

Draft response to proposed 4th Edition of the ASX Corporate Governance Council Principles and Recommendations

July 2018



Introduction

The ASX Corporate Governance Principles and Recommendations are a benchmark of good corporate governance for successful and robust Australian and foreign companies listed on the Australian Stock Exchange. The proposed 4th edition of the Corporate Governance Principles and Recommendations mark an evolution, addressing recent emerging domestic and global issues in corporate governance.

The ASX Corporate Governance Council has invited all stakeholders to provide feedback on a consultation draft to ensure that the 4th edition strikes the right balance between the needs and interests of all stakeholders.

We have prepared these comments and draft submissions for discussion at breakfast roundtable events taking place in Sydney and Melbourne. We have suggested particular themes for discussion in the green highlighted “questions for discussion” sections.

We look forward to our conversations with attendees, which will feed into our final submission to the Council.

Key themes in the proposed changes

- **Diversity:** push to more specificity, including for ASX300 companies, encouragement to set a target of 30% female representation on the Board by a nominated date
- **Emphasis on culture, values and purpose**
- **Annual reviews of leadership team:** their performance and how the skills on the team match up to the skills matrix needed for the organisation
- **Greater interaction between board and management in reviewing risk, performance, culture**
- **In addition to regular reviews of governance framework, sharing the learnings from the review**
- **In addition to monitoring and reporting to the market on financial risk and performance, focussing on ethical risk and performance and giving the market a holistic view of the company’s performance and future prospects**

Our approach

In the interests of streamlining, we have not listed those recommendations where there are minimal changes to the equivalent content in the 3rd edition.

Recommendation	Description	Feedback
Principle 1: Lay solid foundations for management and oversight		
1.1 Board Charter	<p>The recommended contents have been expanded to matters of purpose, culture, and values.</p> <p>It is envisaged that the Board will not only sign off on the entity's remuneration framework but oversee the organisation's alignment with the entity's purpose, values, strategic objectives and risk appetite.</p> <p>There is now a greater emphasis on the board "setting the tone" for the organisation in addition to approving strategy, financial reports and risk management systems. The role of senior management is expressed to include actively monitoring and reporting compliance with the organisation's code of conduct and values.</p>	<p>✓ We envisage that some boards may struggle to take this broader perspective. In practice the prevailing culture of an organisation will either undermine or assist its delivery on strategy and values. Has the Council considered what guidance could be provided to Boards on measuring these intangible but powerful aspects of an organisation's performance?</p>
1.2 Selection process	<p>The existing recommendations of conducting background checks and providing recommendations as to candidates for the Board have been expanded. In the supporting material for a resolution to elect a director, the Board would confirm the results of background checks and detail their reasons for making a particular recommendation (rather than simply stating the recommendation).</p>	<p>We agree with the proposed changes</p>
1.3 Directors' conditions of appointment	<p>In addition to the current recommendations as to the contents of appointment agreements:</p> <ul style="list-style-type: none"> • The director would be asked to notify or seek approval to any new role that could affect their ability to commit sufficient time to the role; • It is expected that the agreement will be with the director personally, not a service company, in view of the personal duties of the director 	<p>We agree with the principle that directors should personally acknowledge their duties and obligations.</p> <p>✓ We suggest that the test outlined in the new point 6 of the commentary require notification where the director expects a 'material reduction' in time available for performance of their duties rather than where an appointment 'could impact' the time available</p>

