Law Council
OF AUSTRALIA

Business Law Section

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Dior Loveridge
Senior Manager Policy & Strategy - Listings
ASX Limited
39 Martin Place
SYDNEY NSW 2000

By email: ListingsPolicy@asx.com.au

Dear Dior

ASX Corporate Governance Principles and Recommendations

1. Thank you for the invitation to comment on the revised draft of the fifth edition ASX Corporate Governance Principles and Recommendations, released by ASX Limited (**ASX**) on 21 July 2026 (**Consultation Draft**). These comments have been prepared by members of the Corporations Committee of the Business Law Section of the Law Council of Australia.

2. Overall, the Consultation Draft is an improvement on the fourth edition ASX CGPR, including in that it:

   - is broadly consistent with Australian corporate law, including the law of directors' duties;
   - removes some obvious areas of overlap with existing legislative obligations;
   - removes discussion of some matters that are not governance;
   - encourages more thoughtful and reflective engagement by listed entities (and those to whom disclosure in the corporate governance statement is directed) with the "if not, why not" approach, given there are situations in which following a particular recommendation would not be in the interests of the entity and its security holders; and
   - reduces the length of the commentary and the extent to which the commentary in previous editions has undermined the "if not, why not" approach.

3. The Consultation Draft does not depart significantly in substance from the current fourth edition. It does not seek to revisit the fundamental approach of earlier editions; nor does it reconsider, in any depth, which aspects of listed entity governance ought to be the subject of recommendations. It maintains the "top-down" approach to corporate accountability and oversight, rather than adopting a more dynamic, systems-based perspective on the relational nature of effective governance.[1]

[1] A more dynamic view recognises the respective and distinct roles of (and interplay between) the board, senior management, security holders and other stakeholders in contemporary corporate governance: see

We recognise that, after the failure of the ASX Corporate Governance Council to produce consensus on a fifth edition in 2024–25, ASX prefers incremental improvement over a more radical rethink.

4. However, we note the broader debate in corporate governance about the ongoing utility and relevance of these kinds of soft-law codes and disclosure frameworks for listed entities.[2] This includes where the recommendations they contain, first adopted many decades ago in quite different market conditions, are not necessarily supported by current evidence that they actually improve corporate behaviour or outcomes.

5. In our submission to the former ASX Corporate Governance Council in 2024, we recommended that the Council plan for a more comprehensive re-examination of the model before moving to a sixth edition. We make the same recommendation to ASX, and suggest that work on that project begin as soon as the fifth edition is concluded.

General observations

6. We make the following general observations about the Consultation Draft.

Role of the ASX CGPR

7. The decision to disband the ASX Corporate Governance Council and for ASX to assume direct responsibility (assisted by a small advisory group) for the content of the ASX CGPR changes their institutional character. The source of authority has shifted from multi-stakeholder consensus to guidance imposed by the market operator. While this is reasonable given ASX's role, it is appropriate for that change to be acknowledged on page 4, which discusses the "role of the Principles, Recommendations and Explanatory Materials in good corporate governance". For example, the first sentence could read "The **8 Principles** express ASX's understanding of the foundation for good corporate governance of listed entities".

8. Including a website with links to other corporate governance resources is useful, but it should not imply that entities are required or recommended to follow them (that is, it should not impliedly incorporate them by reference into the ASX CGPR).

If not, why not

9. The renewed, emphasis on "if not, why not" is helpful, but it may require some further reflection on the use of the word "should" in the Consultation Draft. It is appropriate that all listed entities "should" meet the high-level Principles—that is not controversial. As to whether an entity "should" do the things set out in the individual Recommendations, that depends on whether to do so is the best way for it to give effect to "the spirit and intent of the high-level Principles". So, it depends. But it is probably unhelpful to use the word "should" in the Explanatory Materials, and we suggest looking at this again and perhaps saying "should consider" instead.

P Hanrahan and T Bednall, "Independence of directors affiliated with substantial shareholders: Issues of law and corporate governance" (2015) *C&SLJ* 239 at 255.

