



OWNERSHIP MATTERS

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ASX Corporate Governance Council

Email: asxcorporate.governancecouncil@asx.com.au

RE: Submission on ASX Corporate Governance Council Principles & Recommendations Consultation Draft 5th Edition

Dear ASX Corporate Governance Council,

Thank you for the opportunity to comment on the Council's proposed fifth edition of its Corporate Governance Principles & Recommendations (CGPR). Ownership Matters (OM) is an Australian owned governance advisory firm serving institutional investors that was formed in 2011. The views in this submission are those of OM and not its clients.

OM is broadly supportive of most of the proposed changes. More fulsome disclosure of the processes and outcomes of the work of ASX300 boards provides additional trust in the governance oversight boards provide. OM would like to comment specifically on the following proposed changes:

- **Question 2:** OM notes that following changes to Australia's whistleblower regime, public companies are required to have whistleblower policies which are "available to officers and employees". There seems however to be minimal downside or cost for the ASX Corporate Governance Council to continue to recommend that listed entities make such policies publicly available on their websites, mirroring the recommendation of ASIC Regulatory Guide 270. OM would therefore support retaining recommendation 3.3.
- **Question 7:** OM does not support the recommendation to amend and replace references to factors that impact a directors' independence to a '10% holder' from the current broadly understood level of substantial securityholder (5%). Aligning the independence threshold with the 5% disclosure threshold remains appropriate and aligns the independence criteria with the level of interest requiring disclosure under Australian law. The consultation paper's argument that because related party laws already provide for required disclosures of interests that the ownership threshold director independence criteria should be 10% rather than 5% is a non sequitur.
- The Corporate Governance Council's recommendations are intended as a form of best practice with ASX Listing Rule 4.10.3 requiring that listed entities report against the recommendations on an "if not, why not" basis. Setting the threshold for director independence criteria at 10% implies that a holding of less than that amount leads to an absence of prima facie concerns regarding director independence. It is difficult to conceive of a situation where a director owning 5% of a listed entity or representing a securityholder with a holding of 5% could reasonably be considered to be independent, that is, "free of any interest, position or relationship that might

influence, or reasonably be perceived to influence, in a material respect their capacity to bring judgment to bear on issues before the board.”¹

- While it is certainly true that “the holding of securities in the entity may help to align the interests of a director with those of other security holders, and such holdings are therefore not discouraged”,² it is important to distinguish between potential alignment driven by director shareholdings and the potential impact of a large interest on non-executive director independence. Alignment is often presumed to exist between different shareholders but is only tested on an event (eg. corporate transactions such as takeovers), at which point the interests of various shareholders can often materially differ.
- Setting the threshold at 10% could allow a situation where a shareholder with a 9% interest, almost sufficient to act as a blocking stake in a Chapter 6 takeover offer, with two directors on the board, could have these representatives classified as independent in line with the Council's recommended criteria. It would also allow this shareholder with a 9% interest to have majority representation on the audit committee and comply both with the ASX Council's best practice recommendations on board composition, and, if a member of the S&P/ASX 300 Index, with the requirements of Listing Rule 12.7.
- **Question 11:** OM supports the change to recommendation 4.2, recommending disclosure of the “extent to which” a periodic report outside of financial reports that is released to the market “has been audited or otherwise the subject of assurance” by an external party. Most large ASX listed entities that provide such periodic reports, such as sustainability or climate reports, already have these at least partially assured by an external party, with this disclosure provided, typically in the report itself. Strengthening what is now recommendation 4.3 would simply reflect existing practice for many listed entities producing such reports and should encourage the provision of more information to investors allowing them to assess the reliability of such periodic reports.
- **Question 12:** The proposed new recommendation 4.3, that entities should disclose the tenure of their external audit firm and when its appointment was last comprehensively reviewed, would encourage useful disclosure for investors as to audit firm tenure that is often not provided. For example, OM is aware of one global ASX listed entity that has used the same external audit firm since at least 1995 that in relation to review of the external auditor discloses that if the audit committee “though it appropriate to change the firm undertaking” the external audit “it would conduct a competitive tender process”.
- **Question 14:** OM supports the proposed recommendation 8.2 that non-executive directors should not receive performance-based remuneration or retirement benefits (with the exclusion of superannuation). This confirms what many investors already view as best practice (the number of listed entities with specific, non-superannuation retirement benefit schemes for non-executive directors based on tenure is now minimal). It would also not preclude as ‘best practice’ more innovative approaches to director fees such as delivering fees entirely in equity vesting on the same basis as a director would receive their fees.

¹ ASX Corporate Governance Principles and Recommendations 4th Edition 2019, p.7

² ASX Corporate Governance Principles and Recommendations Consultation Draft 5th Edition 2024 p.19

Please do not hesitate to contact us in relation to any matter raised in this submission.

Yours sincerely,

Dean Paatsch *Martin Lawrence*

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Ownership Matters Pty Ltd