

**Clayton Utz's Submission to the ASX Corporate
Governance Council regarding the Proposed
Fifth Edition of the ASX Corporate Governance
Principles and Recommendations**

Dated 6 May 2024

This submission is lodged by Clayton Utz

Any questions or comments in relation to this submission should be directed to Rod Halstead at rhalstead@claytonutz.com.

The contact details of all contributors are listed below.

Andrew Walker

Partner, Melbourne
(03) 9286 6943
awalker@claytonutz.com

Brendan Groves

Partner, Melbourne
(03) 9286 6934
groves@claytonutz.com

Rod Halstead

Director Strategic Corp/M&A, Sydney
(02) 9353 4126
rhalstead@claytonutz.com

Kwan Leung

Consultant, Sydney
(02) 9353 5721
kleung@claytonutz.com

Kate Allison

Special Counsel, Melbourne
(03) 9286 6425
kallison@claytonutz.com

Will Davies

Senior Associate, Perth
(08) 9426 8016
wdavies@claytonutz.com

Victoria Bandurski

Lawyer, Perth
(08) 9426 8027
vbandurski@claytonutz.com

Ally Clark

Lawyer, Perth
(08) 9426 8238
alclark@claytonutz.com

Contents

- 1. Chapter 1 – Opening Comments 1**
 - 1.1 Preface 1
 - 1.2 Preliminary Summary of the Proposed Changes 1
 - 1.3 Overview of this Submission 1
 - 1.4 Key Takeaways and Opinions 1
 - 1.5 Recommended amendments 2

- 2. Chapter 2 – Board Skills and Independence of Directors 4**
 - 2.1 Background: amendments to Principle 2 4
 - 2.2 The amended Recommendation 2.2 4
 - 2.3 Reasons for the proposed Amendment to Principle 2 and Recommendation 2.2 4
 - 2.4 Is the proposed amendment to Recommendation 2.2 appropriate? 5
 - 2.5 What is our position? 5
 - 2.6 The Amended Commentary to Recommendation 2.4 6
 - 2.7 Is the proposed amendment to the commentary to Recommendation 2.4 appropriate? 6
 - 2.8 What is our position? 6

- 3. Chapter 3 – Diversity 7**
 - 3.1 Background: amendments to Principle 2 and Principle 3 7
 - 3.2 The amended Recommendation 2.3 7
 - 3.3 Reasons for the proposed new Recommendation 2.3 8
 - 3.4 Is the proposed new Recommendation 2.3 appropriate? 9
 - 3.5 What is our position? 10
 - 3.6 The proposed new Recommendation 3.4 10
 - 3.7 Reasons for the proposed new Recommendation 3.4 11
 - 3.8 Is the proposed new Recommendation 3.4 appropriate? 12
 - 3.9 What is our position? 12

- 4. Chapter 4 – Corporate Conduct and Culture 13**
 - 4.1 Background: new Recommendation 3.2(c) 13
 - 4.2 Reasons for the proposed new Recommendation 3.2(c) 13
 - 4.3 Is the proposed new Recommendation 3.2(c) appropriate? 13
 - 4.4 What is our position? 14

- 5. Chapter 5 – Interests of Key Stakeholders and Stakeholder Relationships 15**
 - 5.1 Background: amendments to Principle 3 15
 - 5.2 The new Recommendation 3.3 15
 - 5.3 Reasons for the proposed amendments to Principle 3 and new Recommendation 3.3 15
 - 5.4 Are the proposed amendments to Principle 3 and new Recommendation 3.3 appropriate? 17
 - 5.5 What is our position? 18

- 6. Chapter 6 – Management of Risk 19**
 - 6.1 Background: key amendments to Principle 7 19
 - 6.2 Reasons for the proposed amendments to Principle 7 and its Recommendations. 19
 - 6.3 Are the proposed amendments to Principle 7 and its Recommendations appropriate? 21
 - 6.4 What is our position? 22

- 7. Chapter 7 – Remuneration 23**
 - 7.1 Background: key amendments to Principle 8 23
 - 7.2 Reasons for the proposed amendments to Principle 8 and new Recommendations 8.2 and 8.3 23

7.3	Are the proposed amendments to Principle 8 and its Recommendations appropriate?	25
7.4	What is our position?	25

1. Chapter 1 – Opening Comments

1.1 Preface

Firstly, we would like to thank the ASX Corporate Governance Council for taking the time and effort to prepare the draft Fifth Edition of the [ASX Corporate Governance Principles and Recommendations](#) (the ASX CGPR) (Consultation Draft) and the supplementary materials. We thank the Council in advance for taking our thoughts and opinions in relation to the proposed Fifth Edition of the ASX CGPR into consideration.

1.2 Preliminary Summary of the Proposed Changes

- (a) The Consultation Draft has proposed a variety of changes which aim to improve corporate governance in Australia by better enabling entities to respond to emerging issues and developing regulatory requirements.¹
- (b) The Consultation Draft took into consideration evolving investor and community expectations regarding corporate conduct, culture, management of risk, stakeholder relationships, reporting and remuneration.²

1.3 Overview of this Submission

- (a) This Submission provides an overview and opinion on those of the key changes that have been proposed in the Consultation Draft which we consider to be of particular importance. The structure of the Submission will be as follows:
 - (i) Chapter 2 – Board Skills and Independence of Directors (consultation questions 3 and 7);
 - (ii) Chapter 3 – Diversity (consultation questions 2, 4, 5 and 6);
 - (iii) Chapter 4 – Corporate Conduct and Culture (consultation question 8);
 - (iv) Chapter 5 – Interests of Key Stakeholders and Stakeholder Relationships (consultation questions 9 and 10);
 - (v) Chapter 6 – Management of Risk (consultation question 13); and
 - (vi) Chapter 7 – Remuneration (consultation questions 14 and 15).

1.4 Key Takeaways and Opinions

- (a) Overall, the changes proposed in the Consultation Draft are positive. Some of the new principles and recommendations provide a broad and flexible approach to governance which is necessary given how diverse the entities are to which the ASX CGPR apply.
- (b) Principle 1 continues to provide a solid framework on which a listed entity and its board can build their governance practices. Thus, the recommended changes recognise that a board should be responsible for monitoring the culture within an entity, including its alignment with the entity's purpose (if articulated), values, strategic objectives and risk appetite. Furthermore, the board should oversee the implementation of strategic objectives to build sustainable value for security holders of the entity which now specifically includes having regard to the interests of the

¹ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 4.

² [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 4.

entity's key stakeholders as appropriate.

