

ESG-Australia: Consultation Material for the 5th Edition of the Corporate Governance Council Principles and Recommendations Released

Article By:

Andrew Gaffney

Clive Cachia

Adam Levine

Rania Seoud

Rami Maserow

OVERVIEW

The Australian Securities Exchange (ASX) Corporate Governance Council (Council) has recently released its [consultation materials](#) for the proposed 5th Edition of the *Corporate Governance Council Principles and Recommendations* (Corporate Governance Principles). The Council's consultation draft sets out 33 general recommendations and seven additional recommendations that are applicable in specific circumstances (Consultation Draft).

The Consultation Draft maintains the same eight central principles of the 4th Edition of the Corporate Governance Principles, with proposed amendments to the expression of six of these principles. The proposed new language incorporates the entity's value, risk appetite, stakeholders, strategic objectives, and long-term sustainable value into its corporate governance.

The Consultation Draft does *not* propose to change the current 'if not, why not' approach. Therefore, ASX listed entities will still need to disclose the extent of their compliance with the proposed 5th Edition of the Corporate Governance Principles in accordance with Listing Rule 4.10.3.

Time Frame

The Council has anticipated that the final version of the 5th Edition of the Corporate Governance Principles will be released in early 2025, for the possible commencement on or after 1 July 2025.

This means that the proposed recommendations may apply to entities for their (as applicable):

- Annual report ending 30 June 2026; or
- Annual report ending 31 December 2025.

The ASX has invited comment on the consultation draft and therefore there may be changes in the current proposed 5th Edition of the Corporate Governance Principles.

Next Steps

The Council is now seeking submissions from interested stakeholders on the consultation materials and answers to the consultation questions. Submissions can be made via the online [ASX portal](#) and close on 6 May 2024.

KEY CHANGES

What Is New?

Some of the proposed recommendations in the Consultation Draft include:

New Recommendation	Explanation
Recommendation 2.2 Broad Skills	<p>Entities may need to explain the assessment methodology used to determine the skills of its board of directors. As this process will ultimately need to be disclosed to the market, entities should consider whether they are currently relying on self-evaluation by directors and whether an independent and consistent method should be introduced.</p> <p>This process will be relevant for determining the board skills matrix, and when undertaking appropriate checks before putting forward a director for election.</p> <p>Best practice is to disclose the individual skills of each director, compared to a collective assessment of the skills of the board as a whole. Whilst this forms part of the non-binding commentary, we can likely expect a greater uptake in larger listed entities disclosing individual skills.</p>
Recommendation 2.3 Boards' Gender Diversity Timeframe	<p>A notable departure from the 4th Edition of the Corporate Governance Principles' recommendation 1.5, which requires setting and disclosing measurable gender diversity objectives, is the inclusion of the word 'timeframe'. Accordingly, boards may be required to establish time-based targets and/or milestones for achieving a gender diverse board.</p> <p>In creating a timeline, boards should determine</p>

New Recommendation	Explanation
	<p>what can be achieved each reporting period, as the entity will be held accountable in explaining its progress towards this objective. However, this must be balanced with signalling to the market that the board is committed to gender diversity and has established strong targets.</p> <p>Whilst gender diversity is central to this proposed recommendation, listed entities will be encouraged to discuss and be transparent about other attributes of its board, such as age, race, backgrounds and personal experiences of directors, which it considers adds value and diversity to its board. This helps to promote a broader outlook on diversity that extends beyond gender.</p>
<p>Recommendation 2.3 Additional Gender Diversity Requirement for an Entity in the S&P / ASX 300</p>	<p>For entities in the S&P/ASX 300 index at the commencement of the reporting period, this recommendation endorses a 10% increase from the previous 30% minimum female director requirement established in the 4th Edition of the Corporate Governance Principles. In particular, the recommendation notes that a gender balanced board would include at least 40% women, at least 40% men and up to 20% any gender.</p> <p>As the implementation of the proposed 5th Edition of the Corporate Governance Principles may not be applicable until after 2025, S&P/ASX 300 Index entities not currently meeting the recommendation should consider reviewing the board's current succession planning to achieve or make progress on this recommendation.</p>
<p>Recommendation 3.2 Code of Conduct Breaches</p>	<p>A significant change being proposed is the duty to disclose the outcomes of material breaches of the entity's code of conduct, whistleblower and anti-bribery policies. This will require disclosure of any escalation and disciplinary actions taken, as well as steps taken such as changes to the policy, compliance training or risk management.</p> <p>We expect that this recommendation will be heavily scrutinised during the consultation period given the privacy concerns involved. The Privacy Act imposes high standards for businesses handling sensitive personal information, and the Fair Work Act requires all employers to collect</p>

