



14 November 2013

Ms Mavis Tan  
ASX Limited  
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Sydney NSW 2000

By email: [mavis.tan@asx.com.au](mailto:mavis.tan@asx.com.au)

Dear Mavis

**PUBLIC CONSULTATION: Draft ASX Corporate Governance Council Principles and Recommendations (3<sup>rd</sup> Edition)**

On behalf of Origin Energy Limited (Origin) we welcome the opportunity to provide a submission on the draft third edition of the ASX Corporate Governance Council Principles and Recommendations (ASX Principles).

Origin supports the proposed change to allow disclosure to be made on companies' websites rather than in their annual reports. However, we note the following matters for your consideration:

**Recommendation - 1.2 Issue - Background checks for new directors**

Origin believes it is commercially obvious that a company should know the background of any person who it puts forward as a candidate for appointment as a director. We believe therefore, that it is for each company to design its own system for obtaining that knowledge, and we'd prefer not to be required to undertake particular mandatory compliance checks.

Further, it may not be possible for a company to undertake the checks specified in the ASX Principles for externally nominated candidates, as we may only be notified of the nomination, just in time for a Notice of Meeting to be prepared and printed. If the ASX Principles are to be changed to mandate these checks, it should be possible for the listed company to require them to be undertaken by the individual who nominates an outside candidate, with the results of the checks to be provided to the company at the time the nomination is made.

**Recommendation - 2.1 Issue - Independent director characteristics**

In Origin's opinion, the change from the existing ASX Principles which refers to "relationships affecting independent status" to "defining characteristics" of an independent director may be seen as setting formal criteria in relation to independence. That change gives the perception that a director's independent status will be automatically lost if one of the "defining characteristics" is not met. In Origin's view, that change diminishes the ability for a Board to determine whether a director is independent.

Origin submits that the existing definition of independence works because what is important is whether the rest of the Board considers a director brings independent judgment to bear on board decisions.

Origin does not agree with the view that a specifically determined length of tenure (9 years) so directly and materially impacts the independence of a director that an assessment to retain independence needs to be automatically imposed on the rest of the Board. As a result, Origin recommends that this factor be removed from the ASX Principles as a defining characteristic of an independent director.

Origin also recommends that the materiality threshold be reinstated for professional advisers and consultants in Box 2.1. The modern listed company uses many law firms, accounting firms, consultants, investment banks and other advisers. To remove the word “material” from the relationship will unnecessarily affect the independent status of a significant number of current and potential directors who have, or had, executive careers as an adviser outside the company’s board room. Origin also notes that the term “material” has been retained in relation to suppliers, customers and other contractual relationships.

The current edition of the ASX Principles recognises that family ties and cross-directorships may be relevant in assessing independence and that the relevant director should disclose such relationships to the Board. The proposed changes would elevate close family ties from that position to become a defining characteristic, which is intended to affect independence. Origin submits that this is an unnecessary step which does not reflect contemporary society, where spouses, parents, siblings or adult children often lead independent, professional lives to the director. If a director is assessed as independent despite having a close family relationship which falls within one of the other categories set out in Box 2.1, under the new ASX Principles, the company will need to disclose why the Board considered that director independent despite a “defining characteristic” not being met. In turn, this will require disclosure of that close family relationship and the nature of the family member’s connection with the company (which, taken together with the removal of “material” from the professional adviser and consultant relationship, could be as remote as the director’s sibling being a senior employee at a professional services firm the company sometimes uses to advise on immaterial matters). Such disclosures appear to disregard the privacy of individuals unrelated to the company and, in Origin’s opinion, does not provide compensatory benefit for shareholders.

Origin recommends that family relationships (in existence prior to or after a director joins the board) should remain a matter for the Board to consider as part of its assessment of a director’s independence. In doing so, the Board can have regard to the nature of the relationship when evaluating the impact of that relationship on the director’s performance.

### **Recommendation - 3                      Issue - Ethical and responsible decision making**

The commentary notes that, where it makes philanthropic contributions, a company should disclose any actual or potential conflict of interest that a director or senior executive may have in relation to that contribution. Given the ongoing obligations that directors have under the Corporations Act to manage conflicts of interest and the obligations of disclosure with respect to related party transactions under the Accounting Standards, Origin submits that this recommendation is unnecessarily detailed and may add administrative burden for disclosures of individual donations of relatively immaterial amounts. Further, the existence of non-meaningful connections between directors and charitable causes, may put a “chill” on otherwise appropriate

proposals, to the detriment of the charities without sufficient benefit to the company or its shareholders.

#### **Recommendation - 4.2      Issue - Safeguard integrity in financial reporting**

The commentary in recommendation 4.2 notes that the proposed changes echo the provisions of the Corporations Act which require a CEO and CFO's declaration in relation to the financial statements of a listed entity. To the extent that this recommendation is needed, Origin suggests that the wording of the recommendation be fully aligned with the Corporations Act so that the additional words "in their opinion" be added.

#### **Recommendation - 6      Issue - Respect the rights of security holders**

The proposed change that a listed entity includes a single contact, preferably for a named individual, on its website for enquiries from security holders, analysts or the media is too specific. In Origin's experience, a single individual is unlikely to be able to manage or address all enquiries.

#### **Recommendation - 7.4      Issue - Recognise and manage risk**

Origin is generally supportive of disclosure relating to economic, environmental and sustainability risks. However, listed companies now have a number of stakeholders with differing interests in the way they'd like these issues to be addressed. Sometimes these interests conflict with one another and use different benchmarks to assess a company's performance. Origin recommends that the ASX Principles recognise that a company is best placed to assess whether a benchmark or reporting initiative is appropriate for itself.

#### **Recommendation - 8.3      Issue - Clawback policy**

Whilst the ASX Principles suggest listed entities should implement a clawback policy, Origin considers the proposals to be too prescriptive and should recognise the role of indirect forms of clawback or economic adjustment for example, the operation of employee incentive schemes. Origin considers that Australia's economy is best supported by a principles-based approach to executive remuneration and financial responsibility where accountability is vested in boards and, in particular, non-executive directors, to use their discretion on a case-by-case basis.

In Origin's case, a significant proportion of executive variable pay is in the form of deferred short term compensation and in long term equity incentives which have 3-5 year time horizons from the year of award. The granting of these awards are in the discretion of the Board, who will have regard to performance, both personal and corporate. These equity incentives also contain an inherent clawback mechanism of their own (in that, bad short-term decisions that lead to long-term destruction of value mean that the people responsible for those decisions suffer the consequences automatically through market pricing of the stock). Further, unvested awards can be cancelled on cessation of employment.

Origin also notes that, from a practical perspective, it is likely to be both costly and difficult to claw back fixed remuneration paid out in cash, particularly from a former employee.

Therefore, Origin submits that the incentive for good decision making that is inherent in the appropriate use of equity incentive plans is an already effective mechanism.

## General

## Board Responsibilities and Roles

Origin recognises that not all companies have the same internal structure and, therefore, flexibility needs to be built into the ASX Principles to ensure that they are effectively adopted and followed.

For example, not all companies have a “deputy chair” or “senior independent director”. Origin encourages broadening the description or concept of these roles (and reference to them in the ASX Principles) to include other directors or committee chairs with the appropriate delegated authority, or directors appointed in respect of specific matters.

## Conclusion

Origin is generally supportive of the new ASX Principles and is grateful for your consideration of the matters noted above.

Please do not hesitate to contact me if you wish to discuss any of these matters in more detail.



Gordon Cairns  
Chairman  
Origin Energy Limited