- (c) A rigid set of principles and recommendations does not allow every organisation to implement good governance principles effectively, so by providing flexibility, entities are more likely to implement these principles and recommendations in a way that suits their needs and dynamics, thus fostering good governance across a wider range of organisations. The recommended changes proposed to Chapter 6 – Management of Risk, are an excellent example of this.
- (d) However, there are instances where the proposed changes in the Consultation Draft do not always follow the same pattern of flexibility and versatility, as seen in Chapter 7 – Remuneration. We have expanded on the challenges and potential risks of having rigid principles and recommendations in this Chapter as an example. The further shift in focus to "key stakeholders" as explained in Chapter 5 – Interests of Key Stakeholders and Stakeholder Relationships may be a positive change in theory, but in practicality, appears to seek to amend the law as to how a director should discharge their duty to act in the best interests of the listed entity without necessarily achieving better governance practices. For example, it may open a raft of matters and issues that the listed entity will be expected to consider - see our comments in Chapter 5 – Interests of Key Stakeholders and Stakeholder Relationships below. The reference to having regard to the interests of stakeholders appears in a number of places in the recommended changes, for example, the discussion on Recommendation 1.1, Principle 3 and the discussion on the code of conduct in Recommendation 3.2.
- (e) While there are many positive amendments in the Consultation Draft, there are some proposed changes to the ASX CGPR (as discussed in Chapter 7 – Remuneration and Chapter 5 – Interests of Key Stakeholders and Stakeholder Relationships), which should be further amended to:
 - (i) provide flexibility for entities when taking these principles and recommendations into consideration in the context of the needs, structure and dynamic of that specific entity; and
 - (ii) be revised so as to not infringe on existing, well-established legal principles which have not been found to be lacking.

1.5 Recommended amendments

- (a) In this Submission, we suggest that further amendments be considered to the Consultation Draft, including the following:
 - (i) Commentary to Recommendation 2.2: For the reasons set out in Chapter 2 – Board Skills and Independence of Directors, we suggest that the commentary that "*Better practice is to include information on the skills of individual directors*" should be removed, or amended to note that it is open to listed entities to include that information (rather than being "better practice").
 - (ii) Commentary to Recommendation 3.2(c): For the reasons set out in Chapter 4 – Corporate Conduct and Culture, we suggest that the commentary to Recommendation 3.2 be amended to clarify that all disclosures of outcomes of actions taken in response to material breaches of the code of conduct should be de-identified (rather than referring to such disclosures generally being made on a de-identified basis).
 - (iii) Recommendation 3.3: For the reasons set out in Chapter 5 – Interests of Key Stakeholders and Stakeholder Relationships, we suggest that Recommendation 3.3 should be amended to omit the reference to an entity having processes for engaging with key stakeholders and reporting material issues to the board, to read: "*A listed entity should have regard*

to the interests of the entity's key stakeholders."

- (iv) Commentary to Recommendation 8.2: For the reasons set out in Chapter 7 – Remuneration, we suggest that the commentary in Recommendation 8.2 that an entity should consider seeking security holder approval where remuneration or retirement benefits are not in accordance with the Recommendation is unnecessary.
- (v) Recommendation 8.3: For the reasons set out in Chapter 7 – Remuneration, we suggest that the commentary in Recommendation 8.3 be amended to clarify that clawbacks should be implemented in a balanced way to ensure that the ability to earn incentives does not become illusory.

2. Chapter 2 – Board Skills and Independence of Directors

Summary

Chapter 2 summarises the amendments made to Recommendation 2.2 and the commentary to Recommendation 2.4 which have been included in the Consultation Draft and the potential implications that may arise as a result of the amended Recommendations.

2.1 Background: amendments to Principle 2

- (a) Principle 2, which is "structure the board to be effective and add value", is proposed to be amended as follows (note, deletions are in ~~red~~ and insertions are in ~~blue~~):

"The board of a listed entity should ~~be of an appropriate~~ regularly review its size and ~~collectively have the its~~ directors' skills, commitment and knowledge of the entity and the industry in which it operates, ~~to enable so that it to~~ may discharge its duties effectively and ~~to~~ add value".³

- (b) This amendment is a result of the amended Recommendation 2.2 which is discussed below.

2.2 The amended Recommendation 2.2

- (a) In the [Fourth Edition of the ASX CGPR](#), Recommendation 2.2 provided that:

"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".⁴

- (b) The ASX Corporate Governance Council have now proposed amendments to Recommendation 2.2 as follows:

"A listed entity should:

- (i) *have and disclose a board skills matrix setting out the mix of skills that the board currently has ~~or~~ and is looking to achieve in its membership; and*
- (ii) *disclose its process for how it assesses that the relevant skills and experience are held by its directors".⁵*

2.3 Reasons for the proposed Amendment to Principle 2 and Recommendation 2.2

- (a) According to the *Fifth Edition Consultation Draft Background Paper and Consultation Questions (Background Paper)*, Principle 2 has been amended to highlight the importance of both collective board skills and individual director skills.⁶
- (b) Further, the Background Paper notes that Council member research indicates the importance to investors of understanding how a listed entity assesses that its

³ [ASX CGPR Consultation Draft Mark-up](#), p 24.

⁴ [Fourth Edition of the ASX CGPR](#), p 15 of the PDF.

⁵ [ASX CGPR Consultation Draft Mark-up](#), p 24.

⁶ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 6.

directors hold particular skills and how those skills are defined.⁷

- (c) While the commentary to Recommendation 2.2 permits flexibility for listed entities to report collectively across the board as a whole, which we consider to be appropriate, the commentary suggests that the matrix should clearly distinguish skills that the board is looking to achieve (as compared to the current skills of the board) and suggests that better practice is to include information on an individual basis regarding director skills (subject to exclusion of commercially sensitive information).⁸

2.4 Is the proposed amendment to Recommendation 2.2 appropriate?

- (a) In response to consultation question number 3, the amendments to:
 - (i) require the board to identify potential gaps in its existing skills; and
 - (ii) disclose its process for how it assesses that the relevant skills and experience are held by its directors,are appropriate.
- (b) However, certain of the amendments to the commentary to Recommendation 2.2 are not appropriate. Namely, the commentary regarding "[b]etter practice" should be removed or amended for the reasons set out below.

2.5 What is our position?

- (a) Our position is that the proposed amendment to Recommendation 2.2 is appropriate as it will encourage disclosure on a more meaningful and transparent basis, while ensuring that companies retain flexibility as to how the entity can satisfy this disclosure. We consider that additional information regarding the processes adopted by entities to assess its board and the basis on which an entity assesses that a director holds a particular skill is useful information for investors.
- (b) However, the introduction of the reference in the commentary to "better practice" and "includ[ing] information on the skills of individual directors" is not appropriate. We do not consider that it is necessary or desirable for entities to be required to include information on the skills of individual directors. We suggest that the commentary that "*Better practice is to include information on the skills of individual directors*" should be removed, or amended to note that it is open to listed entities to include that information (rather than being "better practice").
- (c) The ASX commentary contemplates that skills can be reported collectively across the board as a whole, which appropriately recognises that the board is a collective group. While entities can elect to report against individual director competencies, we do not consider it appropriate for the commentary to refer to this as "better practice". We consider that this could discourage entities from appointing directors who have significant experience in one particular area, which would be of great benefit to the entity, but where that director may be less experienced in other areas. Similarly, this could discourage individual directors seeking appointment.
- (d) This proposed amendment to Recommendation 2.2 should be brought to the attention of listed entities to ensure that any review of the board skills matrix and assessment process (and associated disclosures regarding the same) are updated as required.