Recommendation	Description	Feedback
<p>1.5 Diversity Policy</p>	<p>Considerable additional detail has been added to the existing recommendations on diversity policies:</p> <ul style="list-style-type: none"> • Push to set numerical targets, particularly ASX 300 Companies which are encouraged to set a target of 30% female representation on the Board within a set period • In addition to setting measurable objectives for diversity: <ul style="list-style-type: none"> ○ requiring management to design and implement programs to achieve those objectives; ○ including diversity outcomes as KPIs for senior management; ○ reviewing progress with management at least annually and disclosing the outcomes from that review to the market 	<p>We support the push towards setting numerical targets and other measurable objectives. Without detracting from the importance of gender diversity, has the Council considered encouraging listed entities to also set measurable objectives for other forms of diversity e.g cultural?</p>
<p>Question for discussion: What is your organisation’s experience with setting measurable objectives for diversity? What is the level of “buy-in” to promoting diversity and inclusion in your organisation? Where do you feel that more practical guidance is needed?</p>		
<p>1.6 Board Evaluations</p>	<p>The existing recommendation that the Board undergo periodic reviews is strengthened by emphasising:</p> <ul style="list-style-type: none"> • that the entity should have a process in place that ensures that reviews take place annually; • that the review include consideration of individual directors’: <ul style="list-style-type: none"> ○ skills and knowledge (whether they are keeping up with the organisation’s needs); and ○ ability to commit adequate time to the role • that the entity not only disclose whether a review has occurred but particular learnings arising from the review 	<p>We agree with these recommended changes, as a means of ensuring that board reviews contribute to the ongoing development of the Board and its collective and individual capability.</p>
<p>1.7 Evaluations of senior management</p>	<p>The existing recommendation that senior management undergo periodic reviews is strengthened by emphasising that the entity should have a process in place that ensures that reviews take place annually.</p>	<p>We agree with the proposed changes</p>

Recommendation	Description	Feedback
Principle 2: Structure the Board to be effective and add value		
2.2 Board Skills Matrix	<p>Additional detailed commentary on:</p> <ul style="list-style-type: none"> • the role of a skills matrix in driving the education program of current directors and the selection of new ones • coverage of a skills matrix, including the skills needed to address matters of culture, technological disruption, cyber security, sustainability and climate change • reporting about the skills matrix: <ul style="list-style-type: none"> ○ recognising that if the skills matrix reflects the Board’s plans to move into as-yet undisclosed areas, the Board need not disclose those details) ○ encouraging the Board to explain the steps they are taking to fill skills gaps on the current Board 	<p>We agree in principle with the strengthening of the role of the skills matrix, as a “live” document which informs the Board’s education and recruitment processes.</p> <p>However in smaller boards it may never be possible to cover all the relevant skills within the Board. It can be difficult to find non-executive directors who have all the required skills AND who are willing to take on the risk of board appointment.</p> <ul style="list-style-type: none"> ✓ We recommend that the commentary acknowledge the value of advisory boards (such as scientific or clinical advisory boards appointed by biotech companies) and/or the reality that Boards may need to retain specialist advisers to complement and add to the directors’ skills and knowledge
2.3 Independence	<p>The list of factors that could weigh against a director’s being independent has been extended to include the receipt of performance based remuneration or participation in an employee incentive scheme</p>	<p>We are aware that smaller listed companies will often (with shareholder approval) issue options to non-executive directors as a way of compensating for modest cash fees.</p> <ul style="list-style-type: none"> ✓ We ask the Council to distinguish between equity-based remuneration with performance hurdles relating to organisational performance from the issue of options which only have the inherent “hurdle” of the exercise price being higher than the then market price, and recognise that the issue of “plain vanilla” options in lieu of paying higher directors’ fees are unlikely to compromise independence.
<p>Question for discussion: To what extent is it appropriate for non-executive directors to receive equity-based remuneration? Have you had pushback or encouragement from major shareholders when putting option packages for NEDs?</p>		

