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ASX Corporate Governance Council
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To the ASX Corporate Governance Council

Review of the *Corporate Governance Principles and Recommendations*: Draft 4th edition

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility within listed entities for developing governance policies, ensuring compliance with the Australian Securities Exchange (ASX) listing rules and supporting the board on all governance matters. Their familiarity with the practical aspects of how to implement best practice governance frameworks and ensure sound reporting to shareholders and other stakeholders has informed the comments in this submission.

Governance Institute of Australia welcomes the opportunity to comment on the proposed amendments to the *Corporate Governance Principles and Recommendations* (Principles and Recommendations). The Principles and Recommendations have played a vital role in improving corporate governance in Australian listed companies since the release of the first edition in 2003. Their history is one of practical statements on governance that have brought meaningful change to governance practice. The great strength of our members' review of the draft 4th edition is their ability to bring to light the practical and applied governance challenges that arise from changes to the framework.

Our members are pleased to see that the draft 4th edition retains the eight underlying principles in previous versions of the Principles and Recommendations.

Our submission is divided into general high-level comments and more detailed comments in the enclosed Table including suggested drafting changes where appropriate.

General comments

If not, why not model

Governance Institute considers the Council could provide greater elaboration in the section in the Introduction around the 'if not, why not' model. It may assist if the section on page 2 of the mark-up of the Consultation Draft under the heading 'The basis of the Principles and Recommendations – the "if not, why not" approach' were expanded slightly with an additional sentence or two about what follows if an entity does not adopt a particular Recommendation. This is important given the expanded level of commentary in the 4th edition compared to the 3rd edition. It is also especially important for smaller listed entities to be able to point to this in the

document itself where they may not have the resources to adopt many of the suggested practices in the 4th edition so refer to the fact that they adopt an alternative practice that meets the spirit of the relevant Principle.

Explanation of the model is important, given the preponderance of other governance guidelines issued by multiple parties, including intermediaries acting collectively on behalf of asset owners as well as individual asset owners, fund managers, proxy advisers and shareholder groups. While there can be commonality in some areas between these multiple guidelines, they can also conflict at times. The approach can also at times be unduly prescriptive. We refer the Council to the Introduction to the recently published *UK Corporate Governance Code*, which refers to the 'responsibility of investors and their advisers to assess differing company approaches thoughtfully' and to '…pay due regard to a company's individual circumstances. While they have every right to challenge explanations if they are unconvincing, these must not be evaluated in a mechanistic way.' We consider the incorporation of similar encouragement in the Introduction to the 4th edition would assist in addressing this issue.

We would also encourage the Council to publicly communicate this message clearly about the Principles and Recommendations.

As we have observed on a number of occasions, some users of corporate governance information treat commentary as if it were a reporting requirement. Highlighting the 'if not, why not' approach in more than one place also assists the market to counteract the tendency to assume that entities must 'comply' with the Recommendations or be 'marked down' on governance practice.

Increased level of prescription

Our members are concerned about the marked increase in the level of prescription both in the text of some of the Recommendations and in many areas of the new Commentary. This increased level of prescription is at odds with the intent of the Principles and Recommendations as a flexible disclosure-based approach to corporate governance reporting.

The principles should not be a de facto extension of the legal responsibilities of companies but rather should encourage companies to seriously consider what is reasonably achievable and relevant in relation to the specific circumstances of the company concerned. The implication of this is that the principles should be broad principles and detailed suggestions should appear in commentary as possibilities rather than appearing as prescriptive. The recently released UK Code is much reduced in length and revised to reduce the level of complexity in the Principles and Provisions and is accompanied by Guidance on Board Effectiveness. The Council may wish to consider a similar shorter and less prescriptive approach to the 4th edition.

There are a number of areas which illustrate the increased level of prescription, for example, Recommendation 2.2 in relation to the board skills matrix.

Australia is at the forefront of disclosure on board skills matrices and for this reason we consider the proposed revisions are too detailed and prescriptive and will in fact be counterproductive and not lead to improved disclosures. A board skills matrix is one tool used when looking at board composition.

Principle 3

More detailed comments on the changes to Principle 3 are set out in the attached Table. Our members' comments stem from their concern to ensure that the disclosures made against these changes provide meaningful information for companies' shareholders, investors and other key stakeholders rather than vague or imprecise statements that 'tick a box' but are unhelpful. As those responsible for corporate governance disclosures, they are also actively considering how

to frame these disclosures in the way most appropriate to their individual companies' circumstances.

Our members continue to consider that the 3rd edition expression of this Principle 3 is preferable. As our joint publication *Managing Culture: A good practice guide* argues, an ethical framework (which is different from a code of ethics or code of conduct) should sit at the heart of the governance framework of an organisation. For this reason, 'Act ethically and responsibly' is preferable.

Our members are concerned that the phrase 'social licence to operate' which first appears in Principle 3 originated in the mining and gaming sectors and is now being used in a way which makes it open to a broad range of potentially extremely subjective interpretations. This term can mean very different things to different parties. The term has become loaded and is easily used to describe opposition or disagreement, rather than what we consider the Council intends, a concern going to the heart of how an entity is operating. Our members are concerned that the term is easily appropriated by interest groups that disagree with proposals to argue that their opposition indicates a company has 'lost' its social licence to operate, when the fact is that there is a particular group opposed to a course of action or proposal. For these reasons, we have provided detailed comments on the Council's proposals.