⁷ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 6.

⁸ [ASX CGPR Consultation Draft Mark-up](#), p 27-28.

2.6 The Amended Commentary to Recommendation 2.4

- (a) The amendments to the commentary to Recommendation 2.4 propose to:
 - (i) increase the security holding threshold in Box 2.4 (being the list of factors that may indicate a director is not independent) from a "substantial holder" to a "10% holder"; and
 - (ii) provide that a professional adviser to a 10% holder is only applicable where that person is a material professional adviser.
- (b) The Background Paper indicates that the proposed change reflects that Australian law has other significant regulations relating to conflicts of interest, including material personal interests of directors and related party transaction provisions.

2.7 Is the proposed amendment to the commentary to Recommendation 2.4 appropriate?

- (a) In response to consultation question number 7 and noting that the increased threshold aligns with approval thresholds in Listing Rule 10.11.3 for approvals of issues of securities to "substantial (10%+) holders", these changes are appropriate.

2.8 What is our position?

- (a) We support the proposed amendments to Recommendation 2.4.

3. Chapter 3 – Diversity

Summary

Chapter 3 summarises the introduction of new Recommendation 2.3 and Recommendation 3.4 relating to "Diversity" which has been included in the Consultation Draft and the potential implications that may arise as a result of the new Recommendations.

3.1 Background: amendments to Principle 2 and Principle 3

- (a) Principle 2, which is "structure the board to be effective and add value", has been amended as follows (note, deletions are in ~~red~~ and insertions are in ~~blue~~):

"The board of a listed entity should ~~be of an appropriate~~ regularly review its size and ~~collectively have the~~ its directors' skills, commitment and knowledge of the entity and the industry in which it operates, ~~to enable so that it~~ ~~to~~ may discharge its duties effectively and to add value".⁹

- (b) Principle 3, which is "instil a culture of acting lawfully, ethically and responsibly", has been amended as follows (note, deletions are in ~~red~~ and insertions are in ~~blue~~):

"A listed entity should instil and continually reinforce a culture ~~across the organisation~~ of acting lawfully, ethically and responsibly, ~~within the organisation and in its dealing with external stakeholders, to create long-term sustainable value".¹⁰~~

- (c) The amendments to Principle 2 reflect the introduction of new Recommendation 2.3 which is discussed below in paragraph 3.2.
- (d) The amendments to Principle 3 reflect the introduction of new Recommendation 3.4 (amended from Recommendation 1.5), which is discussed below in paragraph 3.6.
- (e) The Consultation Draft proposes to deal separately with board diversity in new Recommendation 2.3 and workforce diversity and inclusion policies in new Recommendation 3.4, rather than together in existing Recommendation 1.5 in the [Fourth Edition of the ASX CGPR](#).¹¹

3.2 The amended Recommendation 2.3

- (a) A new Recommendation 2.3 has been proposed in the Consultation Draft:

"The board of a listed entity should:

- (a) *have and disclose a measurable objective and timeframe for achieving gender diversity in the composition of its board;*
- (b) *disclose the entity's progress in achieving the measurable objective in the reporting period; and*
- (c) *if it is considering any other relevant diversity characteristics for its board membership, disclose those diversity characteristics".*

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

⁹ [ASX CGPR Consultation Draft Mark-up](#), p 24.

¹⁰ [ASX CGPR Consultation Draft Mark-up](#), p 34.

¹¹ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 7.

its board should be to have a gender balanced board (at least 40% women / at least 40% men / up to 20% any gender).¹²

- (b) The new Recommendation 2.3 extends the current disclosure and reporting framework provided by existing Recommendation 1.5 and prompts entities to think beyond gender in respect of diversity.
- (c) New Recommendation 2.3 also increases the measurable objective from "not less than 30% of its directors of each gender"¹³ in existing Recommendation 1.5, to "at least 40% women / at least 40% men / up to 20% of any gender" in new Recommendation 2.3, within a period specified by the entity.

3.3 Reasons for the proposed new Recommendation 2.3

- (a) The new Recommendation 2.3 is focused on disclosure which may assist security holders' understanding of how a board is seeking to develop its range of perspectives, the promotion of board succession planning and flexibility of board recruitment processes.¹⁴
- (b) The new Recommendation 2.3(a) now requires the board of a listed entity to also disclose *timeframes* for achieving gender diversity, which places additional pressure on boards to achieve their stated measurable objectives.
- (c) According to the Background Paper, women hold approximately 35% of all S&P/ASX300 directorships.¹⁵ The Consultation Draft proposes to raise the S&P/ASX300 measurable objective to a gender balanced board to 40% up from 30%.
- (d) New Recommendation 2.3(c) also prompts listed entities to consider diversity characteristics that go beyond gender and notes that the listing rules of some international jurisdictions have provisions that incorporate this, for example ethnicity:¹⁶
 - (i) United Kingdom's [Financial Conduct Authority Handbook](#); and
 - (ii) United States' [NASDAQ Rulebook](#).
- (e) The Background Paper acknowledges that references to other diversity characteristics in comparable foreign governance frameworks may reflect particular diversity priorities within their jurisdictions. We consider that this statement underestimates the contribution that is being made by the diversity of the Australian community. However, rather than specify other diversity characteristics beyond gender, the new Recommendation 2.3(c) and the Consultation Draft proposes that listed entities disclose if there are other relevant diversity characteristics which a board is considering in terms of its membership.¹⁷
- (f) The new commentary for Recommendation 2.3 in the Consultation Draft also highlights that an entity's board benefits from a diversity of thinking and perspectives and that bringing together directors of different ages, race, backgrounds and personal

¹² [ASX CGPR Consultation Draft](#), p 29.

¹³ [Fourth Edition of the ASX CGPR](#), p 9.

¹⁴ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 7.

¹⁵ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 7.

¹⁶ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 7.

¹⁷ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 7.

circumstances can help bring different perspectives and experiences to bear and avoid "groupthink" or other cognitive biases in decision-making. We support these statements.

- (g) The commentary also relevantly recognises that different entities will have different diversity priorities for their boards, but importantly disclosure of these priorities can assist a security holder in understanding how a board is seeking to develop its range of perspectives.
- (h) It is important to note that the Recommendation 2.3(c) only requires disclosure of other diversity characteristics if they are being considered by the board.

