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ASX Corporate Governance Council
c/o ASX Limited
PO Box H224
Australia Square NSW 1215
Attn.: Ms Mavis Tan

Via email: mavis.tan@asx.com.au

Dear Ms Tan

Consultation on the proposed fourth edition of the ASX Corporate Governance Principles and Recommendations

CPA Australia represents the diverse interests of more than 163,000 members working in 125 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

The fourth edition is fundamentally different from its predecessor corporate governance codes in many respects. One of the most distinctive changes of which is the proposed introduction into Principle 3 (*Instill the desired culture*, currently in the third edition *Act ethically and responsibly*) the notion of an entity's "social licence to operate". CPA Australia supports the direction being taken by the Council and agrees with the form and manner of articulation within both the associated recommendations and accompanying commentaries. The basis of our support for this change is set out in this cover letter, and responses to each of the further numerous changes are presented in the attached **Appendix**.

A fair prediction is that proposed Principle 3 will attract criticism. This because "social licence to operate" being merely a social norm preceding or lying outside of legal rules is ill-equipped as a basis for developing a framework for guiding "how authority is exercise and controlled within corporations", and "how those in control are held to account" – to borrow terms from Justice Owen's definition of corporate governance quoted in both the proposed 4th and current 3rd edition of the Principles & Recommendations. As two researchers from the CSIRO noted in 2014 in an examination of the mining industry, vagueness and imprecision in the use of the term in published sustainability reports "suggests that the social license is essentially a metaphorical and rhetorical notion, bearing little resemblance to a license in a legal sense." Proponents of the idea of a social licence to operate are nevertheless attune to this dichotomy pointing out that "while having a formal licence to operate may be necessary, it is rarely sufficient" (The Ethic Centre, January 2018).

What then is the social licence to operate and is it (or is it not) complementary to a formal licence – in the corporate sense, separate legal personality granted upon incorporation and the privilege of limited liability?

A search of the management literature reveals a strong alignment of the social licence with concepts of trust, credibility and, in particular, legitimacy (The Ethics Centre). Issues of legitimacy emphasise, in turn, three interrelated strands of development; community acceptance, market acceptance and sociopolitical/ legal acceptance (Gehman, Lefsrud and Fast, 2017). On this basis, a valid assertion can be made that in the corporate governance context economic licence, social licence and legal licence are not only compatible, but

rather essential to the viability (and validity) of the corporation within processes of economic and market transformation.

Two definitions of legitimacy are presented here to further illustrate that the introduction of the notion of a social licence into the Principles & Recommendations, as a quasi-legal instrument (soft regulation), is not a 'bridge too far' potentially at odds with overriding blackletter law.

> Legitimacy is not a commodity to be possessed or exchanged but a condition reflecting cultural alignment, normative support, or consonance with relevant rules or law. (Scott, 1995)
>
> A generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within socially constructed system of norms, values beliefs, and definitions. (Suchman, 1995)

CPA Australia believes it vital in assessing the merit of what is proposed in the new Principle 3 to remain mindful that a company is a social construct and the relevant, and relatively simple, rules in Chapter 2A of the Corporations Act 2001 delegating to ASIC the power to register a company arise out of parliamentary processes, the validity of which is founded on the normative cultural support of the population at large. To be clear, CPA Australia is not arguing for a radical transformation of the rights, autonomy or regulation of companies - rather to point directly to the reality that the behaviours, actions, interactions and disclosures of companies must reflect the valid expectations of society which are constantly evolving. Frameworks such as the Principles & Recommendation area a fundamental part in mediating these transformations and it should thus be accepted as fair and reasonable that significant redevelopment with the introduction of new concept will, from time to time, be necessary.

For completeness, it is appropriate to briefly address the nature of the blackletter law that affects and gives effect to corporate governance. The necessity of such examination arises from both the previously referred definition of corporate governance including the "framework of rules", and within that framework, the understood degree to which accommodation can, and ought to be, given to changes in the surrounding circumstances that impact how, and to what standards, companies are held to account.

Council will be aware of the two significant reviews in 2005/ 6 considering the fundamental question of the interaction between directors' duties and the interests of shareholders; the Parliamentary Joint Committee on Corporations and Financial Services (PJC) and the Corporations and Markets Advisory Committee (CAMAC). It is not necessary to recount here the circumstances giving rise to these inquiries and the details of the conclusions drawn. Importantly, the authors of Ford, Austin and Ramsay's *Principles of Corporations Law* (16th ed.) describe in relation to CAMAC's report the scope of directors' duties based on existing case law:

> The interests of a company can include its continued long-term well-being… and directors may take into account a range of factors external to shareholders if this benefits shareholders as a whole.

It is worthwhile also to repeat here CAMAC's rationale for rejecting calls for reform of the law of directors' duties:

> The current common law and statutory requirements on directors and others to act in the interests of their companies - - - are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role of companies and how they should conduct their affairs.

With the effluxion of time since these inquiries, ensuing case law would not have altered the above authoritative conjectures that corporate law is sufficiently permissive to allow the taking into account factors that would fall within the ambit of what is understood as elements within a company's social licence to operate. This, CPA Australia argues, supports the notion that the Australian corporate governance framework ought to evolve to reflect what now are widely accepted societal expectations of the conduct of companies and the form and breadth of their disclosures.

Similarly, the now often cited memorandum of opinion by Noel Hutley QC and Sebastian Hartford-Davis on climate change and directors' duties can, CPA Australia argues, provides an important modification to the CAMAC view such that the broadness of the common law and statutory requirements, rather being merely permissive of wider actions and regards, can be seen as a basis of exposure for directors who are recalcitrant in responding to society's consensus expectation as to how a company's affairs should be conducted. Proposed Principle 3 offers both a vital mechanism for facilitating transformation and a major platform for communicating commitment.

