

ASX Corporate  
Governance Council  
*Principles and  
Recommendations*  
5<sup>th</sup> Edition  
*Consultation Draft:*  
Background paper and  
consultation  
questions

February 2024



ASX  
Corporate  
Governance  
Council



## Invitation to comment

The ASX Corporate Governance Council is seeking submissions in response to this background paper and consultation questions **by Monday 6 May 2024**.

The Council prefers to receive submissions in electronic form. Submissions may be made [online](#), as an online questionnaire response or by uploading a PDF or Word document.

If you would like your submission to be treated as confidential, please indicate this clearly. The Council may choose to publish submissions (in whole or in part) on the [ASX website](#), but will not do so where a submission is clearly marked confidential.

For more information, see <https://www.asx.com.au/about/regulation/asx-corporate-governance-council/reviews-and-submissions/>.

## Contacts

For general enquiries, please contact:

### **ASX Corporate Governance Council Secretariat**

Kelly Boschenok, Administration Co-ordinator

T +61 (0)2 9227 0482

E [ASXCorporate.GovernanceCouncil@asx.com.au](mailto:ASXCorporate.GovernanceCouncil@asx.com.au)

## Membership of the Council

The current members of the Council are as follows:

Association of Superannuation Funds of Australia Limited  
ASX Limited  
Australasian Investor Relations Association  
Australian Council of Superannuation Investors  
Australian Institute of Company Directors  
Australian Shareholders' Association  
Business Council of Australia  
Chartered Accountants Australia and New Zealand  
CPA Australia Ltd  
Financial Services Council  
Financial Services Institute of Australasia  
Governance Institute of Australia  
Group of 100  
Institute of Internal Auditors - Australia  
Institute of Public Accountants  
Insurance Council of Australia  
Law Council of Australia  
Property Council of Australia  
Stockbrokers and Investment Advisers Association

Further information about the Council, including a copy of its charter, is available at:

<https://www.asx.com.au/about/regulation/asx-corporate-governance-council/>

# Contents

1. Introduction	4
2. Approach to the <i>Consultation Draft</i>	4
3. Potential changes to 4 <sup>th</sup> Edition Recommendations	5
4. Consultation questions	6
Reducing regulatory overlap.....	6
Board skills.....	6
Diversity.....	7
Independence of directors.....	8
Corporate conduct and culture.....	8
Stakeholder relationships.....	9
Periodic corporate reports and assurance.....	10
Management of risk.....	10
Remuneration.....	11
Additional Recommendations that apply only in certain cases.....	12
Externally managed entities.....	12
Effective Date.....	12
Other comments.....	13

## 1. Introduction

The ASX Corporate Governance Council has released the *Consultation Draft* for a 5<sup>th</sup> Edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations (Principles and Recommendations)*.

This background paper accompanies the [Consultation Draft, together with a communique and a mark-up of the Consultation Draft against the 4<sup>th</sup> Edition](#).

Feedback is sought from interested stakeholders on the consultation questions set out in this paper.

Council members have been actively engaged, bringing their perspectives on how the 5<sup>th</sup> Edition might respond to current governance developments and challenges. Members do not hold identical views on all matters; some of those matters are the subject of specific consultation questions in this paper. The Council encourages your participation in this consultation process.

Submissions to the Council may be made by 6 May 2024 [online](#).

## 2. Approach to the Consultation Draft

The Council developed the *Consultation Draft* considering evolving investor and community expectations around issues including corporate conduct, culture, management of risk, stakeholder relationships, reporting and remuneration.

The *Consultation Draft* aims to reinforce entities' frameworks, to better enable entities to respond to emerging issues and developing regulatory requirements. It is not intended to create parallel regulatory regimes.

In summary:

- The 8 Principles have been retained, with some proposed changes to expression.
- The *Consultation Draft* contains 33 general Recommendations, and 7 additional Recommendations that only apply in limited cases (for example, to entities established outside Australia). This compares to the 4<sup>th</sup> Edition's 35 general Recommendations, and 3 additional Recommendations that only apply in limited cases.
- Several general Recommendations have been removed where there is significant regulation by, or duplication in, Australian law.
- There have been some enhancements to the layout and expression of the document, to improve readability and engagement with the content of the 5<sup>th</sup> Edition. Some existing commentary and expression has been reduced or simplified, with cross-references provided to other resources. Other commentary has been clarified, such as where there is evidence of limited disclosure quality or other market immaturity.