3.4 Is the proposed new Recommendation 2.3 appropriate?

Raising the S&P/ASX300 measurable objective

- (a) The raising of the measurable objective for gender aims to continue encouraging listed entities on the S&P/ASX300 to increase their gender diversity ratios, noting that the average of the entities on S&P/ASX300 reaching approximately 35% women in 2023 as noted by the [2023 Board Diversity Index](#) published by Watermark Search International in partnership with Governance Institute of Australia (**Watermark Report**).
- (b) From a social perspective, the 40% measurable target aligns with such social initiatives such as the 40:40 Vision initiative spearheaded by HESTA and supported by ACSI and other superannuation funds and Workplace Gender Equality Agency. The 40:40:20 Vision initiative is driven by investors and asks ASX300 organisations to pledge to attain the 40:40:20 gender balance target in executive leadership by 2030.¹⁸
- (c) In response to consultation question number 4, the proposed new Recommendation 2.3 and the raising of the measurable objective for gender is appropriate as the data from the Watermark Report suggests that S&P/ASX300 companies have largely achieved the previous measurable objective, the objective is in line with standards set in the United Kingdom and aligns with social perspectives.

Disclosure of other relevant diversity characteristics

- (d) The proposed addition of Recommendation 2.3(c) broadens the concept of diversity for boards beyond gender, which was the focus of the existing Recommendation 1.5 and its associated commentary in the Fourth Edition of the ASX CGPR.
- (e) The drafting of new Recommendation 2.3 and the associated commentary makes it clear that different entities will have different diversity policies and there is no requirement to consider (or disclose against) diversity characteristics beyond gender.
- (f) Moreover, this step to broaden the consideration of diversity characteristics beyond gender is appropriate, but it does not go as far as some international jurisdictions such as:
 - (i) United Kingdom, where a listed company is required to "comply or explain" whether at least one director on its board is from a "minority ethnic background";¹⁹ and

¹⁸ 40:40 Vision [website](#).

¹⁹ [Financial Conduct Authority Handbook](#) Listing Rule 9.8.6R(9). 'Minority ethnic background' means from one of the following categories of ethnic background, excluding the category "White British or other White (including minority-white groups)": (1) Asian/Asian British; (2) Black/African/Caribbean/Black British; (3) Mixed/Multiple Ethnic Groups;

- (ii) United States, where a company listed on NASDAQ is required to "comply or explain" whether at least one director on its board is from an "Underrepresented Minority" or "LGBTQ+".²⁰
- (g) The Watermark Report also notes that cultural diversity across boards of S&P/ASX300 entities remains static from the previous year, with 90% of director roles filled by directors of Anglo-Celtic or European ethnicity, despite people with Chinese ancestry now making up the fifth largest group in Australia.²¹
- (h) In response to consultation question number 5, the proposed new Recommendation 2.3(c) is appropriate as it promotes the awareness of the importance of diversity characteristics other than gender and acknowledges that these diversity characteristics can be important for investors to consider when understanding board composition.²²

3.5 What is our position?

- (a) Our position is that the proposed introduction of Recommendation 2.3 is appropriate as it is in line with comparable international jurisdictions and with the shift in broader social perspectives.
- (b) In response to consultation question numbers 4 and 5, we consider the introduction of Recommendation 2.3 is appropriate, including in relation to:
 - (i) raising the S&P/ASX300 measurable objective to a gender balanced board; and
 - (ii) the proposed disclosure of any other relevant diversity characteristics (in addition to gender) which are being considered for a board's membership.
- (c) However, we do consider that Recommendation 2.3(c) could be further strengthened.

3.6 The proposed new Recommendation 3.4

- (a) The new Recommendation 3.4 is an amendment of Recommendation 1.5 of the [Fourth Edition of the ASX CGPR](#), to be applicable to an entity's general workforce rather than the entity's board.
- (b) The new Recommendation 3.4 has amended existing Recommendation 1.5 as follows (note the amendments are in [blue](#)):

"A listed entity should:

- (a) *have and disclose a diversity [and inclusion](#) policy;*
- (b) *through its board or a [board](#) committee set measurable objectives for achieving gender diversity in the composition of its workforce [\(including in](#)*

and (4) Other ethnic group, including Arab.

²⁰ [NASDAQ Rulebook](#) 5600: Corporate Governance Requirements - board diversity requirements. 'Underrepresented Minority' means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities; and 'LGBTQ+' means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

²¹ [2023 Board Diversity Index](#) published by Watermark Search International in partnership with Governance Institute of Australia, p 3, 6 and 12.

²² [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 7.

its senior executive team); and

(c) *disclose in relation to each reporting period the effectiveness of its diversity and inclusion practices, including:*

(i) *the measurable objectives set for that period to achieve gender diversity;*

(ii) *the entity's progress towards achieving those objectives; and*

(iii) *either:*

A. *the respective proportions (by gender) of members of 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".²³*

(c) The substantive change of new Recommendation 3.4 to existing Recommendation 1.5 is the inclusion of the requirement for a listed entity to disclose "the effectiveness of its diversity and inclusion practices" in addition to reporting against the requested metrics that are already reflected in existing Recommendation 1.5.

3.7 Reasons for the proposed new Recommendation 3.4

(a) The new Recommendation 3.4 and associated commentary in the Consultation Draft go beyond the existing focus on gender diversity in existing Recommendation 1.5 and promote all forms of diversity within a listed entity. The commentary specifically states that a diversity and inclusion policy refers to one or more policies designed to foster a diversity of backgrounds (including personal circumstances) in a listed entity's board and broader workforce, equity (fairness) in treatment regardless of background and an inclusive environment in which those different backgrounds can participate and contribute to the organisation.²⁴

(b) The addition of the introductory wording in Recommendation 3.4(c) is for the purpose of allowing stakeholders to understand the effectiveness of a listed entity's diversity and inclusion practices in the workforce. It is intended to draw out outcomes and information beyond the reporting of the requested metrics and the Consultation Draft suggests that information may be useful to the entity's stakeholders, including employees and investors.²⁵

(c) This new wording in Recommendation 3.4 is the only recommendation to require a listed entity to disclose the effectiveness of its practices in each reporting period.

(d) The inclusion of disclosing outcomes relating to effectiveness broadens the scope of disclosure for listed entities. The proposed commentary to Recommendation 3.4 notes that listed entities should consider the outcomes it can report to communicate the effectiveness of its diversity and inclusion practices, for example, this may include information on the prevalence of and measures taken to address sex-based

²³ [ASX CGPR Consultation Draft](#), p 24.

²⁴ [ASX CGPR Consultation Draft](#), p 28.