Adoption date

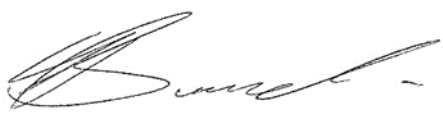
The final version of the 4th edition will not be available until late 2018/early 2019 and the adoption date is currently proposed as the first full financial year commencing on or after 1 July 2019. This adoption date would allow only 5 months to have everything in place. If a company needs to amend all that is required to say it meets all Recommendations for the entire period it is likely to be major issue, particularly as some boards may only meet three times during that period. Our members consider the adoption date should be deferred to the first full financial year commencing on or after 31 December 2019. This would mean that the first companies required to report against the 4th edition would be December balancing companies. As with previous editions, the Council can encourage early adoption by those companies in a position to do so. Deferral of the adoption date would also allow time for further clarity in relation to the whistleblower protection and modern slavery legislation.

Further consultation

Governance Institute welcomes the opportunity to continue its involvement with the Council's Drafting Committee and would be pleased to be involved in any consultation on any guidance the Council considers necessary.

Governance Institute and its members would also be pleased to assist ASX in any consultations around any Listing Rule changes necessitated by the 4th edition and related issues.

Yours sincerely



Steven Burrell
Chief Executive
Governance Institute of Australia

Governance Institute suggestions on Consultation Draft of the *Principles and Recommendations*

Current Draft	Practical issues/Comments	Proposed amendment
Introduction – The linkage with ASX's Listing Rules – para 7 If an entity's corporate governance statement is not included in its annual report, the entity must also give ASX a copy of its corporate governance statement at the same time as it gives its annual report to ASX. The corporate governance statement must be current as at the effective date specified in that statement for the purposes of Listing Rule 4.10.3.	Some companies issue the Year End Results release with an unaudited annual financial report (sometimes called "Annual Report") in August but do not issue the long-form Annual Report Pdf until October just before it is printed for circulation to shareholders. Some companies have been confused about whether the Corporate Governance Statement and Appendix 4G are due at the time of their August short-form Annual Report or the October release of the Annual Report PDF.	1. Clarify whether the Corporate Governance Statement and Appendix 4G are due at the time of their August short-form Annual Report or the October release of the Annual Report PDF.
General – 'if not, why not approach'	Provide greater elaboration in the section in the Introduction around the 'if not, why not' model. Our members consider that greater explanation of this model is particularly important, given the preponderance of other governance guidelines issued by multiple parties, including intermediaries acting collectively on behalf of asset owners as well as individual asset owners, fund managers, proxy advisers and shareholder groups, and while there can be commonality in some areas between these multiple guidelines, they can also conflict at times. The approach can also at times be prescriptive. Highlighting the 'if not, why not' approach in more than one place also assists the market to counteract the tendency to assume that entities must 'comply' with the Recommendations or be 'marked down' on governance practice. Our members refer the Council to paragraph 5 on page 1 of the Introduction to the recently published UK Corporate Governance Code which refers to the 'responsibility of investors and their advisers to assess differing company approaches thoughtfully'. We also note the encouragement to investors and their advisers in paragraph 4 on page of the Introduction "…pay due regard to a company's individual circumstances. While they have every right to challenge explanations if they are unconvincing, these must not be evaluated in a mechanistic way.'	1. Include the words in the subheading 'The purpose of the Principles and Recommendations' on page 2 as well as in any media release accompanying the issue of the new edition. 2. Move the section 'Disclosing the fact that a recommendation is not followed' currently found on page 6 to sit next to the section setting out how the 'if not, why not' approach works. The Council may also wish to consider additional guidance on the 'if not, why not' regime as a way of clarifying its methodology and improving its effectiveness for companies and investors alike, and 3. Clarifying that the Principles and Recommendations are the primary governance guidelines adopted by listed entities. 4. Incorporate additional commentary reminding investors and others to assess differing companies approaches to corporate governance thoughtfully and not in a mechanistic way.
General – disclosure of policies	Our members note that there are practical issues with disclosing full policies. Frequently these contain internal management operational material including contact details which companies quite rightly will not	1. We suggest that this ability to redact personal or confidential information also be referred to in the Introduction as well as in the Footnotes.

Current Draft	Practical issues/Comments	Proposed amendment
	want public. Some policies, such as Delegations of Authority may also contain commercially sensitive material, such as capex authorisation limits etc and companies should not be forced to disclose these. Our members acknowledge that that F/N 26 Diversity Policy, F/N 43 Whistleblower Policy, F/N 45 Anti-bribery and corruption Policy, F/N 54 Continuous Disclosure Policy all indicate that entities may redact from the disclosed policy personal or confidential information such as names and contact details. Note a summary of a policy is able to be disclosed in recommendation 8.3.	
General – increased level of prescription	Our members are concerned that there is an increased level of prescription in the document that move it away from the principles based approach that has been extremely successful in improving Australian listed company corporate governance practices since the Principles and Recommendations were introduced in 2003. There are a number of areas which illustrate the increased level of prescription. For example, R2.2 Board skills matrix. Australia is at the forefront of disclosure on board skills matrices and for this reason we consider the proposed revisions are too detailed and prescriptive and will in fact be counterproductive and not lead to improved disclosures. A board skills matrix is one tool used when looking at board composition. Further examples of the increased level of prescription are R 5.2 – provision of announcements to board and R 8.4 (the proposal that independent advice be obtained on contracts). The recently released UK Corporate Governance Code is much reduced in length and revised to reduce the level of complexity in the Principles and Provisions and is now accompanied by Guidance on Board Effectiveness. The Council may wish to consider a similar shorter and less prescriptive approach to the 4th edition.	1. Review and reduce commentary for R 2.2, 5.2, 8.4 and throughout.
General – adoption date	The 4th edition will not be available until late 2018/early 2019 and the adoption date is currently proposed as the first full financial year commencing on or after 1 July 2019 which would allow only 5 months to have everything in place. If a company needs to amend all that is required to say it meets all Recommendations for the entire period it is likely to be a major issue particularly as some Boards may only meet 3 times during that period. Our members	1. Revise the adoption date to the first full financial year commencing on or after 31 December 2019.