An overview of some changes to the Recommendations appears overleaf.

The 5<sup>th</sup> Edition is currently anticipated to be issued early 2025, to potentially take effect for financial years commencing on or after 1 July 2025. These are indicative dates only, and are subject to stakeholder consultation and ASX confirmation.

### 3. Potential changes to 4<sup>th</sup> Edition Recommendations

This is an overview of some potential changes to the 4<sup>th</sup> Edition Recommendations, which are reflected in the *Consultation Draft*. Please note that this overview is not exhaustive.

#### Recommendations deleted

Several 4<sup>th</sup> Edition Recommendations have been removed where there is significant regulation by Australian law (including, in some cases, duplication). These are as follows:

- Recommendation 3.3 (disclosure of whistleblower policy);
- Recommendation 3.4 (disclosure of anti-bribery and corruption policy);
- Recommendation 4.2 (CEO and CFO declaration for financial statements);
- Recommendation 6.4 (substantive security holder resolutions on a poll);
- Recommendation 6.5 (offering electronic communications to security holders);
- Recommendation 8.2 (separate disclosure of remuneration policies for non-executive directors, other directors and senior executives); and
- Recommendation 8.3 (policy on hedging of equity-based remuneration).

Some of these requirements are now reflected in commentary, or in new Recommendations applicable to entities established outside Australia.

Recommendation 1.5 (diversity) is now dealt with in Recommendations 2.3 (board diversity) and 3.4 (diversity and inclusion policy).

#### Additional Recommendations for entities established outside Australia

The following new Recommendations apply only to entities established outside Australia, given the deletion of Recommendations for significant regulation by Australian law:

- Recommendation 9.3 (CEO and CFO declaration for financial statements);
- Recommendation 9.4 (substantive security holder resolutions on a poll);
- Recommendation 9.5 (offering electronic communications to security holders); and
- Recommendation 9.7 (policy on hedging of equity-based remuneration).

#### New Recommendations and updated disclosure expectations

General Recommendations which are new or have updated disclosure expectations compared to the 4<sup>th</sup> Edition include:

- Recommendation 2.2 (board skills held and sought, and the process for assessing skills and experience);
- Recommendation 2.3(c) (disclosure of relevant board diversity characteristics being considered);
- Recommendation 3.2(c) (de-identified disclosure of outcomes from code of conduct breaches);
- Recommendation 3.3 (interests of key stakeholders);
- Recommendation 3.4 (diversity and inclusion effectiveness);
- Recommendation 4.2 (verification processes for periodic corporate reports);
- Recommendation 4.3 (disclosure of auditor tenure and review);
- Recommendation 7.4 (disclosure of material risks);
- Recommendation 8.2 (non-executive director remuneration); and
- Recommendation 8.3 (provisions for clawback of performance-based remuneration and de-identified disclosure of their use).

These changes are intended to strengthen listed entities' governance, and increase transparency for investors. For example, several changes relate to corporate culture, accountability and integrity of reporting. The disclosures are often outcomes-focused.

## 4. Consultation questions

### Reducing regulatory overlap

Several 4<sup>th</sup> Edition Recommendations have been removed from the *Consultation Draft*, on the basis of significant regulation (including, in some cases, duplication) under Australian law. Some of these requirements are now reflected in commentary, or in new Recommendations applicable to entities established outside Australia.

In particular, the Council encourages feedback on the deletion of the 4<sup>th</sup> Edition's Recommendation 3.3 (disclosure of whistleblower policy). The 4<sup>th</sup> Edition expects disclosure of the policy on an entity's website, or in its annual report. This disclosure could provide access to the policy for third party whistleblowers, such as former employees or suppliers; this compares to the legal requirement to make the policy available to officers and employees. The adequacy of whistleblower policies and practices has also been a matter for focus by ASIC (for example, see ASIC's [open letter to CEOs](#) and [REP 758 Good practices for handling whistleblower disclosures](#)).