In arguing acceptance of the direction proposed by the Council in the draft 4th edition, we are nevertheless mindful of the legal basis upon which the Principles & recommendations apply. Being subject to the ASX's listing rules regime the Principles & Recommendations are, in essence, contractually-based and do not, as such, form strictly part of the corporate law. Without adopting a concluded position, we caution whether there is potential for the Principles & Recommendation becoming at odds with the overarching law and being seen to take the governance of companies in a direction not reasonably contemplated in the law. At a minimum, clearer statements of the boundaries of the Principle & Recommendations are needed.

To conclude here CPA Australia's arguments supporting the inclusion of prominent reference to social licence to operate within the Principles & Recommendations, we think it relevant to identify the extent to which the term has entered into the Australian public policy and regulatory discourse. Two examples are worthy of highlight:

- John Price, Commissioner, Australian Securities and Investments Commission. Centre of Policy Development speech "Financing a Sustainable Economy", Sydney, 18 June 2018.

  > Under the heading Social licence to operate:
  >
  > For some company stakeholders, the social and environmental impact of corporate activity is an increasingly acute criterion considered in deciding which company to invest in or transact with. A salient question for boards and directors to ask now is therefore:
  >
  > > '*how do we identify the risks and opportunities presented by this new environment and respond in a manner that is both consistent with the social contract under which we operate and nurturing of long-term business success?'*
  >
  > For our part, we will continue to encourage boards and directors to ask these questions of themselves and shine the light on their own culture and corporate governance practices, two drivers which we believe are critical in answering them.

- Tony Boyd "Chanticleer" Australian Financial Review, 27 May 2018

- The dinosaurs who think a social licence is mumbo jumbo or waffly corporate speak have not only misunderstood the purpose of the Hayne inquiry [the Honourable Kenneth Hayne AC QC, Financial Services Royal Commission], they have missed one of the most significant trends in global capital markets over the past decade – responsible investing.

If there were any doubt, the circumstances in which listed entities operate has shifted dramatically since the Principles & Recommendations were first devised in 2003. That the proposed 4th edition is more than mere increment is clear from the recognition given to the concept of a social licence to operate, along with the manner and degree to which associated articulation is given to significant attributes of corporate culture (in particular, diversity within Principle 1) and the business and economic impacts of global megatrends (most prominently, climate change risk under Recommendation 7.4). CPA Australia believes it highly appropriate for Australia's key corporate governance guidance to develop in the directions proposed.

We are mindful however of possible criticism that the Principles & Recommendations in expanding the scope of subject matter addressed, risks losing clarity and accessibility. Support for such concerns could be drawn from comparison with the recently released (July 2018) edition of UK FRC's Corporate Governance Code. To this we

would urge that such direct comparison is risky given the presence in the UK of more detailed narrative disclosures in the form of strategic report requirements. Additionally, there are significant difference in legislative underpinning where, under UK corporate law, a statutory requirement applies to have regard for community, environmental and ethical matters (172 Duty to promote the success of the company) – themes of which are now expressed in the Australian context within the proposed 4th edition of the Corporate Governance Principles & Recommendations.

If you require further information on our views expressed in this submission, please contact Dr John Purcell FCPA, Policy Adviser ESG, on +61 3 9606 9826 or at john.purcell@cpaaustralia.com.au.

Yours sincerely

Paul Drum FCPA

Head of Policy

Appendix: Detailed responses to proposed changes in the fourth edition

Set out below is a detailed summary of the changes being consulted upon in the fourth edition of the *Principles and Recommendations*:

- more detailed guidance in the **preface to the recommendations** on what should be disclosed by listed entities that follow the Council's recommendations;

Agree/ disagree	**Agree**
Comment	The additional guidance is highly relevant and well targeted.

- a new section in the **preface to the recommendations** dealing with recommendations that are not applicable, explaining that in such a case the Council has no issue with an entity stating that it follows all of the Council's recommendations provided, of course, it does in fact follow all of the Council's recommendations, apart from those that technically do not apply to it, and it otherwise makes appropriate disclosures for all of the recommendations that it does follow;

Agree/ disagree	**Agree**
Comment	The introduction of this guidance should go some way towards reducing in many company's governance statements the amount of clutter and appearance of a mechanical tick-the-box approach.

- an amendment to **recommendation 1.1** (role of board and management) requiring a listed entity to have and disclose a board charter, plus amendments to the commentary:

Agree/ disagree	**Agree**
Comment	The deliberate positive assertion that a listed entity should have a board charter is commendable and the elaborations in the commentary are sound. Concerning these elaborations it might be worthwhile giving on the seventh dot point, where mention is made of 'business model', footnote reference to Integrated Reporting as a framework for understanding and communicating this key facet of a business, and on the penultimate dot point dealing with remuneration, footnote reference to Corporations Act s 300A(1)(b) alerting preparers of directors' remuneration report requirements addressing remuneration policy's relationship with company's performance.

  - to add to the list of usual responsibilities of the board:

    - defining the entity's purpose;
    - approving the entity's statement of core values and code of conduct to underpin the desired culture within the entity;
    - overseeing management in its implementation of the entity's business model, achievement of the entity's strategic objectives, instilling of the entity's values and performance generally; and
    - ensuring that the entity's remuneration framework is aligned with the entity's purpose, values, strategic objectives and risk appetite;

Agree/ disagree	**Agree**
Comment	These sit appropriately as responsibilities of the board and are key to

	emphasising the locus for setting a corporate culture which should permeate throughout the entity. Given the footnote cross-referencing to proposed Recommendation 3.1, further consideration might be given to inserting an additional footnote reference in either place to Part 2.5 of the Criminal Code Act where under section 12.3(2)(c) a failure in corporate culture is identified as a fault element leading to non-compliance with a relevant provision relating to corporate criminal liability.