Current Draft	Practical issues/Comments	Proposed amendment
	consider the adoption date should be deferred to the first full financial year commencing on or after 31 December 2019. This would mean that the first companies required to report against the 4th edition would be those with a reporting date of 31 December As with previous editions the Council can encourage early adoption by those companies in a position to do so. Deferral of the adoption date will also allow more time for the final forms of the modern slavery and whistleblower legislation to be finalised which will provide greater certainty.	
Principle 1		
Recommendation 1.1: **A listed entity should have and disclose a board charter setting out:** **(a) the respective roles and responsibilities of its board and management; and** **(b) those matters expressly reserved to the board and those delegated to management.** **Commentary:** • demonstrating leadership; • defining the entity's purpose and setting its strategic objectives; • approving the entity's statement of core values and code of conduct to underpin the desired culture within the entity; • overseeing management in its implementation of the entity's business model, achievement of the entity's strategic objectives, instilling of the entity's values and performance generally; ensuring that the entity's remuneration framework is aligned with the entity's purpose, values, strategic objectives and risk appetite; and	We have concerns about 'implementation of the entity's business model'. This is more suitable for a start-up than a mature company. The board's role is to oversee strategy and not implementation of the business model. The material on the role of the chair has been re-located from the Commentary to R 2.5 to the Commentary under R1.1. Given the critical role the chair plays we suggest this material appear first in the Commentary after the material about the senior executive team.	1. We suggest the reference to 'business model' be removed as we consider that this is captured by management's implementation of the strategic objectives – revise to read 'overseeing management in its implementation of the entity's strategy and achievement of its strategic objectives'. 2. Re-locate paragraph 3 under the sub-points to paragraph 1. 3. Query – in some places in this section of the Commentary the reference is to the 'senior executive' (defined term) team and in others to 'management'. We appreciate the distinction but question whether this is what is intended.
R 1.2 **A listed entity should:** **(a) undertake appropriate checks before appointing a director or senior executive or putting someone forward for election as a director; and**	Recommendation 1.2 deals with the checks a listed entity is recommended to undertake before nominating or appointing a director. Practically, it may not be possible for a listed entity to undertake these checks when an external candidate nominates for the board. Moreover, the experience of our Members in listed entities that are also APRA-regulated entities (which are required to undertake checks to ensure that any potential director is 'fit and proper') is that	1. Amend to take into account situations where appointments are made 'subject to satisfactory completion of the fitness and propriety checks'.

Current Draft	Practical issues/Comments	Proposed amendment
(b) provide security holders with all material information in its possession relevant to a decision on whether or not to elect or re-elect a director. **Commentary** **Para 4** A candidate for appointment or election as a non-executive director (F/N 17) should provide the board or nomination committee with the information above and a consent for the listed entity to conduct any background or other checks the entity would ordinarily conduct. **F/N** 17 This applies regardless of who nominates the candidate for appointment or election as a director, including where the candidate nominates himself or herself or is put forward by a security holder or holders (for example, under section 249D, 249F, 252B or 252D of the Corporations Act).	there are times when the entity does not have all the checks back in time when the appointment is made (particularly for overseas directors) or may not be able to access the information required (again, particularly for overseas directors, as some jurisdictions will not release this information) and therefore the appointments are made 'subject to the satisfactory completion of the fitness and propriety checks'. The addition of the footnote is a welcome clarification.	
R 1.3 **A listed entity should have a written agreement with each director and senior executive setting out the terms of their appointment.** **Commentary final para**	Many smaller listed companies that do not require a full time company secretary use contractors, who often provide their services through a corporate entity, although the individual is personally named in the Corporate Governance Statement. In these circumstances it is the contract company secretary's corporate entity that contracts with, receives payment from, and provides various warranties and guarantees about the quality of the services in relation to the listed company and is also responsible for insurance. The contractor for a range of good reasons does not wish to become an employee of the listed entity. Some of our members who provide these sorts of services have expressed concern that if they were to personally contract with some companies, and not others, the ATO may argue that there are grounds to say they should have been treated as an employee of each company, that the companies should have been paying Payroll tax and the SGC levy for them and they will consider that they should receive their income differently. They consider that they are genuine contractors and should not be required to be employees of the relevant company as this does not accurately represent their circumstances. There may also be unintended potentially significant cost consequences to contract company secretaries personally; and to the listed entities they provide services to, were the ATO to apply this interpretation. This method of providing services is usual and lawful and also provides flexibility to smaller listed	1. Clarify to provide that these types of situations are not the intended subject of the Recommendation.