[2] See eg B Cheffins and B Reddy, "Thirty Years and Done – Time to Abolish the UK Corporate Governance Code" (June 9, 2022). European Corporate Governance Institute - Law Working Paper No. 654/2022, University of Cambridge Faculty of Law Research Paper No. 13/2023, Available at SSRN: https://ssrn.com/abstract=4132617 or http://dx.doi.org/10.2139/ssrn.4132617

10. In this regard, we note the important observation by Commissioner Owen 2022 in the final report of the Perth Casino Royal Commission:

> *The aim of good corporate governance is to create and maintain a framework for accountable decision-making … Codes of conduct, guidelines and benchmarks are all directed towards creating a system of governance that is conducive to good decision-making. However, it is necessary to approach any 'best practice' statements with an eye to flexibility and an understanding that corporate governance is not something where one size fits all. Systems and practices should be adapted and modified to suit the particular circumstances of the company to be governed. Prescriptive or slavish adherence to codes, guidelines and benchmarks also carries with it the danger of developing or encouraging a tick-the-box approach to governance. Compliance with the letter of best practice statements should not be or become an end in itself. It is more important to focus on the quality of the conduct of the company that results from the system of corporate governance. Accordingly, periodic review of the actual performance of governance processes against benchmarks or indicators must be a key component of an effective corporate governance system.*[3]

11. While the Consultation Draft recognises the challenges posed in developing principles and recommendations for the broad range of ASX listed entities, and the consequent need for flexibility, many of the Recommendations seem better suited to larger entities in the top 500 by market capitalisation, rather than the those outside it. This is particularly so with the extensive recommendations relating to board committees. While the Consultation Draft's increased emphasis on the flexibility inherent in the "if not, why not" approach is welcome, it does not fully address the problem that exists with any system of defaults—it is easier to comply with the default than to depart from it. An entity departing from the default likely incurs additional direct and indirect cost– for example, an entity "in an exploration, development, start-up or transformation phase with limited cash reserves" mentioned on page 27 might need legal and other advice in explaining their decision to depart from Recommendation 8.3. The entity would need to justify its decision to security holders, analysts, proxy advisers, media and others who are more familiar with the default.

12. To the extent it is possible to provide guidance and support to smaller entities who, as a class, are likely to depart from a default, that might be helpful. The "if not, why not" approach is a bargain with two sides. The entity explains its departure from a recommendation; investors judge the explanation. The approach only functions if a well-explained departure can be accepted as good governance and not, without more, as prima facie a governance failure. The Consultation Draft expressly recognises this for the first time: page 5 states that a checklist approach "by either entities <u>or investors</u>" is unlikely to be consistent with the regime. We welcome that statement and encourage ASX to make it operative. At each recommendation where departure by a class is foreseeable and legitimate, the Explanatory Materials could identify the matters a departure explanation would usefully address, as the Explanatory Materials to Recommendation 8.3(a) already do. Drafted that way, the entity has a brief to write to; investors and their advisers have a standard to judge against and the direct and indirect costs of departing from a default are reduced.

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[3] Perth Casino Royal Commission, *Final Report* (March 2022) 885.

Directors' duties and the role of the board

13. The Consultation Draft discusses the legal duties of directors on page 4, but not those of other officers. Recent civil penalty proceedings against corporate officers by ASIC, including *ASIC v Bekier* [2026] FCA 196 mentioned in footnote 2, suggest that many governance failures in Australian companies are caused by breaches of duty by executives, rather than by directors. The responsibility of executives to ensure material issues are identified and appropriately escalated to the board is fundamental to the success of a top-down governance model like the ASX CGPR. It is part of an officer's legal duty of care, not just a principle of good governance to be alluded to in passing. We think the introductory remarks on page 4 should emphasise that the legal duties apply to all officers, not just directors, recognising the critical role that senior management play in the effective governance of listed entities.

14. As to the express reference to *Bekier,* we note aspects of the decision are on appeal. We suggest the ASX CGPR state governance principles without citing first-instance authority: citations in a code freeze the law at a moment the courts may move past. Given that the code has historically had a multi-year life, it is better not to anchor the principles to the fate of a pending appeal. If citations are retained, duty content is better attributed to settled authority, with *Bekier* noted as a recent illustration only.