- to clarify that the information provided to the board by the senior executive team should not be limited to information about the financial performance of the entity, but also its compliance with material legal and regulatory requirements and any material misconduct that is inconsistent with the values or code of conduct of the entity;

Agree/ disagree	**Agree**
Comment	This, at some level, is self-evident, though probably still worthy of emphasis on the basis of consistent articulation in case law and related commentary that directors must be probing of, and actively engaged in, information laid before them by management.

- to provide additional guidance on the role and responsibilities of the chair;

Agree/ disagree	**Agree**
Comment	Query though whether this elaboration is more suitably addressed in resources and literature outside of the strict confines of a corporate governance code. It is noted however that some of the specifically identified roles and responsibilities of the chair are likewise identified UK Corporate Governance Code (July 2018), though with an additional reference to “seek[ing] regular engagement with major shareholders”. (page 4). This additional point might be worthy of inclusion in the ASX CG P&Rs 4th ed., though within accepted practices of the division between board and management responsibility.

- an amendment to **recommendation 1.2** (background checks) that a listed entity should undertake appropriate background checks on senior executives, as well as directors, before engaging them, plus an amendment to the commentary stating that that the information given to security holders in relation to the election or re-election of a director should not only include a statement as to whether the board supports their election or re-election, but also the board’s reasons for doing so;

Agree/ disagree	**Agree**
Comment	As a minor observation - having introduced reference to the appointment of senior executives, it would perhaps be beneficial (or necessary) to address the threshold of responsibility between the board, chief executive and senior management in making these appointments.

- amendments to the commentary to **recommendation 1.3** (written contracts of appointment):
  - including a statement that letters of appointment for directors and service contracts for senior executives should be with the director or senior executive personally rather than an entity supplying their services, so as to ensure that the director or senior executive is personally accountable to the listed entity for any breach of the agreement;

Agree/ disagree	Agree
Comment	As a minor matter of drafting, proposed footnotes 18 and 19 might be combined as including the statement in fn. 18 “see the commentary below” is a little clumsy. Perhaps also the intended effect of fn. 18 might be addressed in wording Recommendation 1.3 itself to say: “written agreement with each director **in their personal capacity - - -**.”

- including a footnote that:

  “The Council is aware that some directors of listed entities supply their services through a “personal services company” and have their fees paid to that company rather than to the director personally. Provided the director has a personal letter of appointment with the listed entity setting out the director’s duties and responsibilities, such an arrangement is not inconsistent with this recommendation. However, listed entities and directors should be cognisant of the perception that such an arrangement may create of the director being afforded preferential treatment.”

Agree/ disagree	**Agree**
Comment	Mindful of a risk that overuse of footnoting should be avoided, in a Code of this type, it might also be worth including mention that nothing in such an agreement will undermine or affect a directors’ duties and potential liability under statute and at common law.

- adding to the suggested contents for a director’s letter of appointment a requirement to notify the entity of, or to seek the entity’s approval before accepting, any new role that could impact upon the time commitment expected of the director or give rise to a conflict of interest;

Agree/ disagree	**Agree**
Comment	This addition is consistent with addressing concerns which have been raised regarding directors accepting too many appointments undermining capacity to devote sufficient attention to one, or a number, of their companies.

- substantial changes to **recommendation 1.5** (diversity) directed to achieving better gender diversity outcomes, including:

  - splitting the requirement to have a diversity policy from the requirement to set measurable gender diversity objectives;

Agree/ disagree	**Agree**
Comment	Agree this should be split out. Best practice is currently Inclusion and Diversity. Consider changing the references to Diversity policy to Inclusion and Diversity policy. Also recommend the importance of developing a robust Inclusion and Diversity strategy which is then supported and enabled through the Inclusion and Diversity policy/ies. The strategy should outline key focus areas and achieving better gender diversity outcomes may be one of these focus areas. There are many references to gender diversity and targets, however not a lot of reference to broader Inclusion and Diversity initiatives and objectives/measures.

- making it clear that a listed entity's measurable gender diversity objectives should be targeted at achieving gender diversity in the composition of the entity's senior executive team and workforce generally, as well as in the composition of the board;

Agree/ disagree	**Agree**
Comment	This reflect in abundancy society's expectation in these critical regards.

- stating that 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 not less than 30% of its directors of each gender within a specified period;

Agree/ disagree	**Agree**
Comment	No specific comment

- requiring the board or a board committee to charge management with designing, implementing and maintaining programs and initiatives to help achieve its measurable objectives and to undertake an annual review with management of the entity's progress towards achieving its measurable gender objectives and the adequacy of the entity's programs and initiatives in that regard;

Agree/ disagree	**Agree**
Comment	No specific comment

- requiring the entity to disclose in relation to each reporting period whether that review has taken place;

Agree/ disagree	**Agree**
Comment	No specific comment

- including in the commentary a suggestion that a listed entity consider disclosing any insights from that review and any changes the entity has made to its gender diversity objectives and programs as a result;

Agree/ disagree	**Agree**
Comment	No specific comment

- requiring a listed entity to disclose its diversity policy in full and removing its ability to disclose only a summary of the policy;

Agree/ disagree	**Agree**
Comment	No specific comment

- including in the commentary a suggestion that entities disclose the outcomes and actions taken as a result of any gender benchmarking they do against their peers or gender pay audits16 they undertake so that security holders and other stakeholders gain an insight into the effectiveness of the entity's gender diversity programs and initiatives;

Agree/ disagree	**Agree**
Comment	No specific comment

- moving the suggestion that the board or a committee of the board consider setting diversity KPIs for senior executives from the suggested contents of a diversity policy in Box 1.5 to the commentary;

Agree/ disagree	**Agree**
Comment	No specific comment

- including guidance in the commentary that a listed entity's diversity policy should express its commitment to embrace diversity at all levels and in all its facets, including gender, marital or family status, sexual orientation, gender identity, age, physical abilities, ethnicity, religious beliefs, cultural background, socio-economic background, perspective and experience; and

Agree/ disagree	**Agree**
Comment	It is appropriate to spell-out these dimensions of diversity.