²⁵ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 8.

harassment and discrimination.²⁶

- (e) Furthermore in relation to reporting on gender diversity, the proposed commentary to Recommendation 3.4 also helpfully suggests that listed entities that do not report under the *Workplace Gender Equality Act 2012* (Cth) (**Act**) may wish to consider the Act's Gender Equality Indicators, how these indicators relate to their workplace practices and what information can be made available to investors on the effectiveness of its diversity and inclusion practices.²⁷
- (f) The expanded scope of disclosure relating to the effectiveness of a listed entity's diversity and inclusion practices encourages a listed entity to understand the demographics within its workforce and to collect data in a respectful manner and in accordance with law.²⁸

3.8 Is the proposed new Recommendation 3.4 appropriate?

- (a) The proposed introduction of Recommendation 3.4 to replace existing Recommendation 1.5 is appropriate as it shifts the focus of diversity from only gender diversity and acknowledges the importance of other forms of diversity within an organisation.
- (b) In response to consultation question number 6, the proposed introduction of Recommendation 3.4(c) in relation to the disclosure of the effectiveness of diversity and inclusion practices is appropriate as it encourages listed entities to consider and report on effectiveness more broadly, rather than focusing on the requested metrics. It also encourages listed entities to collect data and understand other aspects of its organisation outside of the data required to report on the requested metrics, which may go beyond gender - which is one of the core purposes of this new Recommendation 3.4.

3.9 What is our position?

- (a) Our position is that the proposed new Recommendation 3.4 is an appropriate modification of existing Recommendation 1.5 as it continues the theme of promoting broader aspects of diversity within an organisation.
- (b) In response to consultation question number 6, we consider the proposal to also recommend disclosure of the effectiveness of an entity's diversity and inclusion practices is appropriate.
- (c) The disclosure of the effectiveness of an entity's diversity and inclusion practices is quite extensive. Listed entities should be aware of and may seek advice on: (a) how they can report effectiveness against their existing practices; (b) a review of their existing reporting framework; and (c) whether they will need to amend their existing procedures for collecting the information required to provide such disclosures, subject of course to legal and privacy constraints.

²⁶ [ASX CGPR Consultation Draft](#), p 29.

²⁷ [ASX CGPR Consultation Draft](#), p 30.

²⁸ [ASX CGPR Consultation Draft](#), p 29.

4. Chapter 4 – Corporate Conduct and Culture

Summary

Chapter 4 summarises the introduction of new sub-recommendation (c) in Recommendation 3.2, relating to disclosure of outcomes of actions taken by an entity in response to material breaches of the code of conduct which has been included in the Consultation Draft and the potential implications that may arise as a result of the new Recommendation 3.2(c).

4.1 Background: new Recommendation 3.2(c)

Recommendation 3.2 has been amended to include a new sub-recommendation (c) which stipulates that (note the amendments are in blue):

*"A listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly, including by ... (c) disclosing (on a de-identified basis) the outcomes during the last reporting period of actions taken by the entity in response to material breaches of the code of conduct."*²⁹

4.2 Reasons for the proposed new Recommendation 3.2(c)

- (a) Consistent with a number of the changes throughout the Consultation Draft, the inclusion of new Recommendation 3.2(c) is focussed on enhancing disclosures with respect to corporate conduct and culture.
- (b) The commentary specifically notes that the Consultation Draft "seeks to balance transparency for key stakeholders with an outcomes-focused approach that promotes a "speak up" culture."³⁰
- (c) Adopting such a culture will ultimately contribute towards cultivating transparency and accountability within the market at large. Such an environment is conducive to the interests of stakeholders, security holders and listed entities.

4.3 Is the proposed new Recommendation 3.2(c) appropriate?

- (a) Recommendation 3.2(c) states that disclosure of outcomes taken in response to material breaches of the code of conduct is "on a de-identified" basis. This suggests all disclosures are to be de-identified, however, the commentary states, "*disclosures of outcomes should generally be on a de-identified basis*".³¹ This point should be clarified. We envisage that most disclosures, if not all, would be on a de-identified basis.
- (b) When material breaches of a listed entity's code of conduct arise, these breaches may often be commercially sensitive, conflict with confidentiality clauses in agreements and/or contain sensitive and personal information (such as under the *Privacy Act 1988* (Cth)).
- (c) This may make this disclosure obligation process for entities onerous because it will likely require parties to reach a consensus on what should and should not be de-identified (along with the degree of de-identification), bearing in mind that in most cases of serious breaches, the consent of the offending party is unlikely to be available.

²⁹ [ASX CGPR Consultation Draft Mark-up](#), p 34.

³⁰ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 8.

³¹ [ASX CGPR Consultation Draft](#), p 26.

- (d) Many breaches are likely to be excluded from disclosure on the basis that they cannot be appropriately de-identified. Although it is important to maintain this exception, the exception itself may reduce the effectiveness and therefore the purpose of inserting, Recommendation 3.2(c).
- (e) In response to consultation question number 8, we would support the proposed de-identified disclosure of outcomes concerning actions taken in response to material breaches of a listed entity's code of conduct, subject to the commentary being amended as noted in paragraph 4.4.

4.4 What is our position?

We submit that all disclosures should be made on a de-identified basis for the reasons mentioned above. Accordingly, our proposed amended version of Recommendation 3.2(c) is as follows (note, deletions are in ~~red~~):

"disclosing ~~(on a de-identified basis)~~ the outcomes during the last reporting period of actions taken by the entity in response to material breaches of a listed entity's code of conduct".

5. Chapter 5 – Interests of Key Stakeholders and Stakeholder Relationships

Summary

Chapter 5 summarises the amendments made to Principle 3 and the introduction of new Recommendation 3.3 which has been included in the Consultation Draft and the potential implications that may arise as a result of the amendments and new Recommendation 3.3.

5.1 Background: amendments to Principle 3

- (a) Principle 3, which is "instil a culture of acting lawfully, ethically and responsibly", has been amended as follows (note, deletions are in red and insertions are in blue):

*"A listed entity should instil and continually reinforce a culture ~~across the organisation~~ of acting lawfully, ethically and responsibly, *within the organisation and in its dealing with external stakeholders, to create long-term sustainable value*".³²*

- (b) This amendment is a result of the amended Recommendation 3.3 which is discussed below.

5.2 The new Recommendation 3.3

The ASX Corporate Governance Council have now proposed inclusion of a new Recommendation 3.3 which provides:

*"A listed entity should *have regard to the interests of the entity's key stakeholders, including having processes for the entity to engage with them and to report material issues to the board.*"³³*

5.3 Reasons for the proposed amendments to Principle 3 and new Recommendation 3.3

Having regard to the interests of key stakeholders

- (a) According to the Background Paper, there has been an increasing recognition of an entity's relationships with its internal and external stakeholders.³⁴ In various international jurisdictions such as the United Kingdom and Singapore, their legislation or governance codes recognise stakeholder interests and the importance of effective engagement.³⁵
- (b) Further, the Consultation Draft purposely uses the terminology "key stakeholders" to reflect that stakeholders may vary between entities and over time.³⁶
- (c) Examples of stakeholders may include:
- (i) employees;

³² [ASX CGPR Consultation Draft Mark-up](#), p 34.

³³ [ASX CGPR Consultation Draft](#), p 24.

³⁴ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 9.

³⁵ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 9.

³⁶ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 9.

