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Dear Mr Lewis

Review of Corporate Governance Principles and Recommendations

CPA Australia welcomes the opportunity to make submission to this review on behalf of the more than 144,000 professionals in finance, accounting, business and academia, whom we represent. CPA Australia takes a keen interest in the quality of Australia's corporate governance practices as a key underpinning to market functioning and efficiency, and as a vital compliment to corporate regulation.

As a foundation member of the Corporate Governance Council we have watched with interest the ongoing development of the Principles & Recommendation and have participated in a number of the working groups leading up to the release of draft version 3. Our submission is set out in the attached Appendix. For each Recommendation, a short summary of the proposal is given followed by a statement of our specific views.

If you have any queries or wish to seek clarification, please contact our Policy Adviser ESG, Mr John Purcell on (03) 96069826 or email john.purcell@cpaaustralia.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Drum'.

Paul Drum FCPA
Head of Policy
CPA Australia

ASX Corporate Governance Council *Principles and Recommendations, 3rd edition*
Consultation Draft

New Recommendation 1.1

Elevates to a recommendation, with modified wording, former Guidance under current 1.3: “A statement of matters reserved for the board, or the board charter or the statement of areas of delegated authority to senior executives should be made publically available, ideally by posting it on the company website in a clearly marked corporate governance section”.

CPA Australia agrees with the intention behind this change. However, we urge that some additional commentary be added which emphasises that the public’s assumption about the exercise of company powers is protected by Part 2B.2 of the Corporations Act 2001 (the Act) (indoor management rules) and that the processes of delegated authority are enabled by s 198D within the overarching framework provided by Division 4 of Part 2D.1 of the Act.

New Recommendation 1.2

Recommendation 1.2(a) pertains to due care through appropriate checking of possible appointees or before putting a candidate for election to director positions to security holders.

CPA Australia agrees insomuch as the proposed recommendation reflects the onus on a listed entity to carry out appropriate checks within the scope of directors’ powers. A small risk may arise in attracting shareholder actions were it inferred that shareholders’ rights extended beyond the powers of appointment provided under s 201G of the Act. Again, the process of applying appropriate checks should not be seen to conflict with the notions of a candidate’s holding-out and the consent requirements of s 201D of the Act.

Recommendation 1.2(b) is derived from, and elevates to a Recommendation, commentary material under current Recommendation 2.4, which suggests the names put forward for election be accompanied by information of biographical detail, board’s support of the nomination, relationships, directorships and so forth.

CPA Australia agrees with the commonsense basis of this proposal. The only residual concerns may be in relation to balancing factual information with expressions of a view about a particular candidate, and the possible need for issuing corrections where errors or omissions are identified. Overriding these factors are concerns about materiality of information and the worth of excessive disclosure.

New Recommendation 1.3

Written agreement of appointment with directors and senior executives. This Recommendation is stated as new but draws from content of current Box 1.1 “Content of a director’s letter upon appointment” which is expressed as “may find useful to consider ... when drafting”.

CPA Australia acknowledges that letters of appointment should be regarded as the accepted norm.

New Recommendation 1.4

This Recommendation states that the company secretary should have a direct reporting line to the chair of the board. Whilst it is stated that there is currently no equivalent Recommendation, it draws from the commentary under current Recommendation 2.5 which states: “The company secretary should be accountable to the board, through the chair, on all governance matters”.

CPA Australia acknowledges the sound intention behind this proposal. It is observed though that “accountability” should not be seen to conflict with any legal obligations arising as a company officer and that there is sought a structure of relationship more precise than the general provisions of the Act.

New Recommendation 1.5

Essentially repositions content presently presented under Recommendations 3.2, 3.3 and 3.4, the rationale being to add stress that diversity is predominantly an economic and business issue rather than one of ethics.

We find the emphasis of these proposals highly commendable and commensurate good governance.

New Recommendation 1.6

Disclosure of processes for performance review of board, committees and individual directors. Involves repositioning of current Recommendation 2.5, along with elevating to Recommendation the 8th bullet point of ‘Guide to reporting on Principle 2’ stating that the governance statement should include “whether a performance evaluation for the board, its committees and directors has taken place in the reporting period and whether it was in accordance with the process disclosed”.

CPA Australia believes that prima facie it is sound governance that listed entities be able to disclose these processes. It should be acknowledged though that evaluations can be subjective in nature and it is unclear as to where the line should be drawn in terms of detail – a factor of some importance for some listed entities. Again, the value of these types of governance disclosure need to be understood in the context of very clear division of powers and rights between the directors, the company and the shareholders, thus not presenting a basis for shareholder encroachment on directors’ powers of management.

