

8 May 2024

ASX Corporate Governance Council Secretariat  
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Via email: [ASXCorporate.GovernanceCouncil@asx.com.au](mailto:ASXCorporate.GovernanceCouncil@asx.com.au)

Dear ASX Corporate Governance Council Secretariat,

### **ASX Corporate Governance Principles & Recommendations 5<sup>th</sup> Edition Consultation Draft**

Thank you for the opportunity to provide a submission in response to the Consultation Draft of the proposed 5<sup>th</sup> edition of the ASX Corporate Governance Principles and Recommendations (**Principles**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 52,000 reflects the diversity of Australia's director community, comprised of directors of not-for-profits, large and small and medium enterprises and the government sector.

The AICD is a long-standing and active member of the ASX Corporate Governance Council (**Council**). In light of significant domestic and global developments in governance, as well as evolving stakeholder expectations, **the AICD supports the Council's decision to refresh and update the Principles.**

The Principles are an important component of Australia's corporate governance framework, providing flexible, industry-led guidance on what constitutes good governance for listed entities. More broadly, the principles serve as a high-watermark for governance practice for all Australian organisations.

At the same time, the Council and Principles acknowledge the governance practices that a listed entity chooses to adopt are fundamentally a matter for the board, for which its directors will be held accountable.

### **Executive Summary**

The AICD's response has been informed by extensive consultation with experienced ASX listed company directors, listed entities, experts and stakeholders, noting a range of perspectives on the Consultation Draft. Of note:

- Member feedback has been strongest in relation to the overall level of detail and prescription with the Principles, and proposed changes to board skills disclosures; and
- Mixed feedback has been received in relation to the proposed recommendations for de-identified disclosure of the actions taken in response to material breaches of the code of conduct and disclosure of broader diversity characteristics in the board's membership, which our response, through balanced consideration, seeks to address via a number of suggested drafting changes.

To provide further context for the Council on the strength and range of member feedback, we enclose as **Attachment B** a summary of member views on key issues.

Our submission focuses on the need to ensure the Principles remain focused on core and contemporary governance issues while avoiding prescription and retaining appropriate flexibility.

**Attachment A** sets out responses to consultation questions.

Our key points are as follows:

- **Reduce prescription:** The AICD cautions against the Principles becoming overly detailed or prescriptive, noting their application to all listed entities and the need to continue to attract entities to trade on publicly listed markets. Members have concerns that there is a risk of shifting the Principles toward a rules-based, quasi-regulatory model in application. It is critical that the “if not, why not” foundation of the Principles be strongly emphasised and the 5<sup>th</sup> Edition retain a principles-based model that encourages entities to adopt practices appropriate for their context;
- **Role of the Recommendations and Commentary:** Members have noted that there can be a market expectation of strict adherence to the Principles, at least for larger entities, as well as a perceived lack of differentiation between a Recommendation and Commentary. The AICD recommends that the Council reinforce the hierarchy of the Recommendations (against which “if not, why not” reporting applies) and Commentary (to support and guide listed entities in their consideration of the Principles, and against which reporting is not required);
- **Board skills:** The AICD has concerns about revisions to Recommendation 2.2 and Commentary to the extent they create an expectation for entities to disclose assessments of individual director skills. Members have strong concerns that this would have unintended consequences, including detracting from the board’s collective accountability. The AICD does not support Commentary that it is “better practice” to disclose skills held by individual directors. Disclosures under proposed Recommendation 2.2(a) and 2.2(b) should remain at the collective board level. We also suggest that the Council consider whether Recommendation 2.2(b) is better positioned as Commentary;
- **Board diversity:** The AICD supports the measurable objective for board gender diversity for ASX 300 entities of at least 40 per cent women / 40 per cent men / up to 20 per cent any gender **(40/40/20)** within a period specified by the entity. We note that there will be practical challenges for smaller boards and some sectors in meeting a 40/40/20 target and recommend that this be acknowledged in Commentary as a basis for “if not, why not” disclosure. We also support retaining a “minimum” expectation of 30% of any gender in the new Recommendation;
- **Code of conduct:** The AICD recommends that Recommendation 3.2(c) be more clearly confined to circumstances where only full de-identification is possible. This includes acknowledging that such disclosure remains ultimately a matter for the board to consider whether it would enhance the entity’s efforts to foster an appropriate culture, taking into account relevant circumstances and legal obligations. There will also be challenges for entities with a smaller headcount where de-identified disclosures will not always be practical. The AICD has provided drafting suggestions to reflect these considerations. We also encourage the Council to consider whether disclosure of code of conduct breaches on a de-identified basis should be encouraged as a better practice consideration for larger listed entities in the Commentary, rather than as a Recommendation;
- **Stakeholders:** The AICD supports the Recommendation for entities to have regard to the interests of key stakeholders, including having processes for engagement and for reporting material issues to the board. We recommend that the Council also consider providing greater recognition of the central role and interests of security holders in this section and throughout the Principles;

- **Management of risk:** The AICD supports the Recommendation for entities to disclose their 'material risks', rather than focus on specific risks or specific categories of risks. It is critical that entities can rely on disclosures made in their operating and financial review of the directors' report or sustainability report to limit the reproduction of disclosures and associated litigation risk;
- **Remuneration:** The AICD supports the Recommendation that non-executive directors should not receive performance-based remuneration, subject to clarification around the provision of equity being granted in lieu of directors' fees. We also support the recommendation for entities to have remuneration structures that can limit performance-based remuneration outcomes provided disclosure is confined to 'key management personnel'; and
- **Commencement:** In light of the range of new compliance obligations Australian entities are currently grappling with, including impending mandatory climate disclosure, the AICD recommends that more time be allowed for adoption of the 5<sup>th</sup> Edition. In our view, the commencement date should be deferred such that the first reporting period commences on or after 31 December 2025, with the option for entities to begin reporting earlier if they wish.