- including guidance in the commentary that boards of listed entities should have regard to other facets of diversity in addition to gender when considering their make-up and that having directors of different ages and ethnicities and from different cultural or socio-economic backgrounds can help bring different experiences and perspectives to bear and avoid "groupthink" in decision making;

Agree/ disagree	**Agree**
Comment	No specific comment

- an amendment to **recommendation 1.6** (board reviews) to state that an entity should have and disclose a process for evaluating the performance of the board, its committees and individual directors "*each reporting period*" (ie annually);

Agree/ disagree	**Agree**
Comment	The additional stress given in this recommendation, along with the targeted additional emphasis provided in the commentary, are important measures in ensuring directors and boards remain able to optimise their effectiveness and negates the risk of 'free riders'. As a matter of drafting, (a) of 1.6 could, we suggest, be improved by deleting "for each reporting period" at the end of the sentence and insert "in each reporting period" between "evaluating" and "the performance".

- an amendment to **recommendation 1.7** (management reviews) to state that an entity should have and disclose a process for evaluating the performance of its senior executives "each reporting period" (ie annually);

Agree/ disagree	**Agree**
Comment	Please refer the above comment concerning the drafting of recommendation 1.6.

- an amendment to **principle 2** (structure the board to be effective and to add value) to recognise the importance of the board having directors with "knowledge of the entity and the industry in which it operates";

Agree/ disagree	**Agree**
Comment	Though some commentators might suggest this as self-evident, we believe this as nevertheless worthy of specific articulation reflecting as it does the now well established judicial, and thus practical, interpretation of the duty of care and diligence.

- amendments to the commentary on **recommendation 2.2** (board skills matrix)
    - giving greater guidance on what should be included in a board skills matrix;
    - noting that boards are increasingly being called upon to address new or emerging issues including around culture, conduct risk, digital disruption, cyber-security, sustainability and climate change and suggesting that the board regularly review its skills matrix to make sure it covers the skills needed to address existing and emerging business and governance issues;

Agree/ disagree	**Agree**
Comment	The intention here is significant and should be given effect to. We query though whether stating specific categories or examples is necessary and thus suggest that the second sentence of the third paragraph of the proposed commentary might be amended to remove "In this regards," and finish at the word "issues". If it is strongly desired that these emerging complexities are pointed to, this might alternatively be identified by a broad cross-reference to subject matter and themes that would be within the ambit of both proposed revised Principle 3 and Principle 7.

    - suggesting possible formats for presenting the board skills matrix; and

Agree/ disagree	**Agree**
Comment	Identification of alternative formats is worthwhile.

    - stating that an entity should explain what it means by each skill referenced in its board skills matrix.

Agree/ disagree	**Agree**
Comment	Refer above comment.

- amendments to **recommendation 2.3** (disclose independence and length of service of directors):
    - removing unnecessary duplication and simplifying the drafting in the list of examples of interests, positions, affiliations and relationships that might cause doubts about the independence of a director in box 2.3;

Agree/ disagree	**Agree**
Comment	No specific comment

- replacing the references to “associations”, which has a technical meaning under the Corporations Act, with references to “affiliations”;

Agree/ disagree	**Agree**
Comment	No specific comment

- adding a further example in box 2.3 covering directors who receive performance based remuneration (including options or performance rights) or participate in an employee incentive scheme;

Agree/ disagree	**Agree**
Comment	No specific comment

- extending the example in box 2.3 regarding a person who has “close family ties with any person who falls within any of the categories described above” to a person who has “close personal ties”, along with the inclusion of commentary that these ties may be based on “family, friendship or other social or business connections”;

Agree/ disagree	**Agree**
Comment	No specific comment

- adding guidance in the commentary to recommendation 2.3 that where a director falls within one or more of the examples in box 2.3, the board should rule the director not to be independent unless it is clear that the interest, position, affiliation or relationship in question is not material and will not interfere with the director’s capacity to bring an independent judgement to bear on issues before the board and to act in the best interests of the entity and its security holders generally; and

Agree/ disagree	**Agree**
Comment	No specific comment

- adding a more detailed explanation in the commentary why a director who is or represents a substantial holder should not be considered independent;

Agree/ disagree	**Agree**
Comment	No specific comment

- the addition of a passage in the commentary to **recommendation 2.4** (a majority of the board of a listed entity should be independent directors) stating that:

  “Without detracting in any way from the preferred position that a listed entity should have a majority of independent directors, if a listed entity chooses not to follow this recommendation, the Council suggests that it have more than one independent director at all times. Having a single independent director can lead to that director being isolated and less effective in holding management to account.”

Agree/ disagree	**Agree**
Comment	The ‘concession’ being made here is likely practical in the context of the range of size of listed entities coming within the ambit of the Principles & Recommendations, and the ‘qualification’ to that concession around the

	risk of a single independent director becoming isolated, is an important caution.

- an amendment to **recommendation 2.6** (director induction and professional development) so that it now reads: "[a] listed entity should have a program for inducting new directors and for periodically reviewing whether there is a need for existing directors to undertake professional development to maintain the skills and knowledge needed to perform their role as directors effectively"

Agree/ disagree	**Agree**
Comment	The shift away from passive language now infers a more positive expectation particularly in relation to the skills of existing directors. Accordingly, the fifth paragraph of the proposed revised commentary, might in the second sentence be altered to say that professional development is provided or offered rather than merely "considered".

and changes to the commentary:

  - suggesting that if a new director is not familiar with the legal framework that governs the entity, the entity's induction program should include training on their legal duties and responsibilities as a director under the key legislation governing the entity and the Listing Rules (including ASX's continuous and periodic reporting requirements);

Agree/ disagree	**Agree**
Comment	Evidence is that awareness of the relevant legal frameworks is both a matter of vulnerability for companies themselves and concern for individual directors. Whilst mindful that the commentaries which accompany a recommendation should not become too voluminous, it might be worth prefacing this proposed paragraph with words to the effect that as part of the appointment process a director's familiarity with the legal framework should be ascertained.

