*" in Recommendation 7.2(a) should also be reconsidered. The board of a company will not be in a position to ensure that all material business risks remain within its appetite – nor should it be expected to be.

More importantly, the new wording does not clearly delineate between the role of the board and the role of management with respect to matters of risk. The board's role in this respect should, in our view, be to set the overall risk appetite for the organisation and having oversight of the risk management and internal control system put in place by management to manage risk accordingly. This is consistent with the wording of the existing Recommendation 7.2, which more clearly deals with the respective roles of the board and management.

While we recognise that the draft *APRA Prudential Standard CPS 220 – Risk Management* includes a more thorough description of the processes that should be in place with respect to risk management, this standard will not apply to most ASX listed companies (nor would it be appropriate for similar standards to apply more broadly). Our preference would be for the clearer, more precise language used in the current version of Recommendation 7.2 to be retained.

8. Recommendation 7.4 - economic, environmental and social sustainability risks

We also disagree with the inclusion of this new Recommendation.

It seems peculiar that the disclosure recommended under Recommendation 7.4 is centred on the management of economic, environmental and social sustainability risks. In our view, environmental, sustainability and governance (ESG) reporting (which seems to be what this Recommendation is driving at) should provide meaningful information about positive business performance and the creation of long-term value, rather than on the management of risks. By focussing the ESG disclosure on issues of risk, the Recommendation misses the opportunity to have companies provide positive, proactive disclosures and instead encourages negative, defensive disclosures.

We are also concerned that the term "social sustainability" is not a sufficiently well-understood term. Given that the commentary to Recommendation 7.4 seems to suggest that companies will disclose benchmarks used to measure "social sustainability", a clearer definition of what this term is intended to encompass should be provided in the commentary.

If this Recommendation is included in the 3rd edition, our preference would be for the Recommendation to refer generally to "financial and non-financial risks", rather than to "economic, environmental and social sustainability risks". Any required disclosure should also be made subject to an appropriate materiality threshold.

It should also be considered whether the risks that are intended to be disclosed under this recommendation are already sufficiently dealt with and disclosed under the operating and financial review requirements under section 299A of the Corporations Act

(in which case, it would be sufficient to include reference to this in the commentary to Principle 7).

9. Recommendation 8.2 – remuneration policies and practices

The commentary to Recommendation 8.2 incorrectly states on page 31 that: "*Under the Listing Rules, a listed entity is required to obtain security holder approval for any equity-based incentive plan in which directors may participate*". The footnote to this statement then attempts to clarify this by stating that ASX Listing Rule 10.14 does not apply where "*securities are purchased on market under the terms of a scheme that provides for purchases of securities by or on behalf of employees or directors*".

Listing Rule 10.14 requires shareholder approval if a listed company wishes to make a grant of securities to a director under an employee equity scheme. It does not, as is suggested in the commentary, require that an employee equity scheme be approved merely because a director is eligible to participate.

While some listed companies may elect to obtain shareholder approval for their employee equity schemes, this is usually done for a different reason, for example to rely on Exception 9 of ASX Listing Rule 7.2 (which provides carve out from the requirements of ASX Listing Rule 7.1) or to obtain approval for any termination benefits that may be provided to a member of the key management personnel under the terms of the employee equity scheme.

Given that shareholders vote on the company's remuneration arrangements as disclosed in the remuneration report, most companies do not consider that it is necessary or best practice to voluntarily obtain general shareholder approval for an employee equity scheme unless they are required to do so under the ASX Listing Rules or Corporations Act. This is contrary to the statements made on page 32 of the commentary to Recommendation 8.2.

We suggest that these statements are either removed or that they be amended to address the issues identified above.

10. Recommendation 8.3 – clawback policy

As noted in the Company Directors' submission to Treasury in response to the Corporations Legislation Amendment (Remuneration Disclosure and Other Measures) Bill 2012[5], we do not support the mandating of remuneration clawback arrangements as we are of the view that there is no evidence to justify a prescriptive, heavy-handed approach to clawbacks and that numerous checks and balances already exist to effectively protect against the remote possibility of executives manipulating earnings with a view to securing greater remuneration. We instead believe that a less prescriptive approach should be taken.

While we agree that including guidance on this issue would most logically be included in the Principles and Recommendations, we do not agree that it is a matter that warrants "if not, why not" disclosure. We are therefore opposed to its inclusion in the draft Principles and Recommendations as a Recommendation. Our preference would be for it to be instead dealt with in the commentary to Recommendation 8.2 (which relates to the

[5] http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions/2013/Submission-to-Treasury-on-Corporations-Legislation-Amendment-Bill-2013

disclosure of the company's policies and practices regarding remuneration of non-executive directors and senior executives).

It should also be made clear in the commentary exactly what the term "clawback" is intended to cover. In particular, it should clearly state that a "clawback policy" could cover malus arrangements and/or actual clawback arrangements. The terms "clawback" and "malus" are sometimes used interchangeably or incorrectly. A "clawback" refers to a requirement that an executive pays back an amount that he or she has already received, whereas a "malus" involves the employer reducing an executive's unvested remuneration entitlements (for example, a deferred bonus or a long term incentive entitlement).

As it is important that companies are provided with the flexibility to apply whichever arrangements are the most suited to their particular remuneration structures (and also recognising other factors that will impact on the ability for a company to use malus or clawback provisions, including tax considerations and legal enforcement issues), the commentary should clearly define what each of these mean and state that, for the purposes of the Principles and Recommendations, a company's "clawback policy" can cover either or both of these arrangements.

Companies should also be given the flexibility to simply have clawback arrangements in place, without necessarily needing to have a separate policy dealing with clawbacks. Many listed companies already have some form of malus or clawback arrangements embedded into their equity incentive plans and/ or employment contracts, and these arrangements are usually disclosed in the company's Remuneration Report (and, for the CEO, will often be announced to the market together with the other terms of his or her employment contract). Where companies have these arrangements already in place, we see no reason why they should also be required to adopt a separate policy. As such, reference should instead be made to the need for companies "*to have in place a clawback policy or other mechanism which sets out the circumstances in which the entity may reduce the performance-based remuneration of its senior executives*".

If you would like to discuss any aspect of our views please contact Senior Policy Advisor, Gemma Morgan on (02) 8248 6600.

Yours sincerely,

John H C Colvin
Chief Executive Officer &
Managing Director