Our comments are outlined in further detail below.

We thank the Council for the opportunity to consult with our members and stakeholders on the Consultation Draft, and look forward to contributing to the Council's further review in response to submissions.

### Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au), or Laura Bacon, Senior Policy Adviser at [lbacon@aicd.com.au](mailto:lbacon@aicd.com.au).

Yours sincerely,



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General Manager, Education & Policy Leadership

# Attachment A: Responses to consultation questions

## 1. General comments

The AICD provides the following general observations on the Consultation Draft, including recommendations to preserve the Principles' intended application.

### a) Level of detail and prescription

The AICD considers the fundamental role of the Principles is to provide a sensible and practical framework to assist listed entities with their governance practices. This framework should encourage entities to consider what is appropriate and relevant for their specific circumstances.

We have concerns however that, notwithstanding the "if not, why not" approach, the proposed level of detail and prescription in the Recommendations and Commentary risks detracting from providing flexible, principles-based guidance. The AICD has received member feedback that drafting in areas of the Commentary is overly granular and goes beyond providing guidance or examples, to setting a higher bar for action suggesting that entities *should* adopt certain additional practices or disclosures.

Smaller, resource-constrained ASX listed entities will necessarily report against the Principles differently to their larger peers. The more detailed the Principles are, the more difficult it will be for smaller entities to adopt recommended practices, and to do so meaningfully. We are concerned that this may encourage a shift to a "tick-a-box" compliance approach, compared to the benefits of a principles-based model that encourages entities to engage meaningfully with the Principles and adopt practices appropriate for their context.

The AICD recommends the text of the Consultation Draft be closely reviewed to determine where detail and prescription can be removed. In our view, there is opportunity for the Recommendations to be tightened so that they remain principles-based, while reducing the length, detail and prescription in the Commentary. We make specific suggestions as part of our responses below.

### b) The role of the Recommendations and Commentary

Feedback from members has noted that, in some cases, especially for larger entities, users of corporate reporting treat the Commentary as if it were a Recommendation (or in other words, subject to the "if not, why not" regime). This has led to concern by preparers of reports that they will be 'marked down' on governance practice if they do not 'comply' with the Commentary's suggestions or examples. This is problematic when viewed together with the current level of detail in the Consultation Draft, as discussed above.

To counteract this expectation, the AICD considers there is an opportunity to more explicitly in the preface of the Principles:

- emphasise the role of the Commentary as supplementary, explanatory guidance, relative to the role of the Recommendations as the Council's agreed governance guidelines;
- highlight that the "if not, why not" reporting model applies only to the Recommendations and that there is no expectation for entities to explain their non-conformity to suggested practices or examples in the Commentary; and
- remind users and preparers of corporate governance disclosures that there will necessarily be differing approaches amongst entities in their adoption of the Recommendations, dependent on factors such as their size, resources, strategic and operational context. It is the prerogative of the

board to determine appropriate governance practices, with those decisions being subject to the usual accountability to shareholders.

The Council may wish to consider whether this clarification would be aided by separating the Recommendations and Commentary. This could, for example, involve separating the Recommendations and Commentary into two separate documents, or within the one document with the Commentary situated in an appendix.

### **c) Implementation**

Australian listed entities are operating in an increasingly complex regulatory environment with a multitude of new compliance obligations, technology and sustainability issues on board agendas. Organisations are facing pressure in preparing for recent and planned reforms in areas of mandatory climate reporting, cyber security, privacy laws and industrial relations.

The AICD notes that the 5<sup>th</sup> Edition Principles will not be finalised until late 2024. Should a commencement date of 1 July 2025 be set, this may leave entities with a compressed time period to prepare updated disclosures and corporate governance statements amongst competing priorities.

The AICD considers that a broader window for adoption of the 5<sup>th</sup> edition should be provided. We recommend that the effective date be deferred such that the first reporting period commences on or after 31 December 2025. Entities that wish to adopt the 5<sup>th</sup> edition may still do so voluntarily.

### **d) Reference to security holders**

The AICD endorses the Consultation Draft's focus on stakeholders, material risk management, board and workforce diversity, organisational culture and oversight of audit and assurance. These areas are increasingly important to contemporary governance and warrant a strong focus by boards.

However, we consider there is an opportunity to give greater prominence to the role and value of security holders within the Principles. We make specific recommendations for how this may be addressed as part of our responses to the consultation questions below.