**1. Do you support deletion of the following 4<sup>th</sup> 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)?

**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?**

### Board skills

Principle 2 has been amended, to highlight the importance of both collective board skills and individual director skills.<sup>1</sup>

Recommendation 2.2 regarding disclosure of board skills matrices was first introduced in the 3<sup>rd</sup> Edition of the *Principles and Recommendations*. The *Consultation Draft* proposes that:

- entities disclose a board skill matrix setting out both the mix of skills that the board currently has, and is looking to achieve, in its membership (potential exclusions from disclosure are set out in the commentary); and
- an entity disclose its process for assessing that the relevant skills and experience are held by its directors.

Council member research supports the importance to investors of understanding how a listed entity assesses that its directors hold particular skills, and how those skills are defined.

**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?

<sup>1</sup> For example, individual directors' duties in respect of reading and understanding the entity's accounts.

## Diversity

The 4<sup>th</sup> Edition discusses diversity in Recommendation 1.5. The *Consultation Draft* proposes to deal separately with board diversity (new Recommendation 2.3) and workforce diversity and inclusion policies (new Recommendation 3.4).

The 4<sup>th</sup> Edition has a measurable objective for S&P/ASX300 entities for achieving gender diversity in the composition of their boards, being not less than 30% of each gender within a period specified by the entity (Recommendation 1.5).

Recommendation 2.3 in the *Consultation Draft* proposes that S&P/ASX300 entities' measurable objective for board gender diversity should be for a gender balanced board (at least 40% women / at least 40% men / up to 20% any gender), within a period specified by the entity.

**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?**

Some international jurisdictions' listing rules<sup>2</sup> have provisions relating to diversity characteristics on boards which go beyond gender, such as ethnicity. This may reflect particular diversity priorities within their jurisdictions.

Rather than specify types of diversity beyond gender, the *Consultation Draft* proposes that a listed entity disclose if there are relevant diversity characteristics (other than gender) which a board is considering in its membership.<sup>3</sup>

New Recommendation 2.3 seeks to balance disclosure which may assist security holders' understanding of how a board is seeking to develop its range of perspectives, the promotion of board succession planning, and flexibility for board recruitment processes. It is not intended as disclosure of general diversity characteristics sought across the entity's workforce (diversity and inclusion policies are the subject of new Recommendation 3.4).

**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?**

<sup>2</sup> For example, see the "comply or explain" requirements in the UK *Financial Conduct Authority Handbook* ([Listing Rule 9.8.6R\(9\)](#)) for premium listed issuers and [LR 14.3 33R\(1\)](#) for standard listed issuers) and the *NASDAQ Rulebook* (5600: Corporate Governance Requirements – board diversity requirements).

<sup>3</sup> For example, see S&P/ASX300 diversity information in Watermark Search International in partnership with Governance Institute of Australia, [2023 Board Diversity Index](#) 2023.

The new introductory wording in Recommendation 3.4(c) reflects the purpose for the Recommendation’s disclosures: to understand the effectiveness of a listed entity’s diversity and inclusion practices.

This is intended to draw out outcomes beyond the reporting of the requested metrics. This information may be useful to a range of the entity’s stakeholders, including employees and investors.

**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?**

### Independence of directors

The *Consultation Draft* proposes to amend the fourth of the Box 2.4 factors<sup>4</sup> relevant to assessing the independence of directors, by replacing the references to “substantial holder” (broadly, a security holding interest of 5% or more) with references to “10% holder”.

The Glossary contains a proposed definition of *10% holder*, based on the definition of *substantial (10% +) holder* in [ASX Listing Rule 19.12](#).

The inclusion in Box 2.4 of the security holding example is to address the perception of a material holding on a director’s independence.

A director linked to a security holder may have interests aligned with other security holders and exercise independent judgment as a director, absent another factor impacting independence. The inclusion of substantial holdings as a factor was to address perception of the materiality of a holding that size.