New Recommendation 1.7

Relates to periodic reviews of the performance of senior executives containing the existing content of current Recommendation 1.2 along with elevation to Recommendation the 2nd dot point of ‘Guide to reporting Principle 1’, which states that the corporate governance statement should include “whether a performance evaluation for senior executives has taken place in the reporting period and whether it was in accordance with the process disclosed.”

Reflecting our comments immediately above, this should be a reasonable expectation placed on companies, which would provide an appropriate level of assurance for investors.

New Recommendation 2.1

Covers disclosure of independence and length of service of directors, and establishes as Recommendations 2nd, 3rd and 6th bullet points of current 'Guide to reporting on Principle 2'. The 2nd dot point deals with "the names of directors considered to be independent", 6th dot point deals with "the period of office held by each director" and the 3rd dot point (now Recommendation 2.1[b]) cross-references to Box 2.1. Box 2.1 itself has been substantially reworked. It includes two new examples: "has close family ties with persons falling within any categories" and "has been a director of the entity for more than 9 years", and involves more prescriptive discussion of determining whether it might interfere, or might reasonably be seen to interfere.

CPA Australia perceives these proposals as significant. Though having different purposes, we believe that there should be an endeavour not to see too great a gap between 'independence' for governance disclosure purposes and the Act's definition of related entity. Commentary could perhaps be strengthened to emphasise the policy objective of board renewal - this is particularly pertinent in relation to the new reference to 9 years incumbency. Moreover, the theme of prima facie indicia could be better articulated along with emphasising the theme of performance.

New Recommendation 2.2

"A majority of the board of a listed entity should be independent directors", essentially a mirroring of current Recommendation 2.1.

CPA Australia's view is that this Recommendation reflects the normatively accepted ideal in common law Anglo-Saxon jurisdictions. Without undermining this cornerstone of corporate governance, it may be worth making reference to overarching considerations of impact on performance.

New Recommendation 2.3

Combines current Recommendation 2.2 and 2.3 concerning the chair being an independent director and the separation of CEO and chair roles.

As with our remarks immediately above, this reflects at least the prevailing Australian model of the preferred board structures with which CPA Australia agrees.

New Recommendation 2.4

Corresponds with current Recommendation 2.4 pertaining to nomination committees though is more extensive through inclusion as Recommendation existing bullet point 7 of 'Guide to reporting on Principle 2', which states to include in corporate governance statement "the names of members of the nominating committee and their attendance at meetings of committees, or where a company does not have a nomination committee, how the function of a nomination committee are carried out". Moreover, elements of the current 2nd Edition 2.4 commentary are elevated to Recommendation, particularly points concerning independence and a charter.

Whilst CPA Australia endorses the process of drawing previous guidance material into the Recommendations themselves, the structure, use and conduct of various board committees is one in which differences in size of company is significant.

New Recommendation 2.5

Current Recommendation 2.5 deals with disclosure of the process for evaluating performance of the board, its committees and individual directors, whereas the proposed Recommendation is concerned with “mix of skills and diversity” and thus involves elevation to Recommendation the 5th dot point from the current ‘Guide to reporting on Principle 2’.

CPA Australia considers the mix of skill a significant element in board performance. Smaller or start-up companies again, might be compelled to adopt narrower models as an essential element in achieving particular economic outcomes. Moreover, whilst diversity of skill brings with it a range of benefits, there are responsibilities which are collectively shared by board members, say in relation to matters of finance and solvency. Similarly, the attributes which an individual brings to the board setting are also attitudinal or behavioural in nature – say in relation to an inquiring mindset. These further subtleties we believe ought to be reflected in the Recommendation’s accompanying commentary.

New Recommendation 2.6

Concerned with induction and professional development of directors. No direct equivalent in 2nd edition at Recommendation level, though significantly draws on the 2nd edition’s commentary about induction programs.

CPA Australia’s view agrees with this recommendation, though cautioning against possible increased reporting burden.

New Recommendation 3.1

Whilst proposed 3rd edition and current 2nd edition deal with ‘Code of conduct’ the orientation is substantially different. Attention is drawn to the 3rd edition’s more straight-forward reference to a Code in contrast to what is probably more context within the 2nd edition and the extensive rewording of the preamble.