## **2. Board skills**

### **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?**

#### **a) Recommendation 2.2(a) – disclosure of current board skills and skills that the board is looking for**

The AICD has significant concerns about the proposed revisions to Recommendation 2.2 insofar as they could be seen as creating an expectation of disclosure of listed entity assessments of individual director skills. For the reasons discussed below (see subsection c), the AICD does not support the Principles creating the expectation that all listed entities disclose their assessment of current or prospective skills at held an individual director level.

The AICD supports the proposed changes to Recommendation 2.2(a) that entities disclose a board skills matrix setting out the mix of skills that the board currently has and is looking to achieve in its membership, provided such disclosure remains at the collective board-level.

It is critical that the Commentary retain clear guidance that a board skills matrix disclosure has no prescribed format, skills may be reported collectively across the board as a whole, and entities may exclude disclosure of skills being sought where it is considered to be commercially sensitive, for example – where a particular skill may reveal a yet to be announced venture or activity.

#### **b) Recommendation 2.2(b) – disclosure of the entity’s process for assessing that the relevant skills and experience are held by its directors**

The AICD supports the intent of strengthening market confidence in board skills assessment processes. We offer qualified support for Recommendation 2.2(b) for entities to disclose the process for how they assess that the relevant skills and experience are held by its directors, subject (as above) to such disclosure pertaining to the board as a whole.

Commentary should make clear that there is no prescribed format for this disclosure, that disclosure is at the level of the board as a whole, and that entities retain discretion on their assessment approach, noting the subjectivity and individual circumstances inherent in this exercise.

We note feedback from some members that Recommendation 2.2(b) could add complexity and prescription as an “if not why not” disclosure applying to all listed entities. Disclosures may be of limited value as an addition to existing practices (such as Annual General Meetings, director elections and shareholder engagement). We suggest that the Council give consideration to whether Recommendation 2.2(b) is better positioned as Commentary (strengthening the existing guidance in the 4th Edition).

#### **c) Commentary suggestion for individual skills disclosure**

The AICD has heard significant concerns from members about the supporting Commentary to Recommendation 2.2 stating that “better practice is to include information on the skills of individual directors”, on the basis that this could:

- undermine the board’s collective decision-making responsibility and lead to a more binary view (both externally and from a self-assessment perspective) of whether certain skills are held by individuals. An entity’s focus should instead be on ensuring an appropriate balance of skills and experience collectively on a board, depending on the sector and specific circumstances of the listed entity;
- be interpreted as suggesting that boards must be comprised of directors representing specific deep subject matter expertise, rather than collective skills, experience and ability relevant to the listed entity and its specific circumstances and strategy (including recognising where there may be a need to source independent expertise and to engage in ongoing director education);
- potentially encourage stakeholders to adopt simplistic ranking of director skills based on individual skills disclosures independent of the assessment criteria applied to specific circumstances;
- detract from broader attributes and experience that are taken into account in board skills assessments that are not necessarily tangible – for example, an innovation mindset or strong interpersonal skills. Members have also noted that the benefit of insights and experience from other non-executive director roles is often given insufficient weight by some stakeholders; and
- risk individual directors being targeted in the event of a governance failure or the breach of the entity’s regulatory compliance obligation (e.g. a cyber security incident) where those individuals are assessed to hold a high level of skill in a nominated category.

It is also difficult to characterise individual skills disclosure as “better practice” when the practice itself is very limited. Analysis undertaken for the AICD, as at April 2024, revealed that just 7% of ASX 300 entities currently disclose director skills on an individual basis.<sup>1</sup>

We strongly recommend the reference to “better practice” including information on the skills of individual directors be excluded from the supporting Commentary to Recommendation 2.2.

### 3. Diversity

**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?**

The AICD is committed to gender diversity as demonstrated by our decade-long advocacy, with the 30% Club Australia and other stakeholders, to increase the representation of women on Australian boards.

The AICD supports the proposed increase in a measurable objective for board gender diversity for ASX 300 entities of at least 40 per cent women / 40 per cent men / up to 20 per cent any gender within a period specified by the entity. If introduced, the Recommendation would support continued momentum towards more gender balanced boards. In our consultation with members and stakeholders, there was broad support for the Principles to promote gender balanced boards.

However, we note that there is still significant headroom for many ASX 300 entities in meeting a 30% target and encourage the Council to give consideration to maintaining a ‘minimum’ expectation for this edition. Recent analysis undertaken for the AICD, as at April 2024, indicates that:<sup>2</sup>

- 37% of directors on ASX 300 boards are women;
- 42% of ASX 300 entities currently meet a 40/40/20 target on their board;
- 71% of ASX 300 entities currently have at least 30% women on their board;
- 10% of ASX 300 entities have only one woman on their board; and
- 3% of ASX 300 entities have no women on their board.

Significantly, members have noted that there will be practical challenges with achieving a gender balanced board where there are fewer board members. A 40/40/20 target will be more difficult to achieve for entities with smaller boards comprised of 6 members or 4 members and less. Analysis for the AICD reveals that 17% of the ASX 300 (50 entities) fall within this category of 6 members or 4 members and less, with only 18 of those 50 companies currently meeting a 40/40/20 target.

The AICD endorses the recommendation of the 30% Club Australia that Recommendation 2.3 should retain a 30% gender diversity target as a floor together with a goal of a 40/40/20 target, for example:

*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 its board should be to have a gender balanced board (with not less than 30% of its directors of each gender and the goal of at least 40% women/at least 40% men /up to 20% any gender within a specified period)” [underlined text added].*

<sup>1</sup> [OpenDirector](#) analysis as at 14 April 2024.