- (ii) customers;
- (iii) suppliers;
- (iv) Aboriginal and Torres Strait Islander peoples;
- (v) local community;
- (vi) law makers; and
- (vii) regulators.

The identification of key stakeholders does not include security holders, because the interest of security holders is addressed in Principle 6. The commentary to Recommendation 3.3 also suggests that an entity should regularly review the identity of its key stakeholders having regard to its purpose (if articulated), values, strategic objectives and risk appetite.

- (d) It should be noted that the new Recommendation 3.3 only proposes that an entity should have regard to its key stakeholders' interests and does not require an entity to act in the interests of key stakeholders.³⁷
- (e) This ultimately places a lower burden on entities, as the proposed amendment only recommends that regard should be had to these particular interests, without imposing a duty for the entity to act in the interests of their key stakeholders. Any attempt to impose such a duty would reflect a material departure from the law, except in limited cases in relation to the interests of creditors and we would not support the same.
- (f) Further, the Consultation Draft highlights in the commentary for Recommendation 3.3 that it is in the entity's best interests to have regard to "key stakeholders interests" as appropriate "to support creation of long-term sustainable value for security holders".³⁸ The reference in new Recommendation 3.3 that an entity should have regard to key stakeholders' interests is consistent with the applicable law with respect to directors' duties to the extent to which it permits directors to have regard to these interests.

Having processes in place to engage with key stakeholders and to report material issues to the board

- (g) However, Recommendation 3.3 in so far as it specifies how the directors are to have regard to those interests, goes further and may become inconsistent with the directors' duties as currently understood.
- (h) The proposed new Recommendation 3.3 provides that entities should "hav[e] processes for the entity to engage with [key stakeholders] and to report material issues to the board".³⁹
- (i) This element of new Recommendation 3.3 is close to placing an onus on the board of an entity to design, implement and document a process for engaging with key stakeholders.
- (j) As such, this element of Recommendation 3.3 is testing the bounds of the principles surrounding directors' duties. It is well recognised in the law in Australia that it is the responsibility of directors to determine, acting bona fide and for a proper purpose, what is in the best interests of the entity and not outside stakeholders, a principle which is well recognised by the Australian courts.
- (k) We also consider that this additional language will result in an unduly burdensome process for companies to have to document its processes for engaging with a potentially wide range of stakeholders, with such documentation and processes not

³⁷ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 9.

³⁸ [ASX CGPR Consultation Draft](#), p 27.

³⁹ [ASX CGPR Consultation Draft](#), p 27.

necessarily leading to better outcomes for stakeholders.

- (l) It is our recommendation on this basis that the words, "including, having processes for the entity to engage with them and to report material issues to the board" and the associated commentary, be struck out from the Recommendation.
- (m) Notwithstanding this proposed amendment, Recommendation 3.3 would still appropriately recommend that entities have regard to interests of their key stakeholders, while ensuring entities retain flexibility with respect to how they wish to take key stakeholders' interests into consideration and engage with such stakeholders when making certain decisions that may impact key stakeholders and ultimately the entity.

5.4 Are the proposed amendments to Principle 3 and new Recommendation 3.3 appropriate?

- (a) The proposed amendment to Principle 3 and new Recommendation 3.3 are appropriate in so far as they provide that directors have regard to the interests of material stakeholders, as these amendments acknowledge the increasing recognition of an entity's relationship with its key stakeholders, both internal and external.⁴⁰ However, for the reasons set out above in paragraphs 5.3(g) to (m), the reference to an entity having processes for engaging with such stakeholders and reporting material issues to the board is, in our view, not appropriate and should be removed.
- (b) Our proposed amendment would align the Consultation Draft with those in foreign jurisdictions, such as the United Kingdom⁴¹ and Singapore.⁴²
- (c) Both the United Kingdom and Singapore corporate governance codes encourage consideration of interests of key stakeholders, similar to Recommendation 3.3.
- (d) In the *UK Corporate Governance Code 2018*, provision 5 provides that:

"the Board should understand the views of the company's other key stakeholders and describe in the annual report how their interests and the matters set out in s 172 of the Companies Act 2006 have been considered in board discussions and decision-making".⁴³
- (e) Singapore's *Code of Corporate Governance 2018* also contains a similar provision to the United Kingdom in both paragraph 5 of the Code, but particularly in principle 13 which provides that:

"the Board adopts an inclusive approach by considering and balancing the needs and interests of material stakeholders, as part of its overall responsibility to ensure that the best interests of the company are served".⁴⁴

⁴⁰ [Fifth Edition Consultation Draft Background Paper and Consultation Questions](#), p 9.

⁴¹ [Companies Act 2006 \(UK\) s 172](#), [UK Corporate Governance Code 2018](#) Provision 5 (p 8 of PDF).

⁴² [Code of Corporate Governance 2018](#) Paragraph 5 (pp 2 – 3 of PDF) and Principle 13 (p 18 of PDF).

⁴³ [UK Corporate Governance Code 2018](#) Provision 5 (p 8 of PDF) citing [Companies Act 2006 \(UK\) s 172](#).

⁴⁴ [Code of Corporate Governance 2018](#) Principle 13 (p 18 of PDF).

5.5 What is our position?

Principle 3

- (a) In response to consultation question number 9, we would support the inclusion of an amended version of Principle 3 and Recommendation 3.3, rather than that which is currently proposed.
- (b) We propose that Principle 3 be further amended as follows, for the reasons set out below (note, deletions are in red and insertions are in blue):

"A listed entity should instil and continually reinforce a culture of acting lawfully, ethically and responsibly, within the organisation and in its dealings with ~~external~~key stakeholders, to create long-term sustainable value for the listed entity and its security holders".

- (c) We support the proposed inclusion of "within the organisation" to Principle 3 and note that this insertion has the same effect as the words "across the organisation" previously had (which are now proposed to be deleted).
- (d) We would support an amended version of the proposed inclusion of "and in its dealings with external stakeholders" in Principle 3 on the basis that "external stakeholders" is replaced with "key stakeholders". This is to maintain consistency with the recommendations made in Principle 3 which use the term "key stakeholders" and to ensure that emphasis is had on key stakeholders, not all stakeholders generally.
- (e) We would further support an amended version of the proposed inclusion of "to create long-term sustainable value" in Principle 3, being, "to create long-term sustainable value for the listed entity and its security holders". This is to emphasise that the value created is for the listed entity and its security holders, rather than for other key stakeholders. This inclusion would help provide clarification that the recommendations in Principle 3 are not to be construed as conveying that directors should take steps beyond their legal duties and act in the best interests of key stakeholders (which are not security holders or the listed entity itself). Further, the reference to the creation of long-term sustainable value for the listed entity and its security holders would ensure consistency with Principle 8 (which uses the term "long-term sustainable value for security holders").