15. We understand that the intention of ASX CGPR, despite its top-down approach, is not to turn the board into a "fourth-line" assurance function. It might be worth emphasising this in the introductory remarks about directors' duties on page 4. As we noted in our earlier submission to the ASX Corporate Governance Council, courts do consider the ASX CGPR in understanding the role of officers in listed companies and in determining what is "reasonable" for a person in the position of an officer in such a company. The board's role is oversight, not management, and it is not a guarantor of corporate compliance.

16. It may be worth the Consultation Draft explaining the interaction with the Australian Prudential Regulation Authority's prudential requirements related to the governance of listed ADIs and insurers.

Disclosures

17. The Consultation Draft requires the disclosure of "processes" in several places, including Recommendations 1.3(a), 1.4(a), 2.2, 3.1, 4.2, 7.3 and 9.1. As a general proposition, we are not convinced that this type of disclosure is particularly valuable. The board, not external readers of the corporate governance report, must judge what processes are appropriate for that particular entity to achieve the required outcomes. There is a risk that, by requiring the disclosure of board and other processes, entities will fall back on processes that are recognisable to readers of corporate governance reports, rather than those that are optimal for the individual entity. While the ASX CGPR could require that the entity have an appropriate process, there may be limited value (and indeed some real downside) in requiring the entity to disclose it.

18. Scaling back the coverage in the ASX CGPR of the "E and S" aspects of ESG will likely trigger a separate discussion in the community about how ESG information is communicated by all entities of significance, not just listed entities. We note the Productivity Commission is inquiring into mandatory non-financial corporate

disclosure across a range of areas, which likely will include a consideration of disclosure required by Listing Rule 4.10.3.

19. It is important that, if the ASX CGPR recommend structures and processes for listed entities that are not routinely adopted by unlisted entities of similar size and significance, those recommendations can be justified by the presence of public security holders on their registers (for example, by the information asymmetries and collective action problems faced by members of listed but not unlisted entities). The ASX CGPR should not have the effect of discouraging entities and their boards from accessing public markets. Similarly, where the ASX CGPR require additional disclosure (which is costly to produce and carries with it liability risk) over that expected from unlisted entities of similar size and significance—this should aim to provide public security holders with governance information that assists them to make decisions related to their security holdings and the exercise of their rights as security holders. If information is already required by law to be provided to members (for example, in a notice of general meeting or in a remuneration report) what is the benefit of requiring it in the corporate governance statement also?

Specific suggestions

20. These comments relate to specific Principles and Recommendations in the Consultation Draft.

Recommendation 2.4(b)

21. In the fourth edition, a director is treated as independent if they are free of any interest, position or relationship that might influence their capacity to exercise independent judgement *in a material respect*. The draft retains the qualifier in the glossary definition of "independent director" on page 35 but omits it from the Recommendation and Explanatory Materials creating two different tests.

Recommendation 2.6(b)

22. Corporate law requires that members be given sufficient information in a notice of meeting to ensure they can exercise their vote (or instruct their proxy) in an informed way. It is not clear what this recommendation adds.

Principle 3

23. The reference in this Principle to a culture of acting "responsibly" is very general. It would be helpful, in the explanatory materials for this Principle, to say that this includes a culture of acting in accordance with generally accepted international norms of responsible business behaviour. Examples of such norms include the United Nations Guiding Principles on Human Rights (2011), the United Nations Global Compact (2015) and, for multinational enterprises, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (introduced in 1976, revised 2023). We understand that ASX prefers not to incorporate other instruments or guidelines into the ASX CGPR by express reference, but we think a fuller description of what "responsibly" includes is helpful, including in tethering Recommendations 3.2 and 3.3 to accepted norms.

Recommendation 3.1

24. Directors—and all other officers—are required to exercise their powers and discharge their duties in good faith in the best interests of the entity and for a proper purpose. In a solvent business corporation, in practice this means doing that which the officer rationally believes is in the best interests of the members as a general body. Members are not stakeholders. However, it is appropriate for officers to consider the impact of corporate actions on stakeholders because maintaining good relationships with stakeholders is an important factor in the corporation's success.