  - noting again that boards are increasingly being called upon to address new or emerging issues including around culture, conduct risk, digital disruption, cyber-security, sustainability and climate change; and

Agree/ disagree	**Agree in principle**
Comment	Refer above comment made in relation to recommendation 2.2 commentary.

  - suggesting that the board or the nomination committee of a listed entity should regularly assess whether the directors as a group have the skills, knowledge and experience to deal with new and emerging business and governance issues and that professional development for directors should be considered where gaps are identified and they are not expected to be addressed in the short term by new appointments;

Agree/ disagree	**Agree in principle**
Comment	Refer above comment made in relation to recommendation 2.6

- a new **recommendation 2.7** that a listed entity with a director who is not fluent in the language in which board or security holder meetings are held or key documents are written should disclose the processes it

has in place to ensure the director understands and can contribute to the discussions at those meetings and understands and can discharge their obligations in relation to those documents;

Agree/ disagree	**Agree**
Comment	No specific comment

- substantial changes to principle 3 and the supporting recommendations and commentary to address matters to do with values, culture and social licence to operate, including:
    - changing **principle 3** from "[a] listed entity should act ethically and responsibly" to "[a] listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner";

Agree/ disagree	**Agree**
Comment	Additional to the observations made in the covering letter, we drawn Council's attention to wording with the July 2018 revised UK code issued by FRC which express similar intent: "The board should assess and monitor culture. Where it is not satisfied that policy, practice and behaviour throughout the business are aligned with the company's purpose, values and strategy, it should seek assurance that management has taken corrective action." (Provision 2)

    - amending the commentary to principle 3 to acknowledge that a listed entity's social licence to operate is one of its most valuable assets and that it can be lost or seriously damaged if the entity or its officers or employees are perceived to have acted unlawfully, unethically or in a socially irresponsible manner;

Agree/ disagree	**Agree**
Comment	Refer covering letter

    - a new **recommendation 3.1** that a listed entity should articulate and disclose its core values;

Agree/ disagree	**Agree**
Comment	In addition to comments made in response to the broad revised thrust of Principle 3, it is remarked that absent any statutory articulation of key stakeholder identification and responsibilities towards, which in turn, are factored into Provision 5 of the new UK Code, the degree of explanation and elaboration to new recommendation 3.1 is warranted. This said, some redrafting towards shortening the text a little could be beneficial.

    - amendments to the existing recommendation on codes of conduct (currently recommendation 3.1 in the third edition but to be renumbered as **recommendation 3.2** in the fourth edition):
        - requiring a listed entity to disclose its code of conduct in full and removing its ability to disclose only a summary of the code; and

Agree/ disagree	**Agree**
Comment	This level of transparency is considered desirable.

        - requiring the board to be informed of any material breaches of a listed entity's code of

conduct by a director or senior executive and of any other material breaches of the code that call into question the culture of the organisation;

Agree/ disagree	**Agree**
Comment	These are matters should be brought to the board's attention as a matter of course and good practice within the bounds of materiality.

and including in the commentary:

- a statement that with appropriate training and reinforcement from senior management, a listed entity's code of conduct can help to instil a culture of acting lawfully, ethically and in a socially responsible manner;

Agree/ disagree	**Agree**
Comment	Again, this should happen as a matter of course and is essential to safeguarding the interests particularly of those entities with wide physical and geographic spread of operations, and to reduce risk of 'rogue' behaviour.

- a statement encouraging a listed entity to disclose in general terms the actions it has taken to enforce its code of conduct (recognising that legal and other constraints may prevent it disclosing specific details of any individual action); and

Agree/ disagree	**Agree**
Comment	The proposal is soundly based from the perspectives of transparency and instilling confidence, with the necessary constraints appropriately highlighted.

- a suggestion that a listed entity should review its code of conduct at least once every 3 years to ensure it remains "fit for purpose" and addresses any emerging conduct issues;

Agree/ disagree	**Agree**
Comment	Again, an important element in the board and the company senior management remaining cognisant of changing circumstances within the operating environment which may become a source of vulnerability.

- a new **recommendation 3.3** that a listed entity should: (a) have and disclose a whistleblower policy that encourages employees to come forward with concerns that the entity is not acting lawfully, ethically or in a socially responsible manner and provides suitable protections if they do; and (b) ensure that the board is informed of any material concerns raised under that policy that call into question the culture of the organisation; and

Agree/ disagree	**Agree**
Comment	This matter was previously addressed only as item 5 in Box 3.1. The proposed substantially increased prescription is in keeping with both law reform (refer Treasury Law (Whistleblowers Bill 2017) and community expectation.

- a new **recommendation 3.4** that a listed entity should: (a) have and disclose an anti-bribery and corruption policy; and (b) ensure that the board is informed of any material breaches of that policy;

Agree/ disagree	**Agree**
Comment	As with our comments above, the elevation of these matters within the Principles & Recommendations is warranted. Law reform such as the introduction of a Deferred Prosecution Agreement scheme illustrate anti-bribery and corruption as matters of heightened public policy concern, and more broadly, the OECD 4th assessment report of Australia performance against the anti-bribery convention, whilst acknowledging positive gains, illustrated the need of increased effort across the public and private sectors. Similarly, the introduction of false account penalties in the Criminal Code adds weight to the imperative for suitably robust internal practices and policies.