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	<p>Some of the new content encourages the Board to not only consider these factors that could weigh against a director's being independent but, if they are present, rule a director as non-independent unless they are satisfied that the interest is not material and will not interfere with the Directors' capacity to bring independent judgment</p>	<p>This new emphasis appears to muddy the waters as to directors' mindset. Whether functionally independent or not, all directors must cultivate independence of mind in keeping with the duties that apply to all directors.</p> <ul style="list-style-type: none"> ✓ We recommend deleting the words "and to act in the best interests of the entity as a whole rather than in the interests of an individual security holder or other party." If a director is not able to act in the interests of the company as a whole then potentially they should not be a director. Alternatively, where due to a particular interest or affiliation a director has a conflict of interest or duty concerning particular aspects of a Company's business, the company ought to have a protocol in place to manage that conflict. ✓ We ask the Council to consider including practical guidance on how companies can prepare for and manage conflicts
<p>2.4 Number of Independents</p>	<p>There is new commentary that if a Board does not have a majority of independent directors there be at least more than 1 so the independent director is not isolated.</p>	<p>We agree with the proposed changes, as they recognise the reality that including several executive or "non-independent" NED's may be a conscious choice due to the needs of the organisation at a particular point in time</p>
<p>2.6 Induction Process</p>	<p>In addition to the existing recommendation of an induction process there is a recommendation about continuing education which should be linked to addressing gaps identified in board reviews and skills matrix reviews, as well as ensuring that directors are keeping up to date with developments relevant to the company</p>	<p>We agree with the principle that continuing education is one way of dealing with gaps in the board's skill mix. However it must be recognised that with smaller boards are unlikely to be able to cover all the desirable skills, hence the need for advisory boards to complement and add to the directors' skills and knowledge. [see our recommendation at 2.2]</p>
<p>2.7 Language issues</p>	<p>A new recommendation that where a director may have challenges in understanding the dominant language of the organisation, the entity disclose what measures are in place to ensure that the director understands and can engage with the matters under discussion.</p>	<p>We support this measure in view of the increasing globalisation of entities listed on ASX.</p>

Recommendation	Description	Feedback
<p>Principle 3: A listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner.</p>	<p>A listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner.</p>	<p>We are in support of this amendment, as it provides company boards with greater control and transparency, arming them to monitor the desired values, principles and ethics they should instil in the organisation. Both ASX and ASIC have imposed greater scrutiny around a perceived decline in the culture of compliance in recent years. This amendment is in line with the higher standards of conduct, which is now being imposed across various industries by the regulators. The amendment recognises that an entity’s ‘social licence to operate’ is a valuable asset, which can be lost or seriously damaged if it does not strive to conduct its business in a legal and ethical manner. It is our view the amendment protects companies, allowing company boards to impose increased accountability on their people through disclosure and enforcement of their organisations policies.</p>
<p>3.1 Articulate and disclose its core values</p>	<p>A listed entity should articulate and disclose its core values, which are its guiding principles and defines what kind of organisation it aspires to be.</p>	<p>We are in favour of the proposed recommendation. It supports company boards in their efforts to reinforce the required culture across the organisation, foreshadowed by principle 3. Although it imposes greater disclosure requirements on organisations, we are of the opinion that by being required to articulate and disclose core values, companies will be protected in the long term from accusations of impropriety.</p>
<p>3.2 Have and disclose a code of conduct for its directors, senior executives and employees</p>	<p>A code of conduct for a listed entities directors, senior executives and employees should be disclosed, where the Board is informed of material breaches.</p>	<p>We are in favour of the proposed recommendation that in addition to having and disclosing a code of conduct for its directors, senior executives and employees, the entity ensures that the Board is informed of material breaches by a director or senior executive, or other breaches of the Code which call into question the culture of the organisation. In our view this will encourage organisations to go beyond having a template code of conduct to one which reflects the organisation’s values and which is embedded in the conduct and decision-making of directors and employees.</p>