CPA Australia agrees with this Recommendation and notes that companies in drafting such codes need to be mindful of avoiding conflict or being at cross-purposes with the Act’s requirements and that there be no perceived narrowing down from what the Act either dictates or permits.

A more general, but highly significant, observation we wish to make, is the introductory commentary to Principle 3, setting the theme as being one of “reputation”. We strongly urge reverting to the type of wording contained in edition 2 or deletion of the proposed first paragraph. Ethical and responsible decision-making is the outcome of, and subject to, a range of factors. The corporation embedded within these complexities deal with decisions and

behaviours extending well beyond matters of reputation. We see reputation as the consequence not the fundamental objective of ethical and responsible decision making.

Further, the general commentary of Principle 3 'supporting charitable and philanthropic causes and local community initiatives' is listed as one of the initiatives in relation to acting ethically and responsibly. The commentary also states: 'Where a listed entity makes contributions or provides other support to charitable or philanthropic causes, it should disclose any actual or potential conflict of interest a director or senior executive may have in relation to that matter (for example, because he or she is a member of the governing body of the charitable or philanthropic organisation) and how those conflicts are managed'.

CPA Australia is of the opinion that corporations have the responsibility to behave ethically and engage in the community in which they operate. While we appreciate that philanthropic activities may form part of community engagement, we see community engagement as more appropriate as a corporate governance recommendation than philanthropy.

New Recommendation 4.1

Pertains to audit committees. The 3rd edition proposal combines into one Recommendation 2nd edition Recommendations 4.1, 4.2 and 4.3, along with some material contained in Guidance. Major point of overall difference would seem to be in proposed 4.1[b] which states "if it does not have an audit committee, disclose that fact and the processes it employs that independently verify and safeguard the integrity of its financial reporting."

CPA Australia agrees with this proposal.

New Recommendation 4.2

Deals with CEO and CFO certifications of financial statements and is in essence a repositioning of recommendation 7.3 of edition 2. It is no longer tied exclusively to the Corporations Act s 295A annual requirements and is thus now applicable to financial statements for any period. The drafting is now aligned more to accounting concepts (true and fair) rather than expressed in terms of risk – this reflecting the repositioning of the recommendation from Principle 7 into Principle 4.

Whilst acknowledging the sound intention of this proposal, CPA Australia has identified a number of concerns. Upon a plain reading it is not apparent as to how extensive "financial statements **for any period**" is intended to be. Half-year financial reporting would seem reasonably to come within this scope, but what of monthly internal management reporting? Further, while the reference to "true and fair" reflects alignment with the objectives of financial reporting, true and fair does have specific statutory reference – s 295(4)(d)(ii) and s 297 – built around annual reporting and therefore not necessarily applicable to "statements for any period". Certification is currently applied at the end of an extensive (and expensive) audit process. It is thus unclear what level of confidence is expected and appropriate in relation to this proposal. Finally, we caution a need to ensure that any suggested effect contrary to the s 189 reliance provisions is avoided and that the directors' role in supervising and scrutinizing financial position and solvency is not seen to be abrogated.

New Recommendation 4.3

Pertains to ensuring auditors attendance at AGMs noting that there is no direct equivalent in the 2nd edition. The Corporations Act 2001 in s 250RA provides this for a listed company. The objective of the proposal is to address the circumstances of listed entities established outside of Australia which are not subject to the Act.

Whilst acknowledging the sound intention in having auditors in attendance, a question remains around compelling such outcome.

New Recommendation 5.1

“Make timely and balanced disclosures”, essentially addresses the continuous disclosure regime under Listing Rule 3.1, with some apparent tightening of drafting language, particularly tying the Recommendation to “material effect on the price and value of its securities” rather than the more imprecise “all material matters”.

CPA Australia is of the view that the proposed alignment with the wording of s 674(2)(c)(ii) is an appropriate measure.

New Recommendation 6.1

On its face, a fairly benign Recommendation that “a listed entity should provide information about itself and its governance to investors via its website”, though effectively elevates current commentary under ‘Website’ in the 2nd edition.

CPA Australia has no specific comment other than general agreement.

New Recommendations 6.2 and 6.3

Respectively dealing with “investor relations program” and “facilitating participation at meetings of security holders” arise, in part, from the breaking up of 2nd edition Recommendation 6.1, probably the most substantial change being in proposed 6.2’s emphasis on two-way communication.

CPA Australia neither endorses nor rejects this proposal. However, we caution against any potential risk which places sophisticated investors at an undue advantage – such risk, might be more pronounced with IPOs.