- a change to **principle 4** from "safeguard integrity in corporate reporting" to "produce corporate reports of high quality and integrity" and an addition to the commentary acknowledging that for investors to make informed investment decisions, a listed entity needs to provide corporate reports of high quality and integrity and those reports should give the reader a reasonable understanding of the entity's business model, strategy, risks and opportunities, remuneration policies and practices and governance framework, as well as its financial performance;

Agree/ disagree	**Agree**
Comment	The proposed wording of the principle correctly emphasises the positive and active character of the intended governance behaviour. As a minor point, there might be seen a slight disconnect between the wording of the revised principle and what is expressed in the explanatory sentence in that the "rigorous processes" is directed at validation - an audit orientation. With the introduction of "Produce" the processes should likewise apply rigorously to this earlier step in the cycle of ensuring quality and integrity. As a further minor suggestion, as the commentary identifies providing the reader of reports with an understanding of the entity's business model, a footnote reference to the Integrated Reporting framework might be beneficial.

- the addition of a new **recommendation 4.4** that "[a] listed entity should have and disclose its process to validate that its annual directors' report and any other corporate reports it releases to the market are accurate, balanced and understandable and provide investors with appropriate information to make informed investment decisions", and with commentary that an entity's corporate reports for these purposes include any quarterly activity reports and quarterly cash flow reports the entity may be required to provide under the Listing Rules and, if the entity produces them, an integrated report or sustainability report;

Agree/ disagree	**Agree**
Comment	Whilst strongly supportive of the intention underlying this proposed recommendation, we suspect that there may arise 'push back' from some quarters on the basis that it is onerous in both scope of type of disclosure that might come within its ambit and indeterminacy as to what constitutes a satisfactory level of validation. This, possibly further overlayed by an

	interpretation that addressing qualitative characteristics from the perspective of enabling investors to make informed decisions invites a relationship of reliance with consequent liability implications. The recommendation and commentary make references to listed company director operating and financial review (OFR) requirements and the Council will no doubt be aware of assertions that the absence of some form of business judgment safe-harbour protection in relation to forward-looking elements contained in these disclosures leaves directors in a position of vulnerability. Nevertheless, it is difficult to find instances where OFR disclosures have given rise to either direct or market-based causation claims of economic loss and there is indeed now strong extra-judicial opinion that a failure to disclose is more likely to be a source of liability risk. As such, CPA Australia supports the proposed addition in its current form, and also, we urge close monitoring of the quality of disclosures post adoption of the 4th edition.

- the addition of commentary to **principle 5** (make timely and balanced disclosure) acknowledging that for investors to make informed investment decisions, a listed entity needs to make timely and balanced disclosure of information that a reasonable person would expect to have a material effect on the price or value of its securities;

Agree/ disagree	**Agree**
Comment	As drafted, each of the Principles, except for Principle 1, will now have a Commentary which sets out context and purpose. This will likely be beneficial to both preparers and investors, and in the context of Principle 5, appropriately emphasises an objective reasonable person standard of materiality.

- an amendment to **recommendation 5.1** (disclosure policy) requiring a listed entity to disclose its continuous disclosure compliance policy in full and removing its ability to disclose only a summary of the policy;[28]

Agree/ disagree	**Agree**
Comment	The proposal provides necessary transparency and the footnote explanations regarding redaction and what constitutes “balanced” are likewise beneficial. Rather than additional disclosure burden, this additional requirement could assist in director understanding of how they might meet the due diligence defence under s 674(2B) within the associated Corporations Act continuous disclosure rules (Chapter 6CA).

- a new **recommendation 5.2** that “[a] listed entity should ensure that its board receives copies of all announcements under Listing Rule 3.1 promptly after they have been made”;

Agree/ disagree	**Agree**
Comment	This may seem self-evident though provides an important link between the listed entity’s disclosure obligations and the circumstances that might give rise to board and directors’ responsibility. As a minor matter of drafting, insert “Commentary” heading before the short explanatory paragraph.

- a new **recommendation 5.3** that "[a] listed entity that gives a new investor or analyst presentation should release a copy of the presentation materials on the ASX Market Announcements Platform ahead of the presentation";

Agree/ disagree	**Agree**
Comment	Wording of the recommendation is slightly clumsy. Suggest removing "that gives" and replace with "when giving" and insert a comma between "presentation" and "should".

- an amendment to the commentary to **principle 6** (respect the rights of security holders) acknowledging that the provision of high quality corporate reporting and continuous disclosure are important for security holders to be able to exercise their rights as owners effectively;

Agree/ disagree	**Tentatively agree**
Comment	The proposed reference in the commentary to security holders being provided quality corporate reporting and continuous disclosure, reflects, as it does, the intent underlying the numerous statutory rules governing corporate information obligations, and is therefore commendable. We however query the proposed inserting of the words "as owners" into the Principle. The commentary correctly identifies rights, both statutory and as property, associated holding (owning) securities. The Council will no doubt be aware of historical legal and theoretical debates around shareholder primacy and the separate legal personality of incorporated companies. Though now settled, if rights are to be simply stated in the principles it should, we urge, be "rights as equity holders" rather than "rights as owners".

- an amendment to the commentary on **recommendation 6.1** (information on website) to suggest a listed entity include on its website links to its "other corporate reports", as well as to its annual directors' report and financial statements;

Agree/ disagree	**Agree**
Comment	These seem sound and logical, and reflects the trend in best practice enabling stakeholders access to more 'granular' and real-time information geared to their individual needs.

- amendments to the commentary on **recommendation 6.2** (investor relations program):
    - referring to proxy advisers in the list of possible stakeholders to be covered in the investor relations program of a larger listed entity;

Agree/ disagree	**Agree**
Comment	This correctly spans the range of relevant parties.

    - adding a statement that while the focus of many investor relations programs will be on larger investors and financial market participants who service larger investors, listed entities should also seek opportunities to engage with retail investors and the organisations that represent them, to understand the matters of concern or interest to smaller investors;

Agree/ disagree	**Agree**
Comment	This is a significant measure towards rebalancing and recognising the diversity of proprietary interests in a listed entity and should go some way towards redressing the risk of an assumption that all small retail investors are merely passive.