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3.3 Have and disclose a whistle-blower policy		<p>✓ We recommend an additional line in the recommended content:</p> <p><i>“include appropriate procedures for the reporting and investigation of concerns about the giving of bribes or other improper payments or payment of secret commissions, consistent with a listed entity’s whistleblower policy”;</i></p>
3.4 Have and disclose an anti-bribery and corruption policy		We have no comments on this Recommendation.
Principle 4: Produce corporate reports of high quality and integrity	<p>Investors should be provided with reports of a high quality and integrity and the reports should give the reader a reasonable understanding of the entity’s business model, strategy, risks and opportunities, remuneration policies and practices and governance framework as well as its financial performance.</p> <p>The Council appropriately recognises that high quality corporate reports must look beyond purely financial information and present a holistic view of the business’s prospects by providing investors and stakeholders with all of the information (not merely financial) needed to make informed decisions about the business.</p> <p>However whilst businesses will generally have well-established processes in place to support their financial reporting, we do recognise that reporting on non-financial performance and qualitative information will not be as straightforward. We therefore approve of the general and non-prescriptive language adopted in the commentary, which recognises that processes and systems for reporting on non-financial data will differ between companies.</p>	<p>We are in favour of the amendments to Principle 4.</p> <p>The existing recommendation is strengthened by:</p> <ul style="list-style-type: none"> • providing greater clarity around corporate reporting best practice, whilst remaining broad enough to be universally applicable across the listed company spectrum; and • building on the shift towards an integrated reporting model, which was introduced in the Third Edition of the principles and is intended to bring Australia into line with global trends in corporate reporting.

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<p>4.4 Have and disclose its process to validate its annual directors' report and any other corporate reports</p>	<p>A listed entity should have and disclose its process in validating its annual directors' report and other reports it releases to the market to ensure that they are accurate, balanced and understandable.</p> <p>The commentary specifically refers to the integrated reporting model and footnotes the International Integrated Reporting Framework, which explains the principles of integrated reporting and provides practical considerations for reporting entities.</p>	<p>We are in favour of new Recommendation 4.4 on the basis that:</p> <ul style="list-style-type: none"> • companies should put into practice effective processes to ensure that all reports they release to the market are of a high quality; • the reporting process should not be ad hoc; rather it requires an organised system of information gathering, analysis, drafting and review processes that are consistently applied and periodically re-evaluated; and • to the extent that part or all of a report is not subject to external audit review, the company should ensure the report is subject to an effective validation and review process. <p>Question for discussion: Do you agree with the intent and practical impact of this new Recommendation? Will it have a material impact on the Board's workload? Also, what are your thoughts of use of the word 'validate' vs 'verification'? Do you anticipate increased compliance costs and management time to more comprehensively verify reports under these new measures?</p>
<p>Principle 5: Make timely and balanced disclosure</p>		
<p>5.1 Disclose a written policy for complying with its continuous disclosure obligations</p>	<p>A listed entity should disclose its continuous disclosure compliance policy in full rather than only a summary.</p>	<p>Encouraging listed entities to disclose the full continuous disclosure policy will promote transparency, and encourage entities to draft clear and streamlined policies.</p> <p>✓ We recommend that the Council not amend the commentary to replace "factual" and "complete" with "accurate". Entities need to ensure both that the elements of their announcements are "accurate" and that overall the announcement does not omit important information, or combine facts in an unclear manner. The original wording is preferable.</p>

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<p>5.2 Ensure that its Board receives copies of all announcements</p>	<p>A listed entity should ensure that its Board receives copies of all announcements under Listing Rule 3.1 promptly after they have been made.</p> <p>Question for discussion: What structures do your entities currently have in place to ensure immediate disclosure and do your structures ensure that the Board is informed promptly when an announcement is being made? Also do you believe that all announcements should be run past the Board first?</p>	<p>The new recommendation reflects that Boards will often delegate authority to a committee to approve continuous disclosure announcements in order to facilitate prompt disclosure of new developments. We are in favour of this new Recommendation as it will promote accountability of delegates to the Board as a whole.</p>
<p>5.3 Release a copy of presentation materials</p>	<p>A listed entity that gives a new investor or analyst presentation should release a copy of the presentation materials on the ASX Market Announcements Platform ahead of the presentation.</p>	<p>We support the Recommendation as it is consistent with ASX Guidance Note 8 on Continuous Disclosure.</p>
<p>Principle 6: Respect the rights of security holders</p>		
<p>6.1 Provide information about itself and its governance to investors via its website</p>	<p>A listed entity on its website should include links to its “other corporate reports” and statement of values as well as to its annual directors’ report and financial statements.</p>	<p>We are in favour of these changes to Recommendation 6.1 in keeping with the spirit of Recommendation 6.1, i.e. provision of information about the entity to be freely and readily available in the digital age.</p>
<p>6.2 Have an investor relations program that facilitates effective two-way communication with investors</p>	<p>A listed entity should engage with all investors and not purely focus on larger institutional investors. This may include monitoring popular social media forums used by investors to comment on the entity. Any concerns raised on these social media platforms should be brought to the attention of the Board.</p>	<p>We agree that listed entities should seek opportunities to engage with retail investors and the organisations that represent them to understand the matters of concern or interest to smaller investors and where significant comments or concerns are raised by investors, they should be conveyed to the entity’s board and relevant senior executives.</p> <p>In terms of a listed entity considering monitoring popular social media forums used by retail investors for comments about the entity and where significant comments or concerns are raised by investors, they should be conveyed to the entity’s board and relevant senior executives; this may be viewed as an onerous task for an entity to undertake.</p>