The proposed change to 10% holder reflects that Australian law has other significant regulation relating to conflicts of interest, including material personal interests of directors and related party transaction provisions.

**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)?**

### Corporate conduct and culture

There have been many market examples of governance failures which have involved weaknesses in corporate culture.

The *Consultation Draft* seeks to balance transparency for key stakeholders with an outcomes-focused approach that promotes a “speak up” culture.

An example is the proposed Recommendation 3.2(c), which provides for disclosures (on a de-identified basis) of the outcomes of actions taken by the entity in response to material breaches of the code of conduct.

The *Consultation Draft* commentary recognises that an entity may exclude disclosure of outcomes to the extent that actions are not finalised or cannot be appropriately de-identified.

---

<sup>4</sup> These factors appear in Box 2.3 in the 4<sup>th</sup> edition.



The commentary also notes that entities may wish to consider published guidelines when considering what constitutes responsible business conduct.<sup>5</sup>

**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?**

### Stakeholder relationships

Since the release of the 4<sup>th</sup> Edition, there has been an increasing recognition of an entity's relationships with its internal and external stakeholders (for example, see AICD's [Directors' "best interests" duty in practice](#) (July 2022)). International jurisdictions (such as the United Kingdom<sup>6</sup> and Singapore<sup>7</sup>) have legislation or governance codes that recognise stakeholder interests and the importance of effective engagement.

The *Consultation Draft* addresses stakeholder relationships in a number of ways, including:

- Revising *What is "corporate governance"?* in the Foreword.
- Revising Principle 3: ***"Instil a culture of acting lawfully, ethically and responsibly: A listed entity should instil and continually reinforce a culture of acting lawfully, ethically and responsibly within the organisation and in its dealings with external stakeholders, to create long-term sustainable value."***
- Proposing new Recommendation 3.3 (extracted below, in consultation question 10).

The *Consultation Draft* uses the terminology *"key stakeholders"* to reflect that relevant stakeholders may vary between entities and over time.

New Recommendation 3.3 proposes that an entity should have regard to its key stakeholders' interests. It does not require an entity to act in the interests of its key stakeholders. Further, the related commentary notes that an entity's consideration of the interests of its other stakeholders should be consistent with the long-term interests of security holders. Security holders are the subject of Principle 6 and are not intended to be the subject of new Recommendation 3.3.

**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?**

**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."***

<sup>5</sup> For example, see the [OECD Guidelines for Multinational Enterprises on Responsible Business Conduct](#). See also Paul Redmond AM, *Corporate Governance and Corporate Social Responsibility: the ASX Corporate Governance Principles and Recommendations and the idea of corporate responsibility* (2023) 40 C&SLJ 116.

<sup>6</sup> For example, see section 172 of the Companies Act 2006 (UK) and Financial Reporting Council, [UK Corporate Governance Code](#) (2018) Provision 5

<sup>7</sup> For example, see Monetary Authority of Singapore, [Code of Corporate Governance 6 August 2018](#) (last revised as at 11 January 2023), paragraph 5 and Principle 13.

## Periodic corporate reports and assurance

The *Consultation Draft* seeks to balance the need for quality reporting with the disclosure expectations placed on listed entities.

Research conducted<sup>8</sup> on behalf of the Council indicated lower quality disclosures in respect of the 4<sup>th</sup> Edition's Recommendation 4.3 (now re-numbered as Recommendation 4.2), regarding verification of reports that are not audited or reviewed by an external auditor.

The *Consultation Draft's* proposed Recommendation 4.2 expands this disclosure to all periodic corporate reports, given the range of information increasingly expected to be reported by listed entities, and the ongoing development of reporting and assurance requirements.

**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)?**

There are practical and regulatory barriers to listed entities changing auditors on a regular basis. This should not restrict audit committees considering auditor performance and their making recommendations to the board regarding the auditor's engagement.

The *Consultation Draft* seeks to balance the promotion of audit quality and information for security holders, with the demands on listed entities and confidentiality. It does not introduce additional tenure or rotation requirements.