<sup>2</sup> [OpenDirector](#) analysis as at 14 April 2024. These results include both executive and non-executive directors.

This formulation would provide flexibility for those entities unable to meet a 40/40/20 target due to board size, while also setting an expectation for a minimum of 30% women on boards across the ASX 300.

In addition, we strongly recommend that the Commentary acknowledge:

- the practical challenges for smaller boards of meeting a 40/40/20 target; and
- timeframes and strategies to achieve measurable objectives remain at the discretion of the board.

**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?**

The AICD has received mixed member feedback on the proposed Recommendation 2.3(c) for entities to disclose diversity characteristics in addition to gender which are being considered for the board's membership.

Some members have expressed concern about the benefit of prospective disclosure to the market and perceived complexities. Members have also observed that it is unclear what this disclosure is seeking to achieve, relative to disclosures in other jurisdictions which focus more directly on current board representation.

By contrast, comply or explain listing rules in the UK require that at least one member of the board should be from an ethnic minority background and in the US, NASDAQ has introduced phased targets for different cohorts to have one member who is an underrepresented minority (currently subject to legal challenge).

The AICD considers board diversity to be a contributor to good governance outcomes. While gender diversity has improved significantly over the past decade, other measures of diversity remain low. Recent analysis indicates that only 9% of ASX 300 board seats are held by individuals from a culturally diverse background, 1% identify as LGBTIQ+, 0.2% are First Nations and 0% with disability.<sup>3</sup>

We consider there is an opportunity for the Commentary to suggest practices that expand on Recommendation 2.3(c), noting that entities may wish to provide further information about other diversity characteristics *currently* in the board's membership, as applicable. For example, where board members disclose themselves within a broader category of diversity such as, cultural and linguistic diversity, LGBTIQ+, First Nations, disability or age.

**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?**

The AICD supports the proposed changes to Recommendation 3.4. In particular, we support:

<sup>3</sup> Watermark Search International and Governance Institute of Australia: 2024 Board Diversity Index, available [here](#).



- the reference in Recommendation 3.4(b) to achieving gender diversity in the senior executive team as part of setting measurable objectives for an entity's workforce. This is critical to support the advancement of women in the leadership pipeline; and
- Recommendation 3.4(c) for entities to disclose the effectiveness of its diversity and inclusion practices.

We make the following observations and suggestions in respect of the proposed Commentary:

- The Commentary suggests that an entity can demonstrate the effectiveness of its diversity and inclusion practices by providing information on the "prevalence of and measures taken to address sex-based harassment and discrimination". We agree with this example; it is consistent with an entity's positive duty to prevent sexual harassment and a broader range of harmful conduct in the workplace. The AICD has developed a *Director's Guide to the Positive Duty* to support directors oversee their entity's obligations, including how to move toward greater transparency around prevalence and organisational response;<sup>4</sup>

To avoid duplication with other reporting requirements, however, we suggest the Commentary clarify that entities may reference information reported annually to the Workplace Gender Equality Agency (**WGEA**), under recently expanded reporting requirements, on the prevalence, prevention and response to workplace sexual harassment;<sup>5</sup>

- Other forms of diversity beyond gender should be referenced in the Commentary - for example, cultural and linguistic diversity, LGBTQIQ+, First Nations, disability and age; and
- Further examples of how an entity can demonstrate the effectiveness of its diversity and inclusion practices should be provided in the Commentary. Chief Executive Women (**CEW**) has developed a number of resources on workplace diversity and inclusion practices, including notably on promoting cultural diversity within leadership teams and broader workforce.<sup>6</sup>

We also consider that there is an opportunity to review the Commentary in this section to reduce detail and prescription.

#### 4. Independence of directors

**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)?**

The AICD supports the proposed change to Box 2.4 'factors relevant to assessing the independence of directors' to replace "substantial holder" with "10% holder" which is aligned to the definition of 'substantial (10%+) holder' in ASX Listing Rule 19.12.

#### 5. Corporate conduct and culture

**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.**

<sup>4</sup> AICD's Director's Guide to the Positive Duty, available [here](#).

<sup>5</sup> See changes to WGEA's reporting requirements [here](#).

<sup>6</sup> See CEW Report: Unlocking Leadership – Conversations on Gender and Race in Corporate Australia, available [here](#).

**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?**

As a matter of good governance, the AICD supports accountability and transparency measures that foster a 'speak up culture' within the organisation. The board plays a pivotal role in overseeing, assessing and influencing corporate culture. However, there remains relatively limited public disclosure on culture and there is a lack of market consensus as to the most valuable metrics to report against.

The AICD has received mixed feedback from members in relation to Recommendation 3.2(c) for entities to disclose on a de-identified basis the outcomes of actions taken by the entity in response to material breaches of its code of conduct.

While current practice is limited, members from entities that have disclosed actions taken in response to code of conduct breaches on an aggregate basis have cited a positive impact on organisational culture. The increased transparency has sent important signals to their workforce and interested investors, while highlighting the board's active oversight of organisational culture and conduct.