Current Draft	Practical issues/Comments	Proposed amendment
	companies giving them access to proper company secretarial skills and advice without having to take on an employee and should not be captured by the Recommendation.	
Recommendation 1.5 **A listed entity should:** **(a) have and disclose a diversity policy;** **(b) through its board or a committee of the board:** **(i) set measurable objectives for achieving gender diversity in the composition of its board, senior executives and workforce generally;** **(ii) charge management with designing, implementing and maintaining programs and initiatives to help achieve those measurable objectives; and** **(iii) review with management at least annually the entity's progress towards achieving those measurable objectives and the adequacy of the entity's programs and initiatives in that regard; and** **(c) disclose in relation to each reporting period:** **(i) the measurable objectives for achieving gender diversity set by the board or a committee of the board;** **(ii) the entity's progress towards achieving the measurable objectives;** **(iii) whether the review referred to in (b)(iii) above has taken place; and** **(iv) either:** **(A) the respective proportions of men and women on the board, in senior executive positions and across the whole workforce (including how the entity has defined "senior executive" for these purposes); or** **(B) if the entity is a "relevant employer" under the Workplace Gender Equality Act, the entity's most recent "Gender Equality Indicators", as defined in and published under that Act.**	The recommendation only refers to gender diversity, although the commentary addresses other types of diversity The second paragraph reads more like a list and less like an encouragement to diversity and inclusion in the broadest sense. The commentary only refers to avoiding 'groupthink' as the benefit to considering all forms of diversity, rather than explicitly referring to cognitive diversity and the wider benefits of new ideas, new approaches, improved discussion, asking the right questions, improved consideration of stakeholder points of view, and overall an improved decision-making process.	1. We are concerned that the diversity Recommendation is too heavily focussed on gender diversity whereas the diversity discussion is much broader and should also focus on other aspects of diversity such as age, ethnicity and cognitive diversity. The Recommendation is mainly focussed on gender diversity while the Commentary discusses diversity more broadly. We also suggest including in the commentary a suggestion that boards should consider what aspects of diversity are most important for their needs. 2. Remove the following from the Commentary: • para 8 – disclosure of 'insights' from the annual review • para 13 – disclosure of the results of their benchmarking against other companies. 3. Relocate second last paragraph of Commentary before Box 2.3 to be third paragraph of Commentary and include additional commentary about the importance of a balance of skills and diversity across the board. 4. Incorporate material from Commentary to Principle 3 about equality of access to employment. See comments below.

Current Draft	Practical issues/Comments	Proposed amendment
If the entity was in the S&P / ASX 300 index at the commencement of the reporting period, the measurable objective for achieving gender diversity in the composition of its board should be to have not less than 30% of its directors of each gender within a specified period.		
1.6 **A listed entity should:** **(a) have and disclose a process for evaluating the performance of the board, its committees and individual directors for each reporting period; and** **(b) disclose, for each reporting period, that a performance evaluation was undertaken in relation to that reporting period in accordance with that process.** **Commentary final para**	We acknowledge removal of the rolling three year cycle of reviews and its replacement by in effect annual reviews. We remain concerned that this is too prescriptive. Listed company practice varies widely. For example, APRA regulated entities conduct annual reviews under the APRA governance standards. This may not be the case in non-APRA regulated entities and other industries. Boards need to be in a position to judge what is most appropriate for their circumstances. Our members are concerned that if this is too prescriptive board evaluations may become a 'tick the box' compliance exercise. We consider the requirement should be for a cycle of regular reviews. We have concerns about the reference to disclosing 'insights' from reviews in the final paragraph of the Commentary.	1. In R 1.6 (a) insert 'for a cycle of regular reviews' in the first line after 'process'. 2. In R 1.6(b) delete 'for each reporting period' and insert after 'process', 'whether a review took place in the reporting period'. 3. Revise final para of Commentary by adding: 'material' before 'insights" and 'significant' before 'governance changes'.
Principle 2		
R 2.1 **The board of a listed entity should:** **(a) have a nomination committee which:** **(1) has at least three members, a majority of whom are independent directors; and** **(2) is chaired by an independent director…** **Commentary** Final paragraph.		1. We suggest the insertion of a cross reference to R 1.3 of the Commentary at the end of the final paragraph of the Commentary to R 2.1 to pick up the new insertion in the proposed content of a Director's Letter of Appointment in relation to other appointments.
R 2.2 **A listed entity should have and disclose a board skills matrix setting out the mix of skills that the board currently has or is looking to achieve in its membership.** **Commentary para 4.**	We consider that the additional commentary is too prescriptive and detailed. Governance Institute's Good Governance Guide referenced in the footnote already contains some of this detail and will be reviewed and revised as part of the preparation for the Fourth edition. It is also important not to lose sight of the fact that a board skills matrix is a tool and not an end in itself.	1. Amend paragraph 4 to read 'There is no prescribed content for a board skills matrix. For example, it can set out either ….'.