Recommendation 3.3

- (f) In response to consultation question number 10, to address the issues identified above, we propose that new Recommendation 3.3 be amended as follows (note, deletions are in red):

"A listed entity should have regard to the interests of the entity's key stakeholders, ~~including having processes for the entity to engage with them and to report material issues to the board.~~"

6. Chapter 6 – Management of Risk

Summary

Chapter 6 summarises the amendments made to Principle 7 (Recognise and Manage Risk) and its Recommendations which have been amended in the Consultation Draft and the potential implications that may arise as a result of the amendments.

6.1 Background: key amendments to Principle 7

(a) There are a number of key changes between the Fourth Edition of the ASX CGPR and the Consultation Draft with respect to Management of Risk. The main changes to Principle 7 and its Recommendations that have been proposed in the Consultation Draft include:

(i) a change to Principle 7 to read (note, deletions are in ~~red~~ and insertions are in ~~blue~~):

"A-The board of a listed entity should ~~establish~~oversee a sound risk management framework and ~~periodically~~the periodic review of the effectiveness of that framework",⁴⁵

(ii) a shift in risk management to focus on "frameworks" as opposed to specific types of risks or risk categories;⁴⁶

(iii) a change to the approach on risk committees being more flexible to suit the needs of an entity; and⁴⁷

(iv) a change in risk disclosure to risks that are *material risks* to an entity.⁴⁸

6.2 Reasons for the proposed amendments to Principle 7 and its Recommendations

Principle 7

(a) According to the Background Paper, there are a range of benefits to the amended Principle 7 and its recommendations.⁴⁹ The main benefit that arises through this amendment is the flexibility and versatility that risk management *frameworks* provide, as opposed to a strict list of potential risks that may not be relevant in a material sense.⁵⁰ This allows for entities to consider a range of risks that may be relevant or apply to their entity specifically.⁵¹

(b) One key change is the use of the word "oversee" in the proposed amendment to

⁴⁵ [ASX CGPR Mark-up](#) at p 59.

⁴⁶ [Background Paper and Consultation Questions](#) at p 10.

⁴⁷ [ASX CGPR Mark-up](#) at p 61.

⁴⁸ [ASX CGPR Mark-up](#) at p 63.

⁴⁹ [Background Paper and Consultation Questions](#) at p 10.

⁵⁰ [Background Paper and Consultation Questions](#) at p 10.

⁵¹ [Background Paper and Consultation Questions](#) at p 10.

Principle 7.⁵² This change is material as it has defined the board's role with respect to risk management. In the Fourth Edition of the ASX CGPR, the entity was required to establish risk management frameworks,⁵³ however, in the Consultation Draft, the role of an entity's board is to "oversee" the risk management framework and not implement it themselves.

Recommendation 7.1

- (c) Another key proposed addition to the Recommendations within Principle 7 is the versatility provided with respect to risk committees.⁵⁴ The commentary to Recommendation 7.1 provides that a risk committee could be:
- (i) a stand-alone risk committee;
 - (ii) a combined audit and risk committee; or
 - (iii) a combination of board committees addressing different elements of risk.⁵⁵

This allows entities to establish risk committees that are appropriate and relevant to their circumstances and reflect current practice (particularly with respect to the combination of an audit and risk committee), as opposed to establishing specific risk committees as currently recommended. This will allow for risk management in entities to be more efficiently managed and will likely produce greater risk management results.

- (d) However, the commentary to Recommendation 7.1 stipulates that in the event that an entity establishes multiple committees with responsibility for different elements of risk, it must disclose the division of responsibility between the committees. Where different committees consider different elements of risk, there is potential for omission of consideration of key issues if clear responsibilities are not drawn. Therefore, it is crucial that when an entity establishes its committees, that responsibilities are clearly identified and appropriately allocated, including with respect to overseeing risk as between those committees.

Recommendation 7.4

- (e) The specific amendment to Recommendation 7.4 now focuses on an entity's "material risks" but does not set out specific risks or specific categories of risks. This again follows the same notion of providing a much broader approach to risk management, in recognition that risks ultimately differ between entities.
- (f) The ASX Corporate Governance Council is purposely not being prescriptive and is recognising that risk management is a matter for an entity to determine and identify the material risks that are relevant to that entity. This is expanded on in page 64 of the mark-up, which defines a "material risk" as, "a risk which is material to a listed entity's prospects over the short, medium or long term".⁵⁶ Further, the mark-up highlights that entities should consider "reasonably foreseeable risks" as well as key

⁵² [ASX CGPR Mark-up](#) at p 59.

⁵³ [ASX CGPR Mark-up](#) at p 59.

⁵⁴ [ASX CGPR Mark-up](#) at p 61.

⁵⁵ [ASX CGPR Mark-up](#) at p 61.

⁵⁶ [ASX CGPR Mark-up](#) at p 64.

stakeholders when developing risk reporting mechanisms.⁵⁷

- (g) Another key consideration for the Board of an entity is crisis management and businesses continuity processes, as having such processes in place can assist an entity with coordinating its response to risks which may impact different processes, resources and relationships.⁵⁸ Crisis management and business continuity processes should be adaptable to a range of risks and aligned with investor relations and stakeholder engagement programs, which include stress testing for different scenarios and utilising simulations.
- (h) While sustainability has previously been a prescribed risk area that entities were specifically suggested to report on, the Consultation Draft no longer prescribes a need for sustainability reporting, but rather, it states that it is something that an entity may address.⁵⁹ Further, the need for climate change reporting has also not been included as a prescribed category for reporting. No doubt this is in part influenced by the proposed introduction of specific reporting requirements with respect to both matters.⁶⁰
- (i) Another aspect of the changes to Recommendation 7.4 is that an entity may be able to include references to disclosures in its operating and financial review in a directors' annual report, effectively removing double handling. This amended Recommendation also re-affirms Section 299 of the *Corporations Act 2001* (Cth), as well as ASIC Regulatory Guide 247 which expands on the principles in Section 299.⁶¹

6.3 Are the proposed amendments to Principle 7 and its Recommendations appropriate?

- (a) In response to consultation question 13, the proposed amendments to Principle 7 are very appropriate and should be commended for the flexibility and adaptability that they provide entities while encouraging transparent and tailored disclosure.
- (b) The amended Recommendations are not intended to be prescriptive and give entities the opportunity to properly assess the material risks that are relevant to and may have an impact on their organisation.
- (c) There are a range of benefits to the amended Principle 7 and its Recommendations, which include:
 - (i) the potential to improve reporting practices;
 - (ii) clarity that reporting on environmental, social and governance risk categories are not a requirement but are examples of the types of risks that may be relevant to the entity;
 - (iii) moving away from generic ESG disclosures and generic risk disclosures, but at the same time, ensuring a focus on non-financial risks as well as financial risks;
 - (iv) not prescribing sustainability or climate reporting as a requirement; and

⁵⁷ [ASX CGPR Mark-up](#) at p 64.

⁵⁸ [ASX CGPR Mark-up](#) at p 64.