On the other hand, we have also heard significant privacy concerns in relation to the practicalities of disclosing de-identified outcomes and actions taken. Members note that individuals may still be identified on the basis of the disclosure, particularly within entities with a smaller employee headcount, and thereby heightening litigation risk.

Although the Commentary appropriately recognises that disclosure may be excluded to the extent it relates to actions which are not yet finalised or cannot be appropriately de-identified, the AICD considers this clarification should be significantly more explicit in the Recommendation itself.

We recommend that the Recommendation 3.2(c) be amended to read as follows:

*"A listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly, including by considering whether this would be enhanced by disclosing the outcomes during the last reporting period of actions taken by the entity in response to material breaches of the code of conduct, where they are able to be de-identified" [underlined text added].*

Alternatively, the AICD encourages the Council to consider whether disclosure of code of conduct breaches on a de-identified basis should be encouraged as a better practice consideration for entities in the Commentary, particularly for larger listed entities, rather than as a Recommendation against which "if not, why not" reporting is expected.

We also recommend that the Commentary acknowledge that:

- disclosure of outcomes and actions taken in response to breaches of the code of conduct is just one amongst many levers entities have to foster greater accountability and transparency around corporate culture;
- disclosure must ultimately remain at the discretion of entities taking into account all relevant circumstances and legal obligations; and
- there will be challenges for entities with a smaller employee headcount and providing de-identified disclosures will not always be practical.

## 6. Stakeholder relationships

### 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?

The AICD supports the proposed Recommendation 3.3 for entities to 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.

As referenced in the Consultation Draft, the AICD has over recent years sought to support effective stakeholder governance in Australia through a number of director resources, including: a commissioned senior counsel opinion; AICD practice statement on directors' 'best interests' duty; and guidance on elevating stakeholder voices to the boardroom.<sup>7</sup>

Stakeholder governance involves identifying, engaging with and understanding stakeholder perspectives on key issues, and reflecting on how these perspectives should be addressed in decision-making. High profile governance failings over recent years have demonstrated the community scrutiny that follows when decisions are disconnected from stakeholder interests. If done well, however, stakeholder engagement can strengthen an organisation and promote its long-term success, for the benefit of security holders and stakeholders alike.

It is appropriate, in our view, that:

- there is no prescribed format for stakeholder engagement under this Recommendation. A board's approach will be tailored depending on the purpose, size and nature of the organisation, and type of stakeholders involved;
- there is no specific requirement for disclosure of entities' stakeholder engagement under this Recommendation. Entities can and do already communicate their stakeholder engagement and impact in an integrated way via their annual report, sustainability report and other forms of corporate responsibility reporting; and
- specific reference is made to Aboriginal and Torres Strait Islander stakeholders to acknowledge their potential roles and perspectives in the Australian context.

### 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.”**

In feedback to the AICD, members have raised concerns that the Consultation Draft does not include sufficient reference to the role and interests of an entity's security holders.

The proposed Commentary notes that security holders are the subject of Principle 6 and are not intended to be the subject of Recommendation 3.3. While we agree with this approach, we consider there is an opportunity to clarify the centrality of security holders' interests more explicitly in the Commentary to Recommendation 3.3 by reference to key principles reflected in the Bret Walker SC legal opinion, commissioned by the AICD, on directors' 'best interests' duty, along with the associated AICD practice statement.

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<sup>7</sup> [Bret Walker legal opinion](#) (AICD commissioned) and [AICD practice statement](#) on directors' best interests duty; [AICD guide on elevating stakeholder voices to the board](#).

We recommend that the Commentary reference that:

- directors' have a duty to act in good faith and the best interests of the corporation under section 181 of the *Corporations Act 2001 (Cth)* (**Corporations Act**);
- this duty requires directors to consider what is in the best interests of security holders, as a whole;
- the board has considerable discretion to identify the best interests of the company (including over what time horizons those interests are to be assessed and the precise nature of interests that are to be advanced), taking into account relevant facts and circumstances; and
- while security holders interests are central, directors can, and should, also consider a range of stakeholder interests - doing so is often necessary to protect an organisation's reputation and ensure its sustainability over the long-term.

To avoid any suggestion that directors owe a legal duty to stakeholders, as opposed to considering them as part of their best interest duty, it may be prudent to replace reference to "stakeholder interests" with "stakeholder perspectives".

## 7. 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)?**

The AICD supports expanding existing Recommendation 4.2 for entities to disclose the process used to verify the integrity of *all* periodic corporate reports, including the extent to which a report has been the subject of assurance. Beyond the statutory audit, it is important that entities are able to demonstrate to shareholders and other users of corporate reports that such disclosures are provided on the basis of robust and reliable internal and external assurance processes, as applicable.

While the Commentary notes what reports may be included as an entity's 'periodic corporate reports', the AICD considers that the Commentary or a footnote should clarify explicitly that 'reports to regulators' are not considered to be 'periodic corporate reports' for the purposes of Recommendation 4.2.

### **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?**

The AICD supports the new Recommendation 4.3 for entities to disclose the tenure of its auditor, when the engagement was last comprehensively reviewed and the outcomes from that review. As noted in the AICD and Auditing and Assurance Standards Board (**AUASB**) guide for audit committees, *Periodic Comprehensive Review of the External Auditor*, we consider that investor and stakeholder confidence can be enhanced by transparency around the process in place to assess the quality of an entity's auditor.

