Guerdon Associates
Executive Pay & Governance

14 November 2013

ASX Regulatory Policy
Level 6, 20 Bridge St
Sydney NSW 2000

By email: regulatorypolicy@asx.com.au

Dear Sir or Madam:

Re: Submission on ASX Corporate Governance Principles & Recommendations

Thank you for the opportunity to comment on the proposed amendments to the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (**ASX Principles**).

We are generally supportive of the proposed amendments. We believe they result in a concise and more streamlined set of governance principles and also provide a greater degree of flexibility for smaller listed companies to report on governance practices. However, we do have suggestions for improvement.

Our submission includes brief background on Guerdon Associates and feedback regarding specific aspects of the draft.

Guerdon Associates

Guerdon Associates is an independent[1] executive remuneration and board governance consulting firm. Clients are mainly boards of ASX listed companies. Much of the assistance we provide relates to ASX Governance Council principles. Consulting staff are located in Melbourne and Sydney, with additional support located in offices in Chennai, India (database management and administration) and San Francisco (technology support).

Recommendation 2.5:

Whilst generally supporting the principle that boards should develop a statement outlining the proposed skills and diversity needed to support future growth and development, we have some concerns about the requirement to **disclose** such a statement to the market.

A well-constructed, up-to-date statement or matrix of skills and diversity will be closely aligned to the entity's strategy, future growth scenarios and current challenges. In many cases, such a document will signal to the market how the company is planning to respond to future challenges or opportunities, via the future "shape" of its board. The Board Skills Matrix could therefore be considered "commercial-in-confidence" and it would not be prudent to share it with the general market or, indeed, competitors.

[1] Independence is defined as a specialist provider of consulting services to boards to minimise conflicts of interest that may result from being a broad based supplier of multiple services to both management and boards.

Thus the difficulty with the proposed wording of Recommendation 2.5 is the focus on future skill mix and diversity, as it states, "a listed entity should have and disclose a statement as to the mix of skills and diversity that the board is looking to achieve in its membership".

We recommend that boards should be given the option to disclose either their current or future mix of skills and diversity, depending on whether the disclosure of their future skill requirements may send signals to the market that they wish to keep confidential. Accordingly, we recommend Recommendation 2.5 be amended as follows:

> *"A listed entity should have and disclose a statement as to the mix of skills and diversity that the board currently has, or is looking to achieve in its membership."*

Recommendation 8.2:

The commentary relating to footnote 44 states 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".* This is not, strictly speaking, correct. Listing Rule 10.14 only requires approval to be obtained for a grant or allocation made *under* an equity-based incentive plan, not for the plan itself. There is no general requirement for a company to obtain security holder approval of an equity-based incentive plan. Accordingly, we suggest this statement in Recommendation 8.2 be clarified along the following lines:

> "*Under the Listing Rules, a listed entity is required to obtain security holder approval for directors to acquire any securities under an equity-based incentive plan."*

Recommendation 8.3:

In general, we support the recommendation for listed entities to have a remuneration policy that sets out the circumstances in which the entity can adjust performance-based remuneration of its senior executives. We also agree that this requirement is more appropriately dealt with in the ASX Principles than in legislation, as this affords companies more flexibility to adopt and implement a policy that is appropriate to their particular circumstances.

The commentary provides examples of the ways in which the entity may "claw back" a senior executive's remuneration, including:

- requiring the executive to pay back remuneration,
- reducing any earned but as yet unvested incentives, or
- adjusting current year incentives or fixed remuneration to take account of the previous overpayment.

We have reservations about the use of the term "claw back" in the draft Principle 8.3. The term "claw back" is widely used and understood in other jurisdictions as the repayment of remuneration that has already vested and been paid to or received by an employee. This is distinct from the concept of "malus", which is the forfeiture or reduction of unvested remuneration. The first example in the commentary would conventionally be regarded as claw back. However, the second and third examples are types of malus[2].

[2] The distinction has been recognised in other overseas governance codes, such as the influential and recently updated UK Association of British Insurers (ABI) "Principles of Remuneration" at http://www.ivis.co.uk/ExecutiveRemuneration.aspx.

In our view, the formulation in the now-lapsed *Corporations Legislation Amendment (Remuneration Disclosures and Other Measures) Bill* is more appropriate and should be adopted in the ASX Principles – this referred simply to a "reduction, repayment or alteration" of the person's remuneration. No reference was made to "claw back".

We also note the difficulties associated with requiring the repayment of performance based remuneration. In practical terms, adjustment to remuneration is only likely to be workable in relation to unvested or deferred incentives (i.e. "malus").

It will be very difficult to recover remuneration already paid to executives and virtually impossible in the case of former executives – particularly where the executive is not personally at fault – and would likely require time-consuming and expensive litigation to do so. This will be the case even where listed entities include provisions supporting the reduction, repayment or alteration of remuneration in executive service agreements (as advocated in the commentary to proposed Recommendation 8.3 and also Recommendation 1.3).

The requirement in Recommendation 8.3(c) that entities disclose whether performance-based remuneration has been clawed back in accordance with its policy and, if not, why not, is supported to ensure entities provide adequate disclosure on the operation of their remuneration policies, except, again, we suggest that the words "clawed back" be substituted with "reduced, repaid or altered".

The Council may wish to consider issuing further guidance on these issues and the extent to which there is an expectation on entities to pursue recovery of vested remuneration.

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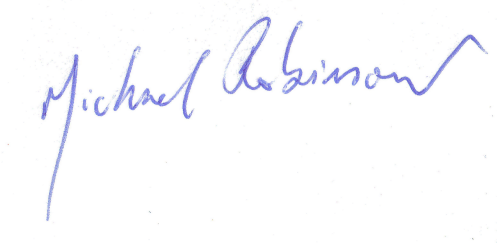
Yours sincerely



Michael Robinson
Director