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Lodged online

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Dear ASX Corporate Governance Council

HSF Submission on ASX Corporate Governance Council Principles and Recommendations 5th edition Consultation Draft

Scope of this submission

This submission is made by Herbert Smith Freehills (**HSF**) in relation to the ASX Corporate Governance Council *Principles and Recommendations* 5th edition consultation draft (the **Consultation Draft**).

Key submissions in response to the Consultation Draft

We consider that, on balance, the proposed changes in the Consultation Draft are reasonable. However, there are some areas where we consider that the Consultation Draft may:

- place entities at risk of breaching confidentiality and other legal obligations by requiring disclosures about material breaches of a code of conduct or use of clawback provisions, even where those disclosures are on a de-identified basis;
- require disclosure on topics which are already subject to significant regulation under Australian law; and
- potentially cause disclosures to be duplicated between an entity's Annual Report and Corporate Governance Statement.

Our submissions in response to specific Consultation Questions are set out in the table at Attachment 1.

Further questions and clarifications

If you have any questions or comments about our submissions, please do not hesitate to contact us using the details below.

Yours sincerely

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HSF submissions in response to the Consultation Questions

Topic	No.	Consultation question	HSF submission
Reducing regulatory overlap	1	Do you support deletion of the following 4th Edition Recommendations, on the basis that there is significant regulation under Australian law?	We support the deletion of these 4 th Edition Recommendations.
		a. Recommendation 3.4 (disclosure of anti-bribery and corruption policy)?	By applying the same logic, we consider that proposed Recommendation 7.4 (disclosure of material risks) and Recommendation 8.3(b) (de-identified disclosure on the use of provisions for clawback of performance-based remuneration) should also be removed from the Consultation Draft.
		b. Recommendation 4.2 (CEO and CFO declaration for financial statements)?	
		c. Recommendation 6.4 (substantive security holder resolutions on a poll)?	
		d. Recommendation 6.5 (offering electronic communications to security holders)?	In relation to proposed Recommendation 7.4(b), entities generally disclose material business risks in the Operating and Financial Review within their Annual Report. This is in light of commentary in ASIC Regulatory Guide 247 regarding effective disclosure of “information that members of the listed entity would reasonably require to make an informed assessment of ... the business strategies, and prospects for future financial years, of the entity reported on” (a disclosure requirement under <i>Corporations Act 2001</i> (Cth) section 299A(1)(c)). We note that commentary to proposed Recommendation 7.4 indicates that an entity can satisfy this requirement by cross-referring to disclosures in its Operating and Financial Review. Therefore, we submit that proposed Recommendation 7.4 is unnecessary.
		e. Recommendation 8.2 (separate disclosure of remuneration policies for non-executive directors, other directors and senior executives)?	
		f. Recommendation 8.3 (policy on hedging of equity-based remuneration)?	

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			<p>In relation to proposed Recommendation 8.3(b), entities are already required to make comprehensive disclosures in respect to remuneration under the <i>Corporations Act 2001</i> (Cth). We query whether additional remuneration disclosures are necessary or useful in light of existing requirements.</p> <p>Accordingly, we submit that proposed Recommendations 7.4 and 8.3(b) could be removed from the Consultation Draft.</p> <p>We are comfortable with the Council retaining certain recommendations listed in Question 1 for entities established outside Australia, as these entities may not be subject to the same disclosure requirements under existing laws or regulations.</p>
	2	In particular, the Council encourages feedback on the proposed deletion of Recommendation 3.3 (disclosure of whistleblower policy). Would you prefer to retain this Recommendation?	We agree with the proposed deletion of Recommendation 3.3.
Board skills	3	<p>Recommendation 2.2: The Council already recommends disclosure of a board skills matrix or skills a board is looking for. Do you support disclosure of the following information about board skills?</p> <p>a. Recommendation 2.2(a): current board skills and skills that the board is looking for?</p> <p>b. Recommendation 2.2(b): the entity's process for assessing that the relevant skills and experience are held by its directors?</p>	<p>We do not see any material issues with this proposal.</p> <p>However, we note that the last paragraph in the commentary states that "Better practice is to include information on the skills of individual directors...". We submit that this comment should be removed. In our experience, taking this approach is rare among listed entities. Boards are</p>

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			usually viewed as a “whole”, rather than as a collection of individuals.
Diversity	4	<p>Recommendation 2.3: Women hold approximately 35% of all S&P/ASX300 directorships. This exceeds the existing measurable objective of at least 30% of each gender for those boards.</p> <p>Do you support raising the S&P/ASX300 measurable objective to a gender balanced board?</p>	We do not see any material issues with this proposal.
	5	<p>Recommendation 2.3(c): The Council already recommends disclosure of a board’s approach and progress on gender diversity.</p> <p>Do you support the proposed disclosure of any other relevant diversity characteristics (in addition to gender) which are being considered for the board’s membership?</p>	We do not see any material issues with this proposal.
	6	<p>Recommendation 3.4(c): The Council already recommends disclosure of an entity’s diversity and inclusion policy and disclosure of certain gender metrics.</p> <p>Do you support the proposal to also recommend disclosure of the effectiveness of an entity’s diversity and inclusion practices?</p>	We do not see any material issues with this proposal.
Independence of directors	7	<p>Recommendation 2.4: Do you support increasing the security holding reference included in Box 2.4 (factors relevant to assessing the independence of a director) from a substantial holder (5% or more) to a 10% holder (10% or more)?</p>	We do not see any material issues with this proposal.

