



3 May 2024

ASX Corporate Governance Council

Submission on the Consultation Draft for a 5th Edition of the ASX Corporate Governance Council's ("ASXCGC") Corporate Governance Principles and Recommendations (Principles and Recommendations)

Glass Lewis appreciates the opportunity to comment on the aforementioned Consultation Draft for a 5th Edition of the ASXCGC Principles and Recommendations.

Founded in 2003, Glass Lewis is a leading, independent provider of global governance services that provides proxy research and vote management services to more than 1,300 clients throughout the world. While, for the most part, institutional investor clients use Glass Lewis research to help them make proxy voting decisions, they also use Glass Lewis research when engaging with companies before and after shareholder meetings.

Through Glass Lewis' web-based vote management system, Viewpoint, Glass Lewis also provides investor clients with the means to receive, reconcile and vote ballots according to custom voting guidelines and record, audit and disclose their proxy votes.

We have used previous editions of the ASXCGC Principles and Recommendations to inform our own Glass Lewis voting policy guidelines, which in turn informs our proxy voting research. We view the ASXCGC Principles and Recommendations as a useful authority for informing the market as to local governance best practices and norms and see the periodic updates to the document as a seminal piece of work.

The responses provided below are not meant to be exhaustive but are designed to address what Glass Lewis sees as the main issues and concerns raised in the Consultation Paper. Thank you in advance for your consideration and please do not hesitate to contact us if you would like to discuss any aspect of our submission in more detail.

Respectfully submitted,

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Consultation questions and Glass Lewis' responses

Question 1

Do you support deletion of the following 4th Edition Recommendations, on the basis that there is significant regulation under Australian law?

- a. Recommendation 3.4 (disclosure of anti-bribery and corruption policy)?
- 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)?
- 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)?

Our Response to Question 1

We are supportive of the removal of passages from the ASXCGC Principles and Recommendations that are covered by significant regulation under Australian law.

We view the ASXCGC Principles and Recommendations as most useful in addressing corporate governance matters that are not well considered by the local legal and regulatory framework.

Question 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?

Our Response to Question 2

We would prefer to retain this Recommendation. The existing legal requirement to make the whistleblower policy available to *officers and employees* may overlook key groups who could potentially act as whistleblowers. Prospective whistleblowers include not only *officers and employees* but also contractors, former employees, customers and suppliers.

Publicly disclosing this policy ensures that any potential whistleblower can readily access this information.

Question 3

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?

- a. Recommendation 2.2(a): current board skills and skills that the board is looking for?
- b. Recommendation 2.2(b): the entity's process for assessing that the relevant skills and experience are held by its directors?

Our Response to Question 3

We support these additions, both of which we view as enhancements to understanding a board's skill makeup and its own views of its skills gaps.

We additionally suggest a further recommendation, that a board skills matrix should allow for an ability to identify which directors hold which skills. Some board skills disclosures currently allow this; however, the majority do not and instead only show aggregate skills held by the board.

This disclosure would be useful in assessing the benefit of individual directors to a board and inform voting on the election of individual directors.

Further enhancements to disclosure could involve offering greater specificity regarding the criteria used to determine when an individual director possesses a particular skill, such as experience or educational qualifications. This would allow stakeholders to make more informed comparisons between boards and directors.

Question 4

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.

Do you support raising the S&P/ASX300 measurable objective to a gender balanced board?

Our Response to Question 4

We fully support corporate and investor aspirations to have a gender balanced society, including a gender balanced board. However, the inclusion of this objective in the ASXCGC Principles and Recommendations warrants additional deliberation.

We consider the WGEA and the Bankwest Curtin Economics Centre (BCEC)'s 2020 report titled Gender Equity Insights 2020: Delivering The Business Outcomes¹ as the most significant and influential report drawn from local settings, indicating that women's participation on boards leads to outperformance. We interpret this as compelling evidence supporting the appropriateness of including a gender diversity target within the ASXCGC Principles and Recommendations.

The Gender Equity Insights 2020 report details that boards with women in more than a third of the board roles are more likely to outperform and less prone to underperform on a composite company performance measure compared to boards with fewer women directors. This trend remained consistent across each year in the six-year study period. However, the report does not split out further how boards with women in 40% or more experience additional outperformance. It may well be the case that the sample size of such boards was too small for this to be possible.