New Recommendation	Explanation
	<p>and appropriately store certain personal information about employees that should only be disclosed on a limited basis. Similarly, strict confidentiality requirements apply under whistleblower laws.</p> <p>Matters that cannot be de-identified or would be contrary to law may need to be omitted from disclosure. This possibly will require entities to take greater care in preparing disclosures and confer with their privacy team or lawyers.</p>
<p>Recommendation 3.3 Stakeholder Engagement</p>	<p>Listed entities may be required to engage further with key stakeholders. This may involve implementing and monitoring a stakeholder engagement program.</p> <p>The proposed commentary under this recommendation suggests that stakeholder management may involve the board, or its relevant committee, investigating any serious workplace incident or customer complaints, compliance with modern slavery laws (and policy if applicable), and lobbying and donation activities.</p> <p>The proposed commentary places a new emphasis on having regard to the interests of Aboriginal and Torres Strait Islander stakeholders, such as business partners, land owners, employees and customers. This may encourage entities to approve and monitor a Reconciliation Action Plan.</p>
<p>Recommendation 4.3 Audit & Partner Engagement</p>	<p>Listed entities may be required to disclose their internal review of the effectiveness and independence of their auditor.</p> <p>To aid security holders in perceiving auditor independence, listed entities may need to disclose how long the audit firm and partner have been acting for the entity. The Corporations Act already sets out rules regarding rotation of individuals who play a significant role in the audit for five successive financial years, which can be extended by the directors subject to a resolution and recommendation of the audit committee. Consequently, information regarding audit engagement partners should be available to publish within annual reports.</p>

New Recommendation	Explanation
Recommendation 7.4 Disclosure of Environmental, Social and Governance (ESG) Risks	<p>Entities may need to disclose a range of foreseeable risks, which extend beyond financial risks and include: cyber-attacks, protection of data, climate change and artificial intelligence.</p> <p>Disclosures in an entity's operating and financial review in its directors' report and, if published, sustainability report may satisfy this requirement.</p> <p>An entity should have reasonable grounds for making disclosures under this recommendation, particularly forward looking statements (e.g. forecasts).</p>
Recommendation 8.2 No Performance-Based Remuneration for NEDs	<p>Entities may need to reconsider their remuneration practices based on the proposed recommendation to prevent bias in decision-making, by removing any securities or payment attached to an entity's performance, or any benefits given in connection with retirement (excluding superannuation) to non-executive directors (NEDs).</p> <p>Commentary suggests that it is possible that if this recommendation is not followed, the entity may be required to obtain security holder approval.</p>
Recommendation 8.3 Remuneration Clawback	<p>Listed entities may need to introduce powers that allow the board, subject to its discretion, to limit or clawback performance-based remuneration to senior executives after it has been paid, awarded or vested.</p> <p>Entities would be required to disclose the type of matters that triggered the use of these provisions, the number of current and former senior executives impacted during the reporting period and their impact.</p> <p>While this is recommended to be disclosed on a de-identified basis, disclosure on an identified basis in the remuneration report will satisfy this recommendation.</p>

What Is Proposed to Be Removed?

To reduce the duplication of requirements that are sufficiently regulated by Australian law, some of the general recommendations from the 4th Edition of the Corporate Governance Principles have

been removed, or moved to the proposed additional recommendations and amended to only apply to listed entities established outside of Australia (that are potentially not captured by Australian regulatory regimes e.g. the Corporations Act).

This includes *removing* the current general recommendations to have and disclose an anti-bribery and corruption policy and a whistleblower policy – given those obligations are already regulated under other Australian law provisions.

Recommendations proposed to be moved to the additional recommendations applicable to entities established outside of Australia include:

- Chief Executive Officer (CEO) and Chief Financial Officer (CFO) declaration and approval of financial statements;
- Substantive security holder resolutions be decided by poll;
- Providing security holders with the option to receive electronic communications; and
- Having a hedging policy for equity-based remuneration schemes.

Although these are proposed to be deleted from the general recommendations in the 5th Edition of the Corporate Governance Principles, Australian listed entities must remain compliant with each of these recommendations in accordance with Australian Law.

What Does This Mean for Listed Entities?

Listed entities should begin to:

- Review their code of conduct and relevant policies in light of new recommendations;
- Evaluate remuneration structures of senior executive and NEDs;
- Consider their gender diversity targets and timeframes for meeting these objectives; and/or
- Assess their key stakeholders and engagement processes, and material risks.

Carl Hinze and Khilen Devani contributed to this article.

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National Law Review, Volume XIV, Number 107

Source URL: <https://natlawreview.com/article/esg-australia-consultation-material-5th-edition-corporate-governance-council>