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Corporate conduct and culture	8	<p>Recommendation 3.2(c): The Council already recommends that a listed entity should have a code of conduct and report material breaches of that code to its board or a board committee.</p> <p>Do you support the proposed disclosure (on a de-identified basis) of the outcomes of actions taken by the entity in response to material breaches of its code?</p>	<p>In practice, if a breach of a code of conduct occurs, a range of confidentiality obligations may arise. For example, under the <i>Corporations Act 2001</i> (Cth) a company has an obligation to protect the confidentiality of a whistleblower, and there may also be confidentiality obligations arising from contracts or settlement agreements. In light of these obligations, we anticipate any disclosure made under this proposed Recommendation will need to be high-level and opaque which may render such disclosure relatively meaningless. We submit that this new recommendation be removed.</p> <p>We also note that the purpose of the ASX Corporate Governance Principles and Recommendations is to “set out recommended corporate governance <i>practices</i> for entities listed on the ASX” (emphasis added). In our view, proposed Recommendation 3.2(c) steps beyond this mandate by requiring disclosure of the <i>outcome or result</i> arising from a governance process.</p>
	9	<p>Principle 3: Do you support the proposed amendments to Principle 3 (acting lawfully, ethically and responsibly), to include references to an entity’s stakeholders?</p>	<p>We are comfortable with the new references to stakeholders in the Consultation Draft and note that this addition builds on existing trends to ensure non-financial risks and external impacts are being factored into the way that companies operate.</p>
Stakeholder relationships	10	<p>Recommendation 3.3: Does this new Recommendation appropriately balance the interests of security holders, other key stakeholders, and the listed entity?</p>	<p>However, while this proposed recommendation is already reflective of the way most of our large listed clients operate, we note that some of our smaller listed clients would not have formal processes in place to govern their engagement</p>

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		<i>“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.”</i>	with key stakeholders and perceive this recommendation as overly prescriptive. We encourage the Council to have regard to the range of existing practices in formulating the commentary to accompany this Recommendation.
Periodic corporate reports and assurance	11	Recommendation 4.2: Do you support the proposed disclosure of processes for verification of all periodic corporate reports (including the extent to which a report has been the subject of assurance by an external assurance practitioner)?	We do not see any material issues with this proposal.
	12	Recommendation 4.3: Do you support the proposed disclosure of an entity’s auditor tenure, when the engagement was last comprehensively reviewed and the outcomes from that review?	We do not see any material issues with this proposal.
Management of risk	13	<p>Recommendation 7.4: The Council is seeking to enhance the quality of existing reporting of material risks to an entity’s business model and strategy, such as in the operating and financial review in its directors’ report.</p> <p>Do you support the proposal that the entity identify and disclose its material risks, rather than identifying specific risks for all entities to disclose against?</p>	We refer to our comments on Question 1 above. In short, given existing regulatory guidance regarding the disclosure of material business risks in the Operating and Financial Review, we submit that the proposed Recommendation is unnecessary.
Remuneration	14	Recommendation 8.2: This proposed Recommendation reflects and simplifies existing commentary in the 4th Edition.	We do not see any material issues with this proposal.

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		Do you support this proposed Recommendation that non-executive directors not receive performance-based remuneration or retirement benefits?	
	15	<p>Recommendation 8.3: Do you support the following proposed clawback Recommendations?</p> <p>a. Recommendation 8.3(a): remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration?</p> <p>b. Recommendation 8.3(b): disclosure of the use of those provisions (on a de-identified basis) during the reporting period?</p>	<p>We refer to our comments on Question 1 above. In short, listed entities are already required to make comprehensive disclosures on remuneration in their Annual Report. We submit that proposed Recommendation 8.3(b) is unlikely to add additional value for shareholders and other stakeholders given these existing requirements.</p> <p>We also query whether entities will be able to make meaningful disclosures in this context, despite the ability to de-identify, given other legal duties such as confidentiality obligations arising from contracts or settlement agreements. In addition, similar to the issues raised in our response to Question 8 above, the disclosure required by proposed Recommendation 8.3(b) goes beyond disclosing governance <i>processes</i> and requires disclosure of the <i>outcome or result</i> arising from a governance process.</p>
Additional Recommendations that apply only in certain cases	16	<p>Do you support the inclusion of the following new Recommendations for entities established outside Australia, on the basis that these Recommendations generally reflect expectations under Australian law?</p> <p>a. Recommendation 9.3 (CEO and CFO declaration for financial statements)?</p>	We do not see any material issues with this proposal.

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		<ul style="list-style-type: none"> b. Recommendation 9.4 (substantive security holder resolutions on a poll)? c. Recommendation 9.5 (offering electronic communications to security holders)? d. Recommendation 9.7 (policy on hedging of equity-based remuneration)? 	
Externally managed entities	17	Should any new or amended Recommendations in the Consultation Draft apply differently to externally managed entities, compared to the manner proposed in <i>The application of the Recommendations to externally managed listed entities</i> ?	We would not recommend any further changes.
Effective Date	18	Do you support an effective date for the Fifth Edition of the first reporting period commencing on or after 1 July 2025?	We do not see any material issues with the effective date, provided that the final version of the Fifth Edition is published sufficiently in advance of the effective date to ensure that listed entities have adequate lead time.
Other comments	19	Do you wish to provide any other comments on the content of the Consultation Draft, including any other changes you would propose?	No further comments.