We note that where an entity has undertaken a comprehensive review, the nature and timing of disclosure of the outcomes of that review will depend on the circumstances. For example, if the board's decision is to put the audit out to tender, it may be appropriate to disclose the comprehensive review only once the tendering process is complete. The AICD considers that the Commentary should clarify that disclosure of outcomes may be excluded where they are not yet finalised or where disclosure could prejudice the outcomes of the review process.

## 8. Management of risk

**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?**

The AICD supports the proposed changes to Recommendation 7.4 for entities to disclose their 'material risks' (including material environmental, social and governance risks), rather than focus on specific risks or specific categories of risks. This re-formulation will provide entities discretion to consider the range of risks relevant to their operations which may, in some cases, include both financial and non-financial risks.

We support, in particular, the clarification proposed in the Commentary that:

- information may be omitted to the extent that it is likely to unreasonably prejudice the entity - for example, by giving a competitor an advantage or by impacting the effectiveness of cyber risk management;
- a sustainability report is not expected when reporting under this Recommendation; and
- an entity may satisfy this Recommendation with a statement that includes references to disclosures in its operating and financial review (**OFR**) of the directors' report and a sustainability report or an integrated report, where applicable.

### Sustainability reporting

In the context of sustainability reporting for entities captured by Australia's incoming mandatory climate reporting regime, it is critical that entities are able to satisfy Recommendation 7.4 by reference to, not reproduction of, disclosures made in compliance with the Corporations Act and (yet to be finalised) Sustainability Reporting Standards.

At the time of writing, the Government's climate reporting bill introduced to Parliament provides only narrow liability relief for a statement of a climate-related financial disclosure made originally in the entity's mandated sustainability report. That is, a statement (where any differences are limited to updates or corrections to the original sustainability report statement) will only be a protected statement and subject to a three-year regulator only enforcement period, where it is required by law.

The AICD has encouraged the Government to apply the modified liability relief to protected statements replicated outside the mandated sustainability report.<sup>8</sup> However, unless the bill is amended to that effect, it remains the case that entities will in practice likely limit their climate-related financial disclosures to the mandated sustainability report.

The AICD strongly encourages the retention of the Commentary's proposed clarification that an entity may satisfy Recommendation 7.4 by reference to its sustainability report disclosure.

## 9. Remuneration

**14. Recommendation 8.2: This proposed Recommendation reflects and simplifies existing commentary in the 4th Edition.**

<sup>8</sup> A copy of the AICD's submission to the Senate Inquiry into the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* is available [here](#).

**Do you support this proposed Recommendation that non-executive directors not receive performance-based remuneration or retirement benefits?**

The AICD supports the simplification and revised formulation of Recommendation 8.2 that non-executive directors should not receive performance-based remuneration or retirement benefits.

We recommend however that it be clarified within the Recommendation that retirement benefits provided to a non-executive director by an entity that are required to meet compliance obligations (for example, superannuation) are acceptable:

*“A listed entity should not give performance-based remuneration or retirement benefits (other than those required to meet compliance obligations) to non-executive directors”  
[underlined text added].*

We also note that it is common for smaller, cash-lean listed entities to grant equity to non-executive directors, in the form of shares or options, in lieu of director's fees. We recommend that the Commentary reflect this reality and recognise that it is an acceptable practice.

**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?**

Use of clawback

The AICD in-principle supports Recommendation 8.3(a) for entities to have remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration.

However, members have noted practical challenges with using a clawback mechanism, particularly in the case of departed employees, which invariably attracts protracted legal proceedings and significant costs for the entity.

While clawback is required as a part of remuneration frameworks of APRA-regulated entities under APRA Prudential Standard CPS 511, members have also queried the rationale for intervening in the remuneration design of ASX listed entities more broadly, particularly smaller entities, when there are other variable remuneration adjustment tools that may be utilised.

Accordingly, recommend that the specific reference to ‘clawback’ in Recommendation 8.3(a) be removed and the recommendation simplified to:

*“A listed entity should have remuneration structures which can limit performance-based remuneration outcomes of its senior executives after award, payment or vesting”.*

The Commentary could provide examples of remuneration adjustment tools that may be used by entities, including in-period adjustments, malus and clawback.

## Disclosure

The AICD supports Recommendation 8.3(b) for entities to disclose on a de-identified basis the use of those provisions during the reporting period, provided the disclosure is confined to 'key management personnel' (KMP).

Similar concerns have been raised as that with Recommendation 3.2(c) (discussed above) that disclosure of remuneration adjustments made to the performance-based remuneration of senior executives more broadly will result in individuals being identified, particularly within entities with a smaller employee headcount. By contrast, there is a substantial body of existing regulation for disclosure of KMP remuneration, including transparency around the impact of adjustments to variable pay.

We recommend that Recommendation 8.3(b) include a specific reference to KMP:

*"A listed entity should disclose (on a de-identified basis) the use of those provisions in relation to its key management personnel during the reporting period" [underlined text added].*

## 10. Reduce regulatory overlap

- 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)?**

The AICD supports the deletion of the bulk of aforementioned 4<sup>th</sup> edition Recommendations to reduce duplication with existing laws and regulatory requirements.