Current Draft	Practical issues/Comments	Proposed amendment
	Australia is at the forefront of disclosure on board skills matrices and for this reason we consider the proposed revisions are too detailed and prescriptive and will in fact be counterproductive and may lead to poor disclosures. See the recent report from CGI Glass Lewis *Special Report: Disclosure of Board Skills and Experience - Emerging Best Practice,* covering North America, Europe and Australia. A board skills matrix is one tool used when looking at board composition.	
R 2.3 Commentary para 3	As currently drafted the implication in this paragraph is that independent directors have a greater duty to act in the best interests etc than other directors. We also consider that there needs to be clarification in item 2 in Box 2.3 that it relates to performance based remuneration from the relevant entity and ensure that arrangements whereby non-executive directors sacrifice fees into non-executive director share plans are not captured by the revised wording. As a practical comment our members note that there may be difficulties in capturing the meaning of 'close personal ties' in a policy relating to director independence. The current formulation points to parties a director is able to identify and from whom a director can reasonably be expected to obtain information. To make disclosure in relation to 'close personal ties' will require a director to identify individuals with whom they may have close personal ties. The company must then try and obtain information either from within its own knowledge, or rely on the director to obtain the relevant information, which may not be practically possible and may not in fact be known to the director.	1. Our preference is to position this commentary by revising the second paragraph of the Commentary with the statement that all directors have a duty 'to bring an independent judgement to bear on issues before the board 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' and then move to a short statement of the role of the independent director, such as, 'Due to their lack of affiliations with a listed entity independent directors are in a position to constructively challenge and add value to a board's deliberations and hold management to account'. 2. Amend second dot point in Box 2.3 by adding at the end the words 'from the relevant entity'. 3. Retain original formulation of 'close family ties'.
R 2.6 **A listed entity should have a program for inducting new directors and for periodically reviewing whether there is a need for existing directors to undertake professional development to maintain the skills and knowledge needed to perform their role as directors effectively.** **Commentary**	Our members consider that what might be more helpful is a box of bullet points listing the basic skills/knowledge base generally expected of a director of an ASX listed entity. This may be an easier way of communicating the message to existing and foreign company directors. See the proposed amendment in the adjacent column. Our members also consider that continuing professional development on legal and accounting matters should be the responsibility of individual directors — it should not be the responsibility of the	1. Our preference is to retain the original wording of this Recommendation as we think it better captures the notion of developing and then maintaining the required skills and knowledge. 2. Our preference is to recast this Commentary as a positive statement of minimum expected knowledge as well as an emphasis on a mindset focussed on continuous learning. We suggest that paragraphs 2-5 of the Commentary could be replaced by the following:

Current Draft	Practical issues/Comments	Proposed amendment
	entity. The entity will ensure that the directors receive briefings and updates on entity-specific or industry-specific matters, and may also provide briefings on governance matters and some legal issues. For example, a number of listed entities provided briefings to directors on Revised Guidance Note 8 on continuous disclosure. While our members strongly encourage directors to undertake continuing education on legal and accounting matters, such as that offered by professional associations and law firms, they consider that the entity itself is not best placed to provide such education. The entity could provide advice on where directors could seek such education, but the onus should be on the director to avail themselves of those educational opportunities and to increase their skills in a particular area if they consider they need more skills in an area. Our members would also point out that it is important for directors to have their own independent sources of knowledge and information outside the entity and to think about these issues from an outside perspective. We are also concerned that the listing of new and emerging issues: 'culture, conduct risk, digital disruption, cyber-security, sustainability and climate change' in paragraph 4 of the Commentary runs the risk of dating the document. Our members consider these are extremely important issues but consider that there will be other issues of similar importance that will emerge in the future which would equally merit mention. Our preference is to refer to 'new and emerging areas that have potential to impact the entity'. We consider the proposed R 2.7 should be included as part of the Commentary to R 2.6. See the proposed amendments in the adjacent column.	*'A director of an ASX listed entity is expected as a minimum to be familiar with, or have an understanding of:* • *The legal framework that governs the entity,(including the relevant ASX Listing Rules)* • *A directors' legal duties and responsibilities as a director under the key legislation governing the entity and the Listing Rules (including ASX's continuous and periodic reporting requirements)* • *The business, the industry and the environment in which the entity operates* • *Accounting policies and financial matters relevant to the business.[This section could be incorporated into a box similar to those in other Principles].* *Directors should also have a willingness to undertake continuous learning in all of the above areas and any new and emerging areas that have potential to impact the entity.* *If a director has been appointed because of the particular specialist skills they bring to the board, the director should be able to demonstrate the steps they are taking to ensure their specialist skills remain current and relevant to the entity, particularly if their skills are in a field undergoing regular change and disruption.* *If a director is lacking in any of these areas, they should be able to demonstrate the steps they are taking to overcome this. This may be through internal training programs or external programs or a combination of both.* *Where a listed entity has a director who is not fluent in the language in which board or security holder meetings are held or key documents there should be processes in place to: ensure the director understands and can contribute to the discussions at those meetings and understands and can discharge their obligations in relation to those documents.*' 3. If the current wording is to remain we suggest replacing the word 'include' with 'supplement' in the second line of paragraph 2 of the Commentary.
R 2.7 **A listed entity with a director who is not fluent in the language in which board or security holder meetings are held or key documents**	Our members remain concerned at the inclusion of this as a separate Recommendation. While we understand ASIC's and ASX's concerns about	We understand the concerns around this issue but still consider it should be part of commentary to R 2.6 as follows:

Current Draft	Practical issues/Comments	Proposed amendment
are written should disclose the processes it has in place to ensure the director understands and can contribute to the discussions at those meetings and understands and can discharge their obligations in relation to those documents.	offshore directors, we continue to consider that this could be included in the Commentary to R 2.6 and also dealt with as a compliance issue.	'Where a listed entity has a director who is not fluent in the language in which board or security holder meetings are held or key documents there should be processes in place to: ensure the director understands and can contribute to the discussions at those meetings and understands and can discharge their obligations in relation to those documents.' – See our comment on R 2.6 above.
Principle 3		
Principle 3 **Principle 3: Instil the desired culture** **A listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner.**	Our members continue to consider that the 3rd edition expression of this Principle 3 is preferable. As our joint publication *Managing Culture: A good practice guide* argues an ethical framework (which is different from a code of ethics or code of conduct) should sit at the heart of the governance framework of an organisation. For this reason 'Act ethically and responsibly is preferable. Our members are concerned that the phrase 'social licence to operate' originated in the mining and gaming sectors and is now being used in a way which makes it open to a broad range of potentially extremely subjective interpretations.[1] The term 'social licence to operate' can mean very different things to different companies. The term is becoming a loaded term which can easily be used to describe opposition or disagreement, rather than what we consider is intended here, namely, a concern going to the heart of how an entity operates. Our members are concerned that the term is easily appropriated by interest groups that disagree with proposals to argue that their opposition indicates a company has 'lost' the social licence to operate, when the fact is that there is a particular group opposed to a course of action or proposal. What they consider is intended is capturing a company's need to run its business in a way that both complies with the terms of its 'licence' from government (complies with the legislation and standards applicable to it) and meets the need to retain the goodwill of its stakeholders. Absent a more precise definition our members are concerned about the use of the term 'social licence to operate' in Principle 3.	1. Restore the original formulation of Principle 3 'Act ethically and responsibly'. Delete 'socially' from the descriptor of the Principle and wherever else linked in Principle 3 and the Recommendations eg Box 3.2 dot point. 2. We recommend recasting the discussion of social licence to operate as an entity running a business in a way that both meets the terms of its actual licence, the laws and regulations that apply to it, and meets the need to retain the goodwill of its stakeholders. 3. We recommend that the revision to Principle 3 be expanded to place the responsibility on Boards to: • instil and monitor the desired culture • continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly • ensure conduct risk is managed as part of the entity's risk management framework. 4. We recommend deleting the words 'paying a living wage to employees' from dot point 1 under the Commentary to the Principle. 5. We recommend relocating dot point 2 under the Commentary to R 1.5. 6. We recommend amending the final dot point under the Commentary to the Principle to read 'dealing with business partners who have undergone appropriate due diligence in relation to lawful, ethical and socially responsible business practices'. 7. We suggest including a reference in a Footnote to *Managing Culture: A good practice guide* as well as the APRA Report on CBA which discusses culture extensively.

[1] See *Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries,* Environment and Energy Bulletin, Vol 7, Issue 2, May 2015, Business Council of British Columbia.

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	Our members are also concerned for similar reasons to references to 'accepted community standards'. While we understand what is intended, our concern is that community standards change over time. We note that ISO 2600 contains a definition of 'social responsibility' as follows: 'Social Responsibility (SR) is the responsibility of an organization for the impacts of its decisions and activities on society and the environment through transparent and ethical behaviour that: • Contributes to sustainable development, including the health and welfare of society • Takes into account the expectations of stakeholders • Is in compliance with applicable law and consistent with international norms of behavior, and • Is integrated throughout the organization and practised in its relationships.' ISO 2600 is not a standard of the same type as other ISO standards, rather it is guide/framework/basis to integrate/implement social responsibility into an entity's values and practices. While it is well known it would not be accurate to say that is used universally. For this reason we would prefer not to use the term 'social responsibility' in the descriptor of Principle 3. Our concern is that adding 'socially' creates an additional layer which does not assist in improving disclosure or behaviour. We suggest it may be preferable to look at ASIC's existing approach in relation to 'conduct risk'. ASIC defines conduct risk as 'the risk of inappropriate, unethical or unlawful behaviour on the part of an organisation's management or employees.' This approach and definition would give substance to the recommendations in the current exposure draft of the ASX Principles. A Board could operationalise an obligation to 'manage conduct risk' within existing risk management systems, whereas 'instil and continually reinforce a culture' is amorphous. This approach would lead companies to ensure that conduct risk is integrated into its risk management system as a standalone risk which would direct attention and resources to the task. In order to do so they would	

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	then draw on material already provided by ASIC about how conduct risk can be managed. (Look for example at Market Supervision Update 57.) Our members consider that the term 'living wage' in the first dot point under the Commentary is imprecise. It is difficult to determine what a living wage is and it will mean different things in different jurisdictions. Using this term may cause difficulties, particularly for those companies that operate globally. Our members have no issue with references to companies providing broader employment opportunities, such as for people with disabilities or from socially disadvantaged backgrounds, but consider this would be better placed with the diversity material rather than in Principle 3 as it relates to inclusion and equality of opportunity which sit at the heart of the discussion about gender diversity and fits better under that Recommendation.	
R 3.1 **A listed entity should articulate and disclose its core values.**	Our members suggest a reference to the Australian Standard on Stakeholder Management which is very thorough and used by many sustainability practitioners. It may be preferable to reference this document rather than to start afresh.	1. Include reference to Australian Standard on Stakeholder Management.
R 3.3 **A listed entity should:** **(a) have and disclose a whistleblower policy that encourages employees to come forward with concerns that the entity is not acting lawfully, ethically or in a socially responsible manner and provides suitable protections if they do; and** **(b) ensure that the board is informed of any material concerns raised under that policy that call into question the culture of the organisation.**	Governance Institute has been actively advocating for some time for reform of the whistleblower protection legislation and also considers that this is an important issue to raise in the document. We note that it will be important to consider the final form of the whistleblowing legislation before the Recommendation is finalised. If the adoption date is deferred as suggested above this will allow time for this to occur. We also suggest some commentary about reviewing the training program around whistleblowing regularly which is a better indicator of whether an organisation is actually working with staff to ensure a code of conduct is broadly known and understood. We also suggest a revision to allow reporting to be to the board or a committee as some boards have delegated this to a committee.	1. We suggest for the reasons outlined about that 'socially' be removed from R 3.3 (a) and from the commentary. The Recommendation is actually stronger if it simply refers to 'responsible'. 2. We recommend incorporating commentary around review of the training program which is actually a better indicator of whether an organisation is actually working with staff to ensure a code of conduct is broadly known and understood. 3. We recommend revising the reporting to be to the board or a committee.
R3.4	Our members note that this is often dealt with under another policy or is part of the code of conduct and may not be a separate policy.	