¹ <https://www.wgea.gov.au/newsroom/more-women-at-the-top-proves-better-for-business>

The change in objective from at least 30% of each gender to at least 40% will impose additional costs, particularly in terms of imposing further constraints on board makeup for entities aiming to comply. Such constraints could potentially limit a board's flexibility in prioritising non-gender diversity factors. This concern is amplified by our observation that the fifth edition draft does not adequately address diversity considerations beyond gender, as highlighted in our response to Question 5 below.

We are highly supportive of boards who elect to adopt a 40:40:20 goal voluntarily, after carefully evaluating their circumstances. The momentum towards a gender ratio of 40:40:20 has been strong and we believe it will continue.

Question 5

Recommendation 2.3(c): The Council already recommends disclosure of a board's approach and progress on gender diversity.

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?

Our Response to Question 5

We view this addition as a step forward, though see more opportunity for development of diversity recommendations.

Australia currently lacks comprehensive diversity disclosures other than gender, leaving significant room for improvement. It is generally unclear on existing disclosures how diversity beyond gender is being considered. We are concerned that Australia is at risk of lagging behind other Western markets in addressing non-gender diversity areas.

The current version of ASXCGC Principles and Recommendations has not placed nearly the level of focus on other aspects of diversity as it has for gender, and in our view the changes proposed in the 5th edition draft do not go far enough in addressing this issue. We believe it would be beneficial to market practice if other non-gender elements of diversity were drawn out specifically in the Principles and Recommendations, instead of being grouped in a general category.

We recognise the importance of advocating for board representation that embraces a broader spectrum of diversity. In addition to gender diversity, we suggest considering factors such as age, ethnicity, and education as initial areas for additional focus. The findings of the Watermark Board Diversity Index 2023² highlight minimal progress in board diversity within these categories. Australian boards remain dominated by individuals of Anglo-Celtic and European ethnicity, with an average age of 60 and backgrounds primarily in accounting, banking or financial services. The report also underscores the need for enhancing reporting and representation for under-represented groups such as First Nations

² <https://www.watermarksearch.com.au/thought-leadership/2023-board-diversity-index>

peoples, individuals with disabilities, members of the LGBTQ+ community, and those from more diverse socio-economic backgrounds.

Given the reported slow pace in increasing diversity on boards beyond gender and the very limited disclosure provided by companies in this area, we advocate for more comprehensive changes.

6. Recommendation 3.4(c): The Council already recommends disclosure of an entity's diversity and inclusion policy and disclosure of certain gender metrics. Do you support the proposal to also recommend disclosure of the effectiveness of an entity's diversity and inclusion practices?

Our Response to Question 6

We do not have a clear view of what additional disclosures this amendment would result in, nonetheless the amendment at least on a surface level seems reasonable.

7. 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)?

Our Response to Question 7

We do not support this amendment. We take a view that a 5% shareholding in most ASX300 entities will be a material holding impacting director independence in most cases. We additionally assert that a 5% shareholding is large enough to be the deciding vote in a significant number of special resolution proposals.

The risks to independence are therefore high for a 5% shareholder, particularly when considering an acquisition that would lead them to exit their position. Given this view, raising the reference to 10% appears excessive.

We do however believe the ASXCGC Principles and Recommendations do not sufficiently differentiate between directors that are non-independent by merit of association with significant shareholdings and non-independent for other conflicts of interests. In many situations directors who are associated with significant shareholdings are more aligned with minority shareholders than independent directors.

We believe this could be explored further and built into future editions of the ASXCGC Principles and Recommendations, e.g. by differentiating such directors when considering compositions for certain board subcommittees.

8. 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. 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?

**Our Response to Question 8**

Yes. This disclosure may have the effect of giving codes of conduct more weight, as otherwise companies risk the perception that material breaches of such codes have no severe consequences if consequences are not disclosed. We believe this disclosure will generally be beneficial to corporate culture.

9. Principle 3: Do you support the proposed amendments to Principle 3 (acting lawfully, ethically and responsibly), to include references to an entity's stakeholders?

Our Response to Question 9

Yes. We see stakeholder management as part of good corporate governance.

10. Recommendation 3.3: Does this new Recommendation appropriately balance the interests of security holders, other key stakeholders, and the listed entity? "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."