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<p>6.3 Disclose how it facilitates and encourages participation at security holder meetings</p>	<p>For discussion: What practical issues arise in monitoring social media forums, what constitutes a “significant” comment or concern, the person who identifies whether a comment/concern on social media is “significant” and the steps that will need to be undertaken before conveyed to the board (e.g. investigating the comment/concern).</p>	
	<p>A listed entity should encourage and facilitate participation at meetings by choosing appropriate venues and encouraging the use of technology to communicate to a wider range of members.</p>	<p>Whilst we agree that a meeting of security holders is a significant forum for two-way communication between an entity and its security holders, we note that no venue can be reasonably accessible to all security holders who wish to attend the meeting in person or by proxy. The shareholder base of an entity may be quite diverse by location and also may be different from the registered office or principal place of business of the entity.</p>
	<p>For discussion: Where an entity has a large or geographically diverse share register, to what extent have you considered or experienced:</p> <ul style="list-style-type: none"> • the use of live webcasting of security holder meetings which will allow security holders to view the meeting online; or • holding meetings across multiple venues linked by live telecommunications; • the use of hybrid meetings where security holders can attend and vote in person, by proxy or online? 	
<p>6.4 Ensure that all resolutions at a meeting of security holders are decided by a poll rather than by a show of hands</p>	<p>The chair of a meeting should ensure all resolutions are carried by a poll instead of a show of hands.</p>	<p>ASIC has, in previous reviews after “AGM Season”, expressed concerns about Chairs going to a vote on a show of hands rather than a poll.</p> <p>However there are situations where the proxy voting is clearly in favour of a resolution, so that going to a poll will interrupt the flow of the meeting without producing a different outcome to a show of hands.</p> <p>✓ We recommend that the Council clarify that the Chair should put resolutions to a poll on those matters where the lodged proxies disclose a strong “no” vote or that the matter would be lost if decided on the proxies.</p>

Recommendation	Description	Feedback
Principle 7: Recognise and manage risk	<p>A sound risk management framework requires substantial understanding of key drivers of an entity's long term success.</p>	<p>We are in favour of the proposed amendments. The amendments identifies that sound management framework is necessary for understanding the key drivers of an entity's long term success. By identifying inherent risks in the model and strategy of a business and recognising both financial and non-financial risks that may impact the wellbeing of the business, an entity will be much better positioned to monitor and manage risks with short, medium and longer term horizon.</p>
7.1 Risk committee	<p>The Risk Committee should now monitor an entity's performance against its risk management framework, including whether it is operating within the risk appetite of the Board, receive reports from management on emerging sources of risks and how to mitigated them and make recommendations to the Board in relation to a the risk management framework.</p>	<p>We are in favour of the amendment as it encourages long term sustainability through identifying a broader range of factors and risks that are crucial for the overall wellbeing of an entity's operations.</p>
7.2 Annual risk review	<p>The Board should monitor the adequacy of the entity's risk management framework and that the entity is operating with due regard to the risk appetite set by the Board. Additionally the Board should disclose that it has reviewed the entity's risk management framework.</p>	<p>This amendment ensures that management is not operating in a silo from the board, recognising the importance of the board's accountabilities to the entity and its shareholders.</p> <p>We are in favour of this amendment. We believe the amendment is supported by the overall amendments to principle 7, which aim to expand the risk factors an entity must consider when assessing the overall wellbeing of its operations, ensuring that the board is well informed of any material risks at all times.</p>
7.3 Internal audit	<p>A listed entity that has an internal audit function may find it helpful to structure its internal audit based upon the International Standards for Professional Practice of Internal Auditing published by the Internal Audit Standards Board.</p>	<p>The addition of the footnote to the commentary to this recommendation, aims to provide guidance for entities that have or wish to have an internal audit function to determine how best to structure and staff the internal audit function. The reference to the International Standard for the Professional Practice of Internal Auditing provides entities with a benchmark to best structure and staff the internal audit function.</p>