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A listed entity should: **(a) have and disclose an anti-bribery and corruption policy; and** **(b) ensure that the board is informed of any material breaches of that policy.**		
Principle 4		
Produce corporate reports of high quality and integrity **A listed entity should have formal and rigorous processes to validate the quality and integrity of its corporate reporting.** ***Commentary*** For investors to make informed investment decisions, a listed entity needs to provide corporate reports of high quality and integrity. Those 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.	We consider that 'high quality' introduces too much subjectivity. Integrity is a strong word that captures the essence of what is required. We also consider that the references to 'quality' should be removed from the qualifier and the initial commentary. Our members have concerns that the references to processes for validating is included in the Principle itself and that 'validate' does not capture what is intended. The ordinary meaning of validate is 'to check or prove the validity or accuracy of/to demonstrate or support the truth or value of/to make or declare legally valid'. Similarly the use of the term 'verify' implies checking against supporting information and imports the concepts of the prospectus regime and is not appropriate in this context. See also our comments on R4.4 below.	1. Revise to read as follows 'Produce corporate reports of integrity. A listed entity should have formal and rigorous systems and processes to support the integrity of its corporate reporting.' 2. Revise commentary to read as follows: ***Commentary*** 'For investors to make informed assessments, a listed entity needs to provide corporate reports of integrity. Those reports should give the reader a reasonable understanding of the entity's strategy, risks and opportunities, remuneration policies and practices and governance framework, as well as its financial performance.'
R 4.1 **The board of a listed entity should:** **(a) have an audit committee which:** **(1) has at least three members, all of whom are non-executive…** **Commentary**	The commentary suggests that the role of the audit committee includes reviewing and making recommendations in relation to the adequacy of reporting processes and 'financial controls'. We suggest this be reworded to 'the internal control framework' and not just focused on financial controls.	1. Amend as suggested to refer to the 'internal control framework'.
R 4.4 **A listed entity should have and disclose its process to validate that its annual directors' report and any other corporate reports it releases to the market are accurate, balanced and understandable and provide investors with appropriate information to make informed investment decisions** **Commentary para 5** These processes should be disclosed to assist the market in assessing the quality of the information included in these corporate reports.	See our comments on the Commentary to Principle 4 above in relation to the use of 'validate'. Our members are also concerned that the terms 'balanced' and 'understandable' are imprecise. We also note that this has been appropriated from the UK regime. We consider that 'accurate' captures the intention. In addition, our members consider that the suggestion the processes be disclosed to the market as going into too much operational detail. • the requirement to 'disclose its process to validate that its annual Director's report and any	1. Revise Recommendation to read 'To provide investors with appropriate information, a listed entity should have a formal and rigorous process for supporting the accuracy of its annual directors' report and any other reports its releases to the market.' 2. The suggestion to disclose should be recast to encourage entities 'to consider'. The reference to 'integrated report' should be removed from the first line of the second last paragraph. 3. We also suggest that there be a footnote to clarify that what is required is no more than is required under the Corporations Act and that exclusions apply – see the comments in the adjacent column.

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	other corporate reports it releases to the market are accurate, balanced and understandable' etc.. - Sections 1308 and 1309 of the Corporations Act contain provisions which require reasonable steps to be undertaken when preparing information so as to avoid it being false and misleading in a material respect. Sub-sections 1309(7)-(10) set out what amounts to reasonable steps e.g.: a person is taken to have taken reasonable steps if the person proves that the person made all enquiries (if any) that were reasonable in the circumstances and after doing so the person believed on reasonable grounds that the information was not misleading or deceptive in a material particular (section 1309 (7)). Therefore if the motivation behind this Recommendation is to ensure people adequately validate the information contained in those reports – the law already provides sufficient motivation. Given the existence of these sections, we believe that the market should already have confidence in the quality of the information included in corporate reports. There is concern that the requirement to disclose such processes could expose the company and others to potential liability in the event of an inadvertent material misstatement. There is also a concern that by having this requirement it will ultimately lead to more assurance being undertaken by the entity's external auditor which will add to the cost of corporate reporting without, for the vast majority of companies, adding to the quality of reporting. • The reference to 'provide investors with appropriate information to make informed investment decisions'. The commentary notes this is already covered by S 299A(1) of the Corporations Act. Consequently we do not see the need to repeat it as it may create confusion as to what is required. In addition, section 299A does not use the phrase 'informed investment decisions' but instead refers to 'an informed assessment of… the operations of the entity reported on; the financial position of the entity reported on; and the business strategies, and prospects for future financial years, of the entity reported on.' There is also an exclusion in	

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	subsection (3) for disclosing any information if it is likely to result in unreasonable prejudice. None of this is captured in the broader formulation included in recommendation 4.4 and this may be seen as extending the remit of what is required to be included in those corporate reports possibly to something more akin to a prospectus type disclosure. This is not the way that these sections have previously been construed and applied. • Our members are concerned that this is a mixing of 2 regimes which may have unintended consequences.	
Principle 5		
Recommendation 5.3: **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.** **Commentary para 3**	We consider that this does seem to add to the existing continuous disclosure requirements in that material should be released in advance of the presentation. These requirements are already well covered by Guidance Note 8 which applies to all listed entities, not just those subject to the Corporations Act and other relevant legislation. Another issue to note is that many entities permit retail investor participation in an investor teleconference that allows Q&As following results release, by announcing the details of avenues for participating beforehand. This could be added as an acceptable, alternative and more cost effective option.	1. Revise paragraph 3 of the Commentary to refer to 'details of avenues for participating in these presentations.'
Principle 6		
Commentary below Principle 6 ***Commentary*** A fundamental underpinning of the corporate governance framework for listed entities is that security holders should be able to hold the board and, through the board, management to account for the entity's performance. For this to occur, a listed entity needs to engage with its security holders and provide them with appropriate information and facilities to allow them to exercise their rights as security holders effectively. This includes:	See comment above about the subjectivity of 'high' quality.	1. Revise second dot point to read 'providing them with quality corporate reporting and continuous disclosure'.