However, we recommend that Recommendation 4.2, for boards to receive a declaration from the CEO and CFO before approving the entity's financial statements for a financial period, be retained in the 5<sup>th</sup> Edition on the basis that the Recommendation is not wholly duplicative, but rather broader in application than section 295A of the Corporations Act.

Section 295A of the Corporations Act requires a declaration from the CEO and CFO in respect of financial records for an entity's financial year only. Recommendation 4.2 applied to the financial statements for *any* financial period (for example, half-yearly reports) and extended to include a declaration by the CEO and CFO that their opinion has been formed on the basis of a sound system of risk management and internal control which is operating effectively. As a matter of good governance, the AICD considers that boards should continue to seek a declaration from the CEO and CFO in respect of financial statements for all relevant financial periods under Recommendation 4.2.

Should Recommendation 4.2 be reinstated, we recommend that the following proposed Commentary accompanying Recommendation 7.2 be deleted to avoid duplication: "*The board should also require for financial reports in respect of a financial period that management provides an opinion that the reports are based on a sound system of risk management and internal control which is operating effectively*".

**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?**

The AICD supports the deletion of Recommendation 3.3 for entities to disclose their whistleblower policy on the basis that such disclosure is already prescribed under the Corporations Act.

We note that the Consultation Draft includes appropriate references to the importance of board oversight of whistleblower reports in the proposed Commentary to Recommendation 3.2 which, in our view, should be retained.

## 11. Additional Recommendations that apply only in certain cases

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

The AICD supports the above-mentioned Recommendations applying to entities established outside of Australia on the basis that they reflect expectations under Australian law.

## 12. 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 *The application of the Recommendations to externally managed listed entities*?**

The AICD supports modifying the application of the Recommendations to externally managed entities as proposed in the Consultation Draft.

## 13. 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?**

As discussed above, the AICD considers there should be a broader window for adoption of the 5<sup>th</sup> edition than is contemplated. Entities are currently preparing for a number of significant regulatory reforms, including mandatory climate reporting, many of which will have an impact on governance practice and corporate reporting.

We recommend that the commencement date be deferred such that the first reporting period commences on or after 31 December 2025, with the option for entities to begin reporting earlier if they wish.



## Attachment B: Summary of AICD member views

Issue	Member views	Strength of feedback
<b>General observations</b>	<ul style="list-style-type: none"> <li>• Consistent member feedback raised concerns with prescription and granularity in the Recommendations and Commentary. Support was expressed for a holistic review of the Consultation Draft and removal of detail and prescription, particularly in Commentary.</li> <li>• Members, primarily from large listed companies, expressed concern that there were some market expectations for suggested practices in the Commentary to be adhered to as if it were a Recommendation (i.e. “if not, why not” adoption).</li> <li>• Members supported greater emphasis in the Principles of the “if not, why not” reporting model, as well as the hierarchy of the Recommendations (to which “if not, why not” applies) relative to the Commentary (serving as supplementary guidance against which reporting is not required).</li> <li>• Some members supported separating the Recommendations and Commentary into two separate documents, or within the one document with the Commentary situated in an appendix, should that help clarify their distinct purpose.</li> </ul>	<ul style="list-style-type: none"> <li>• High level of feedback.</li> </ul>
<b>Board skills</b>	<ul style="list-style-type: none"> <li>• <b>Recommendation 2.2(a):</b> No concerns shared from members with the change proposed to the language of Recommendation 2.2(a).</li> <li>• <b>Recommendation 2.2(b):</b> Mixed feedback from members on the proposed new Recommendation for disclosure of the process for assessing board skills/experience. <ul style="list-style-type: none"> <li>○ Some members recognised that there is demand for improvements to the quality of board skills matrix disclosures, including around greater transparency around the skills assessment process at the collective board level.</li> <li>○ Some members questioned the market value of disclosures on the skills assessment process and queried what reporting should look like, noting also it could lead to boilerplate disclosures.</li> </ul> </li> <li>• <b>Commentary (“better practice is to include information on the skills of individual directors”):</b> Strong and relatively unanimous opposition from members for the Commentary to suggest that better practice would include disclosing individual director skills, highlighting the following concerns:</li> </ul>	<ul style="list-style-type: none"> <li>• Area that attracted the greatest level of feedback: <ul style="list-style-type: none"> <li>○ High level of feedback received on Commentary suggestion for individual skills disclosure;</li> <li>○ Moderate level of feedback received on Recommendation 2.2(b) – process disclosure.</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ Undermine the board's collective decision-making responsibility and lead to a more binary view (both externally and from a self-assessment perspective) of whether certain skills are held by individuals;</li> <li>○ Lead to a focus on directors being appointed subject to having specific subject matter expertise in areas, rather than a holistic assessment of the set of skills that complement the composition of the board;</li> <li>○ Lead to stakeholders adopting a simplistic ranking based on individual skills disclosures that influences expectations for entities' future director appointments;</li> <li>○ Detract from attributes and experience taken into account in board skills assessments that are not necessarily tangible (e.g. innovation mindset, strong interpersonal skills); and</li> <li>○ Risk individual directors being targeted, rather than the board held accountable, in the event of a governance failure or the breach of the entity's regulatory compliance obligation (e.g. a cyber security incident) where those individuals are assessed to hold a high level of skill in a nominated category.</li> </ul>	
<p><b>Diversity</b></p>	<ul style="list-style-type: none"> <li>● <b>Board gender diversity:</b> Members generally support 40/40/20 gender balance target.</li> <li>● Consistent concerns raised by members regarding how smaller boards and boards in certain sectors would be able to meet objective practically. Members supported recognising this challenge explicitly and providing more flexibility for smaller boards.</li> <li>● <b>Other relevant diversity characteristics:</b> Mixed feedback from members: <ul style="list-style-type: none"> <li>○ Some members queried what the Recommendation would achieve compared to the approach in other jurisdictions (e.g. UK and US) with a measurable objective for reflecting other diversity characteristics in the board's membership.</li> <li>○ Some members expressed no concerns with the Recommendation as drafted.</li> <li>○ Some members cautioned against any implicit encouragement to widen board diversity considerations beyond gender.</li> </ul> </li> <li>● <b>Workforce diversity:</b> Few concerns raised by members on changes to this Recommendation. Member feedback received suggested that:</li> </ul>	<ul style="list-style-type: none"> <li>● Moderate level of feedback on board gender diversity.</li> <li>● Moderate level of feedback on broader diversity characteristics.</li> <li>● Limited feedback on workforce diversity.</li> </ul>