New Recommendation 6.4

Concerned with facilitating electronic communications. Has no equivalent in the 2nd edition, though reflects content and intention of material in Box 6.1.

CPA Australia supports this recommendation.

New Recommendation 7.1

Deals with establishment of a risk committee expressed in quite prescriptive terms and can be contrasted with the more general language around policies and oversight contained in Recommendation 7.1 of the 2nd edition. It calls for a stand-alone risk committee or a combined audit and risk committee, and is perhaps the principle response from the ASX CGC to the fallout of the GFC. Noteworthy that 7.1[c] acknowledges that smaller companies and boards may legitimately decide not to have a risk committee, though in doing so, should disclose the “processes it employs for identifying, measuring, monitoring and managing the material business risks it faces.”

CPA Australia is in general agreement with the proposal.

New Recommendation 7.2

Deals with annual risk review. It provides a fairly substantial enhancement on 2nd edition 7.2 prompted by the fallout from the GFC and identifies ongoing monitoring in relation to risk appetite. The public consultation document notes that the current 7.2 is based on an assurance model pertaining to design, risk management and internal control, and talks about management receiving a report, rather than the proposed 7.2 emphasis on review.

CPA Australia is generally in agreement with this proposal but raises a concern around the subjective and ambiguous notion of ‘risk appetite’ and problems of delineating between reasonable investor information expectations and directors’ powers of management.

New Recommendation 7.3

Deals with internal audit. The public consultation document emphasizes the elevation of material pertaining to internal control into a Recommendation. Noteworthy though in the redrafting is the removal of reference to statutory declarations (Corporations Act s 295A).

CPA Australia agrees.

New Recommendation 7.4

“A listed entity should disclose whether, and if so how, it has regard to economic, environmental and social risks”. New with no equivalent in the current 2nd edition. The public consultation document sets the proposal in the context of international developments amongst stock exchanges, along with the UK “enlightened shareholder value” now embodied in statutory duties.

CPA Australia acknowledges and commends the intention behind this proposal. Practice will prove whether this is subject to bland motherhood expressions of intention or, alternatively, clouded by cautious boilerplate statements. Alternative approaches would be to cover ESG within Principle 7 preamble commentary or even at the outset either under “What is corporate governance” or “The purpose of the Principles and Recommendations”. This would potentially have the effect of emphasising that ESG is an integral component of doing business, not merely a source of risk to be dealt with. Reference to external materials, such as the GRI, is commendable given both the complexity and changing nature of the subject matter. We note

also in this context the present international momentum towards the development of an integrated reporting framework.

New Recommendation 8.1

Pertains to remuneration committees and is a combination of 2nd edition Recommendation 8.1 and 8.2, along with elevating into Recommendations 1st dot point (names etc.) and 4th dot point (charter) from current 'Guide to reporting Principle 8'.

CPA Australia's view is that it appears that the intention is sound but we caution against a disclosure which is 'disclosure for disclosure's sake' without commensurate investor or market benefit.

New Recommendation 8.2

The public consultation document notes broad alignment with existing recommendation 8.3, with emphasis given to different roles and responsibilities of executive and non-executive directors, and how this is reflected in the level and composition of remuneration.

Please note our comments immediately above. We are also of the opinion that the level of detail is fairly prescriptive in what is, or is intended to be, a more principle-based set of guidelines.

New Recommendation 8.3

This is new and has no equivalent in the 2nd edition. The Recommendation pertains to the listed entity having an executive remuneration "clawback" policy and whether in the reporting period performance-based remuneration was clawed back, or should have been but wasn't. The commentary ties the clawback to material misstatement in financial statements or other events. The policy intent stems from Australian Government concerns which had initially foreshadowed a legislative approach.

CPA Australia's view acknowledges the sound intention behind the proposal. However, a number of practical issues are apparent. If not properly structured, such policies may be ineffective or promote disruptive litigation. The policy should not be in any way at odds with individual contracts of employment. Materiality and lapse of time thresholds would need to be carefully considered, as would arguments around innocent change of position, and in the extreme situation of corporate insolvency, the policy would be subject to overarching preference and antecedent transaction recovery rules.

New Recommendation 8.4

Addresses policies around equity-based remuneration schemes mirroring that which is in the 2nd edition with the inclusion of what was covered in the 5th bullet point of the current 'Guide to reporting on Principle 8' concerning limiting economic risk.

CPA Australia agrees with the proposed Recommendation.