⁵⁹ [ASX CGPR Mark-up](#) at p 62.

⁶⁰ [ASX CGPR Mark-up](#) at p 62.

⁶¹ [Corporations Act 2001 \(Cth\)](#) s 299; [ASIC Regulatory Guide 247](#).

- (v) elevating governance risk generally due to the versatility and awareness created for a wider range of risks.⁶²

6.4 What is our position?

- (a) The amendments to Principle 7 and its Recommendations in the Consultation Draft are beneficial to entities and as such, are endorsed by us. This is due to the flexibility that the amendments provide and the improvements to risk management and reporting that will follow as a result of these amendments.

⁶² [Background Paper and Consultation Questions](#) at pp 10-11.

7. Chapter 7 – Remuneration

Summary

Chapter 7 summarises the amendments made to Principles 8 (Remunerate Fairly and Responsibly) and new Recommendations 8.2 and 8.3 and associated commentary which have been amended in the Consultation Draft and the potential implications that may arise as a result of the amendments and new Recommendations.

7.1 Background: key amendments to Principle 8

- (a) There are some key changes between the Fourth Edition of the ASX CGPR and the Consultation Draft with respect to remuneration. The main changes to Principle 8 and its Recommendations that have been proposed in the Consultation Draft include:
- (i) a change to Principle 8 to read (note, deletions are in ~~red~~ and insertions are in ~~blue~~):

"A listed entity should ~~pay~~ ensure that its director ~~remuneration sufficient to attract and retain high quality directors and design its~~ and executive remuneration ~~to attract, retain and motivate high quality senior~~ policies and practices are fair and responsible. Remuneration of executives ~~and to~~ should align their interests with the ~~entity's values, strategic objectives and risk appetite~~, and the creation of long-term sustainable value for security holders ~~and with the entity's values and risk appetite~~".⁶³
 - (ii) inclusion of new Recommendation 8.2 that performance-based remuneration and retirement benefits for non-executive directors should not be permitted; and⁶⁴
 - (iii) addition of new Recommendation 8.3 for remuneration structures to have clawback provisions and the disclosure of the use of clawback provisions.⁶⁵

7.2 Reasons for the proposed amendments to Principle 8 and new Recommendations 8.2 and 8.3

Recommendation 8.2

- (a) One of the most notable changes recommended in the Consultation Draft is the inclusion of new Recommendation 8.2 stating that performance-based remuneration and retirement benefits for non-executive directors should not occur.⁶⁶ For the purposes of this report, the focus will be on the change to performance-based remuneration, reflecting the fact that retirement benefits, other than statutory superannuation, are no longer current practice.
- (b) The recognition in the Commentary that when setting the level and composition of remuneration for non-executive directors, a listed entity needs to balance the need to ensure that non-executive directors are not remunerated in a manner that may

⁶³ [ASX CGPR Mark-up](#) at p 67.

⁶⁴ [ASX CGPR Mark-up](#) at p 71.

⁶⁵ [ASX CGPR Mark-up](#) at p 67-68.

⁶⁶ [ASX CGPR Mark-up](#) at p 71.

conflict with their obligation to bring independent judgment to matters before the board.⁶⁷ This is sound and we strongly support the same. In doing this, the board should have regard to both the nature and quantum of the proposed remuneration.

- (c) Further, this amended Principle is consistent with the new Recommendation 3.3 regarding the interests of key stakeholders, as it provides transparency for the key stakeholders with respect to remuneration of non-executive directors.⁶⁸
- (d) However, the commentary in Recommendation 8.2 that a listed entity should not give performance-based remuneration to non-executive directors is unduly prescriptive in nature,⁶⁹ and does not allow the same flexibility as, for example, seen in Principle 7.
- (e) For example, a new-start up may wish to preserve cash in the business and to remunerate its non-executive directors by issue of options that will vest based on future performance goals being achieved. However, whilst there may be a case for providing performance-based remuneration in those circumstances, regard should be had to the overlying principle referred to in paragraph (b) above.
- (f) Further, we agree with non-executive directors receiving securities as a part of their remuneration by sacrificing directors' fees for shares.⁷⁰ This alternative is appropriate, so long as it does not compromise the ability of a non-executive director to make decisions without prejudicial influence. The grant of a large number of shares to a non-executive director which may be material to their own personal financial position is unlikely to be appropriate in the case of an ASX listed entity.
- (g) The recommendation that an entity should consider obtaining security holder approval where remuneration or retirement benefits are not in accordance with Recommendation 8.2 is inappropriate.⁷¹ A non-executive director is a fiduciary and is not entitled to obtain remuneration, unless it is reflected in the entity's constitution, or if the remuneration is approved by the shareholders prior to the director receiving the same.

Recommendation 8.3

- (h) The new Recommendation 8.3 suggests that an entity should have remuneration structures that can clawback or limit performance-based remuneration outcomes for senior executives and that an entity should disclose (on a de-identified basis) the use of such provisions during reporting periods.⁷²
- (i) Recommendation 8.3 and clawbacks themselves are not a foreign concept to companies and are widely used where short-term incentives and long-term incentives are provided to senior executives. It is important that the circumstances in which clawback is to occur are balanced so as to ensure that clawback occurs in circumstances which do not necessarily require a restatement of financial reports. However, the circumstances should not be so broad as to render the entitlement to short-term or long-term incentives to be illusory.

⁶⁷ [ASX CGPR Mark-up](#) at p 68.

⁶⁸ [Background Paper and Consultation Questions](#) at p 11.

⁶⁹ [ASX CGPR Mark-up](#) at p 72.

⁷⁰ [ASX CGPR Mark-up](#) at p 72.

⁷¹ [ASX CGPR Mark-up](#) at p 72.

⁷² [ASX CGPR Mark-up](#) at p 72.

7.3 Are the proposed amendments to Principle 8 and its Recommendations appropriate?

- (a) The amendments to Principle 8 and associated Recommendations and commentary are relatively straightforward and are generally positive, particularly the reference in the commentary to Recommendation 8.2 to the need to ensure that the nature and quantum of compensation of non-executive directors does not prejudice their ability to bring an independent mind to their responsibilities.
- (b) In response to consultation question number 14, as previously indicated, the prescriptive nature of Recommendation 8.2 may not be appropriate in certain circumstances, for example, in the case of a start-up company. We also suggest that the reference in the commentary to an entity considering obtaining security holder approval where remuneration or retirement benefits are not in accordance with Recommendation 8.2 should be deleted.
- (c) In response to consultation question number 15, Recommendation 8.3 regarding clawbacks is a good addition to the ASX CGPR, but as noted in paragraph 7.2(i) above, should be implemented in a balanced way to ensure that the ability to earn incentives does not become illusory. We suggest this be reflected in the commentary.

7.4 What is our position?

- (a) Our position is reflected in paragraphs 7.3(a)-(c) above.