- adding a suggestion that a listed entity should also consider monitoring popular social media forums used by retail investors for comments about the entity; and

Agree/ disagree	**Disagree**
Comment	This level of detail is likely not suitable for a Code of this nature.

- adding a statement that where significant comments or concerns are raised by investors, they should be conveyed to the entity's board and relevant senior executives.

Agree/ disagree	**Agree**
Comment	Though might be considered self-evident and be considered for omitting on this basis.

- a change in the text of **recommendation 6.3** (facilitate participation at meetings of security holders) from "[a] listed entity should disclose the policies and processes it has in place to facilitate and encourage participation at meetings of security holders" to "[a] listed entity should disclose how it facilitates and encourages participation at meetings of security holders",

Agree/ disagree	**Agree**
Comment	The change in wording is commendable, being both less cumbersome and prescriptive.

- plus the addition of guidance in the commentary to the recommendation that a listed entity should:
  - choose a venue for a meeting of security holders that is reasonably accessible to security holders who wish to attend the meeting in person or by proxy; and

Agree/ disagree	**Agree**
Comment	Again, this plain language unambiguous statement is commendable and reflects what is reasonably discernible as the legislative intent underlying s 249R of the Corporations Act 2001.

  - if it has a large or geographically diverse register, consider having hybrid meetings that allow shareholders to attend and vote in person, by proxy or online;

Agree/ disagree	**Agree**
Comment	As above, this recognises important measures towards facilitating active engagement of listed entities with their security holders. The second sentence of the relevant paragraph might be seen as unnecessary elaboration, yet on the other hand, the level of description of forms of technology-based engagement adds weight to the seriousness need to actively engage in these forms of communication. Moreover, this merely

	reflects what should be understood as intended by s 249S.

- a new **recommendation 6.4** that a listed entity should ensure that all resolutions at a meeting of security holders are decided by a poll rather than by a show of hands;

Agree/ disagree	**Agree**
Comment	Notwithstanding the provision made in s 250E(1)(a) for a show of hands, this proposed new recommendation and its accompanying commentary explanation is highly commendable.

- an amendment to the commentary to **principle 7** (recognise and manage risk) stating that a sound risk management framework is based on an informed understanding of the key drivers of an entity's long term success and a thorough assessment of the material risks inherent in its business model and strategy and that it should address financial and non-financial risks, as well as risks with a short, medium or longer term horizon;

Agree/ disagree	**Agree**
Comment	The approach to redrafting the commentary to Principle 7 is broadly sound, particularly the extent to which it gives greater alignment with the commentary to Recommendation 1.1 and those parts of the suggested board charter which give recognition to risk appetite (11th and 12th dot points as drafted in the 4th edition proposal). With regards the proposed reference to financial and non-financial risks, it might, we suggest, be worthwhile adding a short clarification that the dichotomy is not absolute and that what might be seen as non-financial will very likely, in time, manifest as financial risk if not managed.

- amendments to the commentary to **recommendation 7.1** (risk committee) adding more detail about the usual role of a risk committee;

Agree/ disagree	**Agree**
Comment	The more expansive description of the risk committee roles will likely be beneficial.

- amendments to **recommendation 7.2** (annual risk review):
    - moving the commentary in the third edition that a board should satisfy itself that the entity is operating with due regard to the risk appetite set by the board into the text of the recommendation; and

Agree/ disagree	**Agree**
Comment	Refer our previous comments about the interaction with matters identified as crucial to a board's roles and responsibilities.

    - including in the commentary statements that an entity's annual risk review should have regard to the considerations set out in the commentary to principle 7 and encouraging the board of a listed entity not only to disclose that it has reviewed the entity's risk management framework but also any insights it has gained from the review and any changes it has made to that framework as a result;

Agree/ disagree	**Agree in principle**
Comment	Mindful that the commentaries should not be of undue length, given that the proposed penultimate paragraph alludes to an acknowledgement of operating outside the current risk appetite, it might, we suggest, be worth adding an additional cautionary sentence about risks that may ensure in relation to solvency and operating as a going concern. Highlighting these further considerations may be all the more significant given the law reform in 2017 granting some level of safe harbour relief around initiating a business turnaround strategy (Corporations Act s 588GA).

- the addition of a footnote to the commentary to **recommendation 7.3** (internal audit) that listed entities that have or wish to have an internal audit function may find the International Standards for the Professional Practice of Internal Auditing published by the International Internal Audit Standards Board helpful in determining how best to structure and staff that function;

Agree/ disagree	**Agree**
Comment	No specific comment

- amendments to **recommendation 7.4** (sustainability disclosures) to refer to "environmental and social risks" rather than "economic, environmental and social sustainability risks",

Agree/ disagree	**Agree**
Comment	The narrowed reference provides greater focus without attracting risk of omission of material or significant matters.

plus amendments to the commentary to that recommendation:

  - acknowledging that a listed entity's "social licence to operate" is one of its most valuable assets and that the licence can be lost or seriously damaged if the entity conducts its business in a way that is not environmentally or socially responsible;

Agree/ disagree	**Agree**
Comment	Refer our remarks in the covering letter.

  - replacing the current statement in the commentary that to make the disclosures called for under this recommendation does not require a listed entity to publish a "sustainability report", but an entity that does publish a sustainability report may meet this recommendation simply by cross-referring to that report, with:

    "To make the disclosures called for under this recommendation does not require a listed entity to publish an "integrated report" or "sustainability report". However an entity that does publish an integrated report in accordance with the International Integrated Reporting Council's International <IR> Framework, or a sustainability report in accordance with a recognised international standard, may meet this recommendation simply by cross-referring to that report."

Agree/ disagree	**Agree**
Comment	This provides suitable reference to emerging and established frameworks of non-financial disclosure. We suggest that it may be beneficial to cross-reference to Recommendation 4.4 as an important element in building

	competence and confident in these associated disclosures.