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• giving them ready access to information about the entity and its governance; • providing them with high quality corporate reporting and continuous disclosure; • communicating openly and honestly with them; and facilitating and encouraging their participation in meetings of security holders.		
R 6.4 **A listed entity should ensure that all resolutions at a meeting of security holders are decided by a poll rather than by a show of hands.** **Commentary final sentence** 'This can only be achieved with certainty by calling a poll on all resolutions to be considered by security holders.'	Our members are on the record as supporting voting by poll rather than a show of hands, however they consider that one size does not fit all. For many companies this is the way forward but not for all, often for quite practical reasons. For these reasons they support this position in commentary but not as a separate Recommendation and it should not apply to procedural meeting issues. They also note that the statement that the true will of the meeting can only be achieved with certainty by calling a poll on all resolutions is not quite accurate. In the vast majority of cases, it is easy to ascertain the will of the meeting without going to a poll. In these circumstances running a poll will be an added expense of the meeting. In addition, there should be clarification that this is limited to resolutions included in the notice of meeting and should not relate to procedural resolutions. Our members note that if the concern is that chairs are breaching their statutory and common law duties in relation to ascertaining the will of the meeting, this could be stated and the Recommendation revised to say that if the result is in any way close, there should be a poll.	1. Revise as suggested to clarify that it refers to 'substantive' resolutions or resolutions included in the Notice of Meeting.
Principle 7		
R 7.2 **The board or a committee of the board should:** **(a) review the entity's risk management framework at least annually to satisfy itself that it continues to be sound and that the entity is operating with due regard to the risk appetite set by the board; and**	We consider that the more appropriate role for the board is to 'monitor' that the entity is operating with due regard to the risk appetite. See also our concerns in our comments on Principle 4 in the context of corporate reporting. In the final paragraph we suggest the disclosure should be limited to 'material' insights and changes. This reference to materiality is important as there will be some things that would not	1. Commentary para 1 Revise 'validate' to 'monitor'. 2. Insert 'material' before 'matter' in paragraph 4 of the Commentary. 3. Commentary final paragraph disclosure should be of 'material' insights and changes.

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(b) disclose, in relation to each reporting period, whether such a review has taken place. **Commentary para 1.** **'**One of the key roles of the board of a listed entity is to monitor the adequacy of the entity's risk management framework and validate that the entity is operating with due regard to the risk appetite set by the board. **Commentary final para**	be taken to the board for entirely proper reasons, but because those delegated with responsibility for implementing the risk management framework have made a judgement call.	
R 7.4 **Commentary paras 1 and 5.**	See our comments above in relation to 'social licence to operate'. For the reasons outlined above in relation to Principle 3 we consider that the term in para 1 of the Commentary should be 'responsible' not 'socially responsible'. In para 5 we consider that this should be framed more in terms of 'may wish to consider' to help ensure potential risk exposures have not been overlooked or under-estimated.	1. Delete 'socially' in para 1 of the Commentary and replace by 'otherwise'. 2. Revise para 4 to 'may wish to consider benchmarking etc … to ensure potential risk exposures have not been overlooked or under-estimated.'
Principle 8		
Commentary	Paragraph 4 – See our comments above in relation to 'social licence to operate' in relation to Principle 3 and R 7.4.	
Recommendation 8.4: **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:** **(a) if it has independent advice that:** **(i) the services being provided are outside the ordinary scope of their duties as a director or senior executive (as applicable);** **(ii) the agreement is on arm's length terms; and** **(iii) the remuneration payable under it is reasonable; and** **(b) with full disclosure of the material terms to security holders.**	We understand that there have been issues with some smaller companies misusing the 'arm's length' and 'reasonable remuneration' exceptions, however we consider that this is not the appropriate place to deal with this issue and may have unintended consequences. For example, there is potentially an issue where a contract company secretary provides services because the entity does not require a full time company secretary who may be a senior executive. Similarly, some smaller entities may have a director who is also a partner in a professional services firm which provides advice to the entity but the partner is not involved in the provision of the advice. Our members consider that these types of arrangements are legitimate and should not caught by this Recommendation. There should be no requirement that independent advice be obtained that these arrangements are appropriate. If it is not intended to capture this kind of service, then it needs to be amended to clarify.	1. Suggest clarify drafting of commentary as follows: 'A listed company can enter into a consultancy agreement with a senior executive for the provision of consultancy services, where those services are within the normal scope of that executive's duties and it is not necessary to obtain independent advice or make disclosure about the agreement in these circumstances.'

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	Our members also question from a practical perspective who is contemplated as giving this independent advice? An additional practical issue is when should these disclosures take place - before or after the arrangement is implemented? Should they be announced through the Market Announcements Platform or included in a subsequent annual report? The Listing Rules cover the CEO and directors/related parties – this applies to senior executives which creates an overlay to the existing law. While we understand this is aimed at smaller companies which may not be subject to the Corporations Act, an alternative may be to provide that if an entity is a foreign company this applies. Our members consider that de facto extending the operation of the Corporations Act and limiting the operation of the exemptions will cause difficulties for some companies which for legitimate reasons have related party transactions. Our members note that this is a good example of where the document is moving significantly away from a principles based approach.	