Our Response to Question 10

Generally, yes. We note that there is no requirement for non-shareholder stakeholders to be prioritized alongside or above shareholders, and so the prioritization of all stakeholders remains discretionary. We agree that decision should remain outside the scope of the ASXCGC Principles and Recommendations.

To better reflect the complexities of stakeholder dynamics, we suggest that the ASXCGC Principles and Recommendations include reference to "external stakeholders, both individually and collectively." This would acknowledge the varied situations where stakeholders may be at odds with each other or where hostility towards the company arises.

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)?

Our Response to Question 11

Yes, this will be a useful disclosure that will encourage better consideration of report verification.

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?

Our Response to Question 12

Yes, we believe this will lead to better considerations of auditor independence. We note some audit tenures in the marketplace seem excessive for an independent appointment and visibility of this excess is poor on current disclosures.

13. 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. 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?

Our Response to Question 13

This amendment is reasonable as the company itself will be in the best position to identify and disclose material risks in real time. The frequency of updates to the ASXCGC Principles and Recommendations does not lend itself to identifying the most prominent risk categories of the moment on an ongoing basis.

14. Recommendation 8.2: This proposed Recommendation reflects and simplifies existing commentary in the 4th Edition. Do you support this proposed Recommendation that non-executive directors not receive performance based remuneration or retirement benefits?

Our Response to Question 14

Yes, we support the proposed recommendation given we see performance-based remuneration as presenting a threat to non-executive directors independence and objectivity.

We also support the existing wording which clarifies that ordinary equity is an acceptable form of remuneration so that interests are aligned with other shareholders. We encourage non-executive directors to hold ordinary equity and would suggest the ASXCGC to also consider encouraging these shareholdings in future editions of the ASXCGC Principles and Recommendations.

15. Recommendation 8.3: Do you support the following proposed clawback Recommendations?

- a. Recommendation 8.3(a): remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration?
- b. Recommendation 8.3(b): disclosure of the use of those provisions (on a de-identified basis) during the reporting period?

Our Response to Question 15

Yes, we support the proposed recommendations. We view clawback as an important safeguard against poor behaviour, and disclosure of the use of these provisions will avoid perceptions that such provisions are toothless.

16. 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?

- a. Recommendation 9.3 (CEO and CFO declaration for financial statements)?
- b. Recommendation 9.4 (substantive security holder resolutions on a poll)?



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- c. Recommendation 9.5 (offering electronic communications to security holders)?
- d. Recommendation 9.7 (policy on hedging of equity-based remuneration)?

Our Response to Question 16

Yes, we support the proposed recommendations.

17. Should any new or amended Recommendations in the Consultation Draft apply differently to externally managed entities, compared to the manner proposed in The application of the Recommendations to externally managed listed entities?

Our Response to Question 17

We have nothing to add on this topic.

18. Do you support an effective date for the Fifth Edition of the first reporting period commencing on or after 1 July 2025?

Our Response to Question 18

Yes, the timing discussion in the background paper appears reasonable.

19. Do you wish to provide any other comments on the content of the Consultation Draft, including any other changes you would propose?

Our Response to Question 19

Director commitments: We suggest that "*Principle 2: Structure the board to be effective and add value*" would benefit from an additional recommendation regarding the disclosure of considerations related to other commitments of individual directors. A director's capacity and commitment can be compromised when accumulating significant workload from different public and non-public company roles. Therefore, a board should ensure that each director can dedicate the necessary time to fulfill their role effectively.

Assessing the risk of overcommitment for an individual director can be challenging for shareholders and other stakeholders due to the nuances of specific positions and individual circumstances.

We believe that the market would benefit from more consistent disclosure on: i) The other roles performed by individual directors, clearly distinguishing between public and non-public entities; ii) The board's processes and policies for evaluating a director's capacity and commitment.

Defining materiality of business relationships on director independence: We see inconsistency across the market as to what business relationships are considered material in impacting a directors independence. We suggest the ASXCGC Principles and



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Recommendations provide further guidance on the materiality of business relationships when considering director independence to narrow this inconsistency.

Board Tenure Policies: To facilitate better succession planning, we suggest the ASXCGC Principles and Recommendations encourage boards to develop and disclose policies that cover tenure limits, or tenure guidelines of non-executive directors.