**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?**

## Management of risk

The *Consultation Draft* does not discuss contemporary risks at Recommendation level, but has referred to some of these risks in commentary (for example, see Recommendation 7.4's commentary).

The *Consultation Draft* focuses instead on frameworks, with commentary including discussion of matters such as crisis management and business continuity processes (for example, see Recommendation 7.2's commentary). This is intended to support entities as new risks emerge and regulation or standards continue to be developed.

Similarly, the *Consultation Draft* re-casts Recommendation 7.4 to focus on an entity's material risks, but does not expect disclosure of specific risks or specific categories of risks. (Previously, Recommendation 7.4 focused on disclosure of material environmental and social risks only).

This proposal for Recommendation 7.4 is intended to benefit listed entities' existing reporting practice and management of risk. For example:

- It may improve practice for existing reporting on an entity's prospects, such as in an operating and financial review, rather than creating additional reporting obligations.
- Commentary clarifies that it is not necessary to report against the environmental, social and governance risk categories individually; their inclusion in Recommendation 7.4(a) is to assist entities to consider the range of risks relevant to their entity.

<sup>8</sup> KPMG. [ASX Corporate Governance Council Adoption of 4<sup>th</sup> Edition Corporate Governance Principles and Recommendations: Analysis of disclosures made by listed entities between 1 January 2021 to 31 December 2021](#) (June 2022).

- As such, the Recommendation moves away from generic ESG disclosures, generic risk disclosures, and distinctions between financial and non-financial risk.
- The commentary does not prescribe climate or other sustainability reporting, although such reporting may complement the requirements of the Recommendation. Sustainability concepts go beyond ESG to consider the entity, the resources it uses to generate value, and its relationships.
- It elevates governance risk, given highly publicised corporate governance failures as a result of conduct, compliance and operational risk failures.

**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?**

## Remuneration

The *Consultation Draft* proposes deletion of 4<sup>th</sup> Edition's Recommendation 8.2 (separate disclosure of remuneration policies for non-executive directors, other directors and senior executives) and Recommendation 8.3 (hedging of equity-based remuneration), on the basis of significant regulation of remuneration and remuneration reporting under Australian law.

Instead, the *Consultation Draft* proposes two new Recommendations, to reflect the principles behind non-executive director remuneration and performance-based remuneration for senior executives. They are intended to promote good governance and transparency for key stakeholders.

Recommendation 8.3(b)'s proposed disclosure requirements regarding the use of clawback and similar provisions is intended to apply to current and former key management personnel who are subject to those policies. The *Consultation Draft* commentary recognises that an entity may exclude disclosure of outcomes to the extent that actions are not finalised or cannot be appropriately de-identified.

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

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

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

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

### Additional Recommendations that apply only in certain cases

Several 4<sup>th</sup> Edition Recommendations have been removed from the *Consultation Draft*, on the basis of significant regulation (including duplication) with Australian law. Some of these requirements are now reflected in new Recommendations applicable to entities established outside Australia.

**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)?

### Externally managed entities

Some Recommendations require modification for externally managed entities, given that their governance structures involve management by an external responsible entity.

**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*?**

### Effective Date

If the final version of the 5<sup>th</sup> Edition is released in early 2025, it could potentially take effect for an entity's first full financial year commencing on or after 1 July 2025. This could mean that:

- entities with a 30 June balance date could be expected to measure their governance practices against the 5<sup>th</sup> Edition's Recommendations commencing with the financial year ended 30 June 2026; and
- entities with a 31 December balance date could be expected to measure their governance practices against the 5<sup>th</sup> Edition's Recommendations commencing with the financial year ended 31 December 2026.

Each edition has had different lead times for implementation. For example, the 3<sup>rd</sup> edition was released 27 March 2014 with an effective date of 1 July 2014; the 4<sup>th</sup> Edition was released 27 February 2019, with an effective date of 1 January 2020.

The Council recognises the need to balance the implementation requirements on listed entities, with the refreshing of governance practices and reporting. ASX will form a view on the effective date for the 5<sup>th</sup> Edition, including having regard to stakeholder feedback.

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

**Other comments**

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

**Thank you for your participation in this consultation.**