- adding a suggestion that entities that believe they do not have any material exposure to environmental and social risks should consider carefully their basis for that belief and benchmark their disclosures in this regard against those made by their peers;

Agree/ disagree	**Tentatively agree**
Comment	A monitoring of the operating environment would of itself determine the likelihood of emerging environmental and social risks.

- as recommended in the Senate Economics References Committee report on Climate Risk Disclosure, giving greater guidance on the disclosure of climate change risk (also referred to as "carbon risk"), including:
  - explaining the different types of climate change risk (physical risks, transition risks and liability risks);
  - noting that many listed entities will be exposed to these types of risks, even where they are not directly involved in mining or consuming fossil fuels; and
  - suggesting that listed entities with material exposure to climate change risk implement the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures;

Agree/ disagree	**Tentatively agree**
Comment	The intentions underlying these proposed changes are highly commendable. There is however a need for some caution in proceeding as currently drafted. Council will be aware that the referred to Senate Committee recommended that both ASIC and the ASX more forthrightly encourage the recognition of climate change risk in their respective narrative disclosure guidance instruments (Recommendations 1 and 2) and that Government in its response gave in principle agreement. Each instrument should be in harmony, not only for practical reasons of avoiding needless duplication and reader confusion, but more particularly to enable clear understanding of interaction with legal obligations. Any undue reliance on the Principles & Recommendations as the chief instrument for disclosing climate risk may undermine the proper use of director narrative disclosures and analysis under Corporations Act s 299A, along with distracting proper attention being given to financial accounting judgments, particularly on matters of asset impairment.

- the addition of a reference in **principle 8** (remunerate fairly and responsibly) and the accompanying commentary to remuneration being aligned with "the creation of value for security holders over the short, medium and longer term"

Agree/ disagree	Agree
Comment	This proposed amendment is consistent with the value creation and long term corporate sustainability insights and expectations stimulated, in part, by the integrated reporting movement. Likewise, such statement is in no way at odds with the relatively permissive character of common law "interest of the company as a whole" requirement, and the related Corporations Act s 181 duty of good faith, as expressed in the previously

	referred 2006 CAMAC Social Responsibility of Corporations Report. As a minor cautionary matter, we would like to direct the Council's attention to statutory remuneration disclosure requirements under s 300A. There, amongst a raft of disclosures, is requirement for a narrative linking remuneration policy with company performance and compulsion that the board remuneration policy discussion deal in terms of the consequences of the company's performance on shareholder wealth (s 300A(1AA)(b)). We query therefore whether there is a possible divergence in policy and disclosure orientation which preparers should be mindful of.

and changes to the commentary to that principle:

- altering the description of the remuneration process from "formal" to "rigorous";
- adding a statement that an entity's remuneration policy should not reward conduct that is contrary to the entity's values or risk appetite;
- adding a reference to the impact on the entity's social licence to operate if it is seen to pay excessive remuneration to directors and senior executives; and
- suggesting that listed entities should benchmark their remuneration against that of their peers to verify that it is not excessive;

Agree/ disagree	**Agree**
Comment	Each of the proposed changes to the commentary reflects reasonable and contemporary expectations about board and individual director and executive behaviour, and, from a corporate governance perspective, should assist in aligning remuneration with corporate and investor interests.

- amendments to the guidelines for executive remuneration in box 8.2 under **recommendation 8.2** (disclosure of executive and non-executive director remuneration policies) adding statements that:
  - the targets for performance based remuneration should be aligned to the entity's short, medium and longer term performance objectives and should be consistent with its circumstances, purpose, strategic goals, values and risk appetite; and
  - equity based remuneration should be aligned to the entity's short, medium and longer-term performance objectives;

  plus the addition of a statement in the commentary to that recommendation that an entity's remuneration policies and practices should have regard to the considerations set out in the commentary to principle 8;

Agree/ disagree	**Agree**
Comment	Please refer the two immediately prior comments.

- a new **recommendation 8.4** that a listed entity should only enter into an agreement for the provision of consultancy or similar services by a director or senior executive or by a related party of a director or senior executive: (a) if it has independent advice that: (i) the services being provided are outside the ordinary scope of their duties as a director or senior executive (as applicable); (ii) the agreement is on arm's length terms; and (iii) the remuneration payable under it is reasonable; and (b) with full disclosure of the material terms to security holders;

Agree/ disagree	**Agree**
Comment	The intent is highly commendable. We suggest for completeness that it might be worth including in relation to (a)(ii) a footnote reference to the Corporations Act s 210 arm's length term exception from related party benefit member approval. More generally, suggest including a footnote reference to AASB 124 Related Party Disclosures cautioning a need for preparer awareness of possible definitional differences in what will be recognised as related parties in financial statements and what is intended to be covered as a disclosure within the ambit of proposed Recommendation 8.4.

- amendments to the section at the back of the *Principles and Recommendations* dealing with **externally managed entities:**
    - suggesting when it is addressing the alternative recommendation to recommendation 1.1 (disclose the arrangements between the responsible entity and the listed entity for managing the affairs of the listed entity and the role and responsibility of the board of the responsible entity for overseeing those arrangements), the responsible entity should disclose the extent to which the responsible entity has outsourced any aspects of the management of the listed entity and the role and responsibility of the board for overseeing the performance by the outsourced service provider; and
    - adding a reference to ASIC Regulatory Guide 259 in the commentary on recommendation 7.2 (annual risk review);

Agree/ disagree	Agree
Comment	No specific comment

- changes to the **glossary** to:
    - add new definitions of "environmental risk" and "social risk" to tie in with the changes to recommendation 7.4 mentioned above; and

Agree/ disagree	Agree
Comment	No specific comment

    - amend the definition of "substantial holder" to address some technical issues with the way in which that term is defined in the Corporations Act;

Agree/ disagree	Agree
Comment	No specific comment

- the addition of commentary for each of the new recommendations; and
- other minor consequential changes and drafting improvements.