25. An accurate statement of the legal position, therefore, is that each officer (rather than "the board") of a listed entity must exercise their powers and duties as an officer in the best interest of the entity, which is to be discerned from the interests of its members as a general body. This cannot be a Recommendation from which an entity departs with a "why not" explanation—it is simply a statement of the law.[4]

26. If the intention in Recommendation 3.1 is to capture the importance of having a meaningful process that allows the board to identify and take into consideration material concerns of stakeholders, then it might be better to narrow the drafting to reflect that.

27. One option is to alter the first dot point in "Why this Principle is important" to say: "Directors and other officers have a legal responsibility to act in the best interests of the entity, reflecting the interests of its members as a general body."[5] The Recommendation could then be: "The board should have proper processes for engaging with stakeholders and have regard to the implications of corporate decisions and actions for stakeholders."

Recommendation 4.1(a)

28. It is not the role of the audit committee to "independently verify" the entity's periodic corporate reporting—its role is to provide independent oversight of the process. The Recommendation could instead read "... with a charter and responsibilities to provide independent oversight of the processes used to verify and safeguard the integrity of its periodic corporate reporting ...", which is how Principle 4 itself describes the board's role.

Recommendation 8.2

29. Remuneration structures adopted before the ASX CGPR takes effect may not permit downward adjustment after award, payment or vesting; existing grant terms and executive contracts cannot be amended unilaterally, as the words "subject to applicable law" acknowledge. The Explanatory Materials should say that an explanation on the following lines is a legitimate response: new grants will carry an adjustment mechanism, while legacy grants run off on their existing terms. Without

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[4] The difficulty compounds for externally managed listed entities. A recommendation that the board act in the best interests of "the entity", applied to the responsible entity in its corporate capacity, points the duty at the wrong beneficiary. No single-sentence restatement can be accurate across companies, registered schemes and corporate collective investment vehicles at once.

[5] Retaining the materials currently cited in footnote 7 of the Consultation Draft.

this, entities with pre-2028 grants report a departure they cannot cure, and the first reporting season produces a wave of technically deficient statements.

30. The Explanatory Materials could include: “Remuneration structures adopted before this edition took effect may not permit downward adjustment. In that case, an explanation that new grants will include an adjustment mechanism while existing grants run off on their terms is consistent with this Recommendation.”

Reporting machinery

31. The general consensus seems to be that Appendix 4G can be discontinued rather than simplified. The consultation paper records stakeholder feedback that the form encourages a box-ticking approach and notes that no peer exchange requires a listed entity to lodge two documents when reporting against its governance code. These are good reasons to remove the form, not shorten it.

32. The Appendix 4G’s locator function is better performed inside the corporate governance statement itself: the statement can indicate, for each Recommendation, whether it is followed and where the relevant disclosure is made. The verification function is an internal compliance exercise; entities that find a checklist useful will keep one, and discontinuing the lodgement removes only the filing that produces the box-ticking signal.

33. We support the retirement of Guidance Note 9, subject to one request. It contained the only extended guidance on the content of a “why not” disclosure and the new Explanatory Materials are thinner on that subject than the guidance being retired. We ask ASX to indicate where each retired function now resides and to house the explanation-quality guidance in the Explanatory Materials at the recommendations where departures are most likely (see our observation above on “if not, why not”). On the proposed webpage, consistent with our observation above, materials published there should carry dated version control and an express statement that they create no reporting expectation. Finally, Annexure B notes Guidance Note 8 will be updated “in due course” for the change to the continuous disclosure liability standard; as the operating manual for Listing Rule 3.1, it should be updated with the fifth edition package, not after it.

Further contact

34. The Committee would be pleased to discuss any aspect of this submission.

35. Please contact Philippa Stone, Chair of the Committee [redacted] if you would like to discuss this submission with representatives of the Committee.

Yours sincerely



Adrian Varrasso
Chair, Business Law Section