Recommendation	Description	Feedback
7.4 Sustainability disclosures	<p>A listed entity should now determine their material exposure to ‘environmental and social risks’, instead of ‘economic, environmental and social sustainability risks’.</p>	<p>The amendment reinforces the importance of the entity’s social licence to operate, acknowledging that an entity’s ‘social licence to operate can be lost or seriously damaged if the entity conducts its business in a way that is not environmentally or socially responsible. The amendments aim to put environmental and social risks at the forefront of an organisations risk considerations.</p> <ul style="list-style-type: none"> ✓ We note however, that greater guidance will be required to assist entities to understand the expectation on them and to be able to effectively assess and manage this risk.
Principle 8: Remunerate fairly and responsible	<p>The remuneration of a director should be sufficient to attract and retain high quality individuals in order to create value for security holders over the short, medium and longer term. Additionally the remuneration process should now be rigorous and listed entities should now benchmark their remuneration against that of their peers.</p>	<p>We are in support of the proposed amendments.</p> <p>In particular, we agree that a listed entity’s remuneration policy should include a benchmarking process involving an analysis of the remuneration paid to directors and senior executives by comparable entities on an annual basis. However, we consider that:</p> <ul style="list-style-type: none"> ✓ the Council should provide further guidance on how the benchmarking process should be undertaken by listed entities (practically speaking). ✓ listed entities should be encouraged to explain the benchmarking process undertaken in their Remuneration Reports for the purposes of verifying that the remuneration being paid to directors and senior executives is reasonable, market based and, importantly, not excessive. ✓ for clarity and completeness, we recommend clarifying footnote 74 by referring to the maximum aggregate remuneration of <u>non-executive</u> director approved by security holders, (LR 10.17).
<p>Question for discussion: Do you agree that companies should be undertaking a benchmarking process on an annual basis and are you comfortable with disclosing the analysis undertaken in the Remuneration Report?</p>		

Recommendation	Description	Feedback
8.2 Separately disclose policies and practices regarding remuneration of non-executive directors and remuneration of executive directors and other senior executives	New commentary: the targets for performance based remuneration should be aligned to the entity's short, medium and longer performance objectives.	We are in favour of the proposed amendments to Recommendation 8.2.
8.4 Guidance on agreements for provision of consultancy or similar services by a director or senior executive	New recommendation: A listed entity should only enter into an agreement for the provision of consultancy or similar services by a director or senior executive, or by a related party of a director or senior executive if <ul style="list-style-type: none"> • they seek independent advice that : <ul style="list-style-type: none"> i) services being provided are outside the normal scope of their duties; ii) the agreement is on arm's length terms; and iii) the remuneration is reasonable. • the agreement is disclosed to security holders. 	Overall we agree with the new recommendation. However, as there is already extensive commentary in ASIC Regulatory Guide 76 on how Boards should deal with “related party transactions” we recommend that: <ul style="list-style-type: none"> ✓ The Council remind Boards of the availability of the guidance in RG 76; and ✓ Boards be encouraged to consider whether and what kind of independent advice is required on the understanding that in some Boards it may be possible to obtain independent review within the Board (for example the audit committee or remuneration committee if the relevant skills reside within those groups)

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