	<ul style="list-style-type: none"> <li>○ the Commentary could be reduced in both length and detail;</li> <li>○ there was some duplication with new requirements for reporting to WGEA on the prevalence of, and measures taken to address, workplace sexual harassment; and</li> <li>○ there was a lack of recognition of other diversity characteristics in this Recommendation and Commentary.</li> </ul>	
<b>Code of conduct</b>	<ul style="list-style-type: none"> <li>● Mixed feedback from members on Recommendation for disclosure on a de-identified basis the outcomes of actions taken by an entity in response to material breaches of its code of conduct: <ul style="list-style-type: none"> <li>○ Some members expressed strong opposition to the Recommendation, citing concerns with privacy and legal implications, particularly for entities with a smaller employee headcount.</li> <li>○ Some members expressed support, particularly directors from large listed entities and/or ADIs that currently adopt such practice, noting an observed positive impact on corporate culture as a result of code breach disclosure.</li> <li>○ Some members noted that such disclosure should be a matter for the board to determine at its discretion, rather than an “if not, why not” reporting expectation.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>● High level of feedback.</li> </ul>
<b>Stakeholders</b>	<ul style="list-style-type: none"> <li>● Members generally supported the proposed Recommendation for entities to have regard to the interests of the entity's key stakeholders.</li> <li>● Members supported the Recommendation not prescribing a requirement for entities to disclose their stakeholder engagement process, noting other methods and channels are used for these purposes (e.g. annual report, sustainability report and other reporting).</li> <li>● Some members raised concerns that the Consultation Draft lacked sufficient reference to the interests of security holders. Members supported references to the centrality of security holder interests being strengthened in Commentary, including principles from the Bret Walker SC legal opinion and AICD's best interests duty practice statement.</li> </ul>	<ul style="list-style-type: none"> <li>● Moderate level of feedback.</li> </ul>
<b>Management of risk</b>	<ul style="list-style-type: none"> <li>● No material concerns raised by members with the proposed changes to Principle 7.</li> <li>● Members generally supported the changes to Recommendation 7.4 to focus on material risks more broadly, rather than focusing on specific categories of risk.</li> </ul>	<ul style="list-style-type: none"> <li>● Limited level of feedback.</li> </ul>

<p><b>Remuneration</b></p>	<ul style="list-style-type: none"> <li>• <b>NED remuneration:</b> Members generally supported the Recommendation that non-executive directors should not receive performance-based remuneration or retirement benefits. Some members noted there was a practice for smaller, clean-lean listed entities to grant equity (shares and/or options) in lieu of director fees and that this should be recognised as an acceptable practice.</li> <li>• <b>Use of clawback:</b> Consistent member feedback that clawback is a difficult mechanism to use in practice, particularly for departed employees, and can attract significant costs and protracted legal proceedings.</li> <li>• Members supported the intent of the Recommendation, but noted that other remuneration adjustment tools were commonly used in practice (e.g. malus and in-period adjustments).</li> <li>• <b>Disclosure of clawback use:</b> Mixed member feedback on Recommendation for disclosure on a de-identified basis the use of those provisions during the reporting period.</li> <li>• Members raised consistent concerns around the legal and privacy implications of such disclosure – particularly within entities with a smaller headcount of senior executives.</li> <li>• Members generally supported retaining the Recommendation provided it was confined to KMP only, noting disclosure of adjustments in respect of that cohort is current practice.</li> </ul>	<ul style="list-style-type: none"> <li>• High level of feedback.</li> </ul>
<p><b>Commencement date</b></p>	<ul style="list-style-type: none"> <li>• Consistent member feedback that there are significant and ongoing regulatory changes preoccupying listed entities at present, including most mandatory climate reporting.</li> <li>• Strong member support for a delayed commencement date and/or longer period for adoption.</li> </ul>	<ul style="list-style-type: none"> <li>• Moderate/high level of feedback.</li> </ul>