

Submission to the ASX Corporate Governance Council about the Public Consultation Draft on the Fourth edition of the *Corporate Governance Principles & Recommendations*

Submission by:

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and

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General Remarks:

We are of the view that the proposals to update and issue a fourth edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* ("*Principles and Recommendations*") proactively seek higher standards of corporate governance of listed entities. It is our believe that it reflects increased public and investors' expectations of how listed entities are governed in the wake on governance and conduct risk issues from the findings of the Prudential Inquiry into The Commonwealth Bank of Australia and ongoing Hayne Royal Commission. We would also like to applaud the ASX Corporate Governance Council's forward thinking and global mindset with the inclusion of recommendation 2.7 to tackle the issue about directors who are not fluent in the language in which the board or security holder meetings are held and so on. This would be advantageous to attract listing from companies incorporated in other Asian countries like China with the ASX as well as institutional or sophisticated investors from those countries to invest in ASX listed entities to further develop Australia as a financial hub of the Asia-Pacific region. Even though bridging the language barrier alone will not be enough to attract such listings and long term foreign investments from Asian neighbors, it is a step in the right direction.

Specific Comments on the proposed new and changes to existing recommendations:

Whilst we like to commend ASX Corporate Governance Council to include matters of anti-bribery and corruption in the proposed new recommendation 3.4, we would like to highlight that this is vastly

inadequate to address such conduct risk. Tackling anti-bribery and corruption of listed entities should be given higher priority because companies that engage, permit or turn a blind eye to bribery and corruption destroy investors' and the public trust in their corporate governance and leadership. The harm is more than just reputational. It conveys the company's inability to prevent or halt financial crimes. Fraud is another financial crime that links closely to bribery and corruption as such illegal and immoral transactions have to be hidden in the accounts. Associating with fraud is the dealing with proceeds of crimes. As such these companies could be involved in money laundering. Therefore, bribery and corruption underscores deep-seated problems with a listed entity's behavior and failure to address conduct risks.

Yet some companies around the world continue to engage in such financial crimes for the simple fact that bribery and corruption is very profitable for these entities. For example, research conducted by Karpoff, Lee and Martin (2017) about US companies engaging in bribery and corruption revealed that the share prices of those listed entities, '[i]ncrease significantly (on average 3.3%) upon the news of a project that subsequently is tied to bribe payments, and that share prices decrease significantly (on average 5.44%) upon news that a firm engaged in bribery. Hence, capital markets incorporate the benefits of bribe-related projects and the costs of enforcement.'¹

Whilst noting that the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 and the decision of *ASIC v Flugge and Geary* (2016) VSC 779 could serve a deterrent against bribery and corruption, it is inadequate to address the problem. Again referring to research by Karpoff, Lee and Martin, if those companies are caught the penalties including legal costs, fines, penalties, and monitoring costs were on average 3.27 percent of the company's value and the share prices had decreased on average 5.44 percent upon the news that the company engaged in bribery.² Since the chances of getting caught by US authorities are very low in spite of the US Foreign Corrupt Practices Act,³ there are greater incentives for listed entities to bribe than not if the opportunity to do so were present. We therefore propose that the ASX Corporate Governance Council should include more measures in the new recommendations 3.4, or stipulate that listed entities should anti-bribery, corruption and other financial crimes as explicit items on the proposed changes to existing recommendation 3.1 about the code of conduct.

Another matter we would like to comment relates to the conduct risk highlighted by the findings of the Prudential Inquiry into The Commonwealth Bank of Australia. The inquiry found that the Commonwealth Bank of Australia's non-compliance with anti-money laundering regulations was mostly

¹ Jonathan Karpoff, D. Scott Lee, and Gerald Martin, 'Foreign Bribery: Incentives and Enforcement' (April 7, 2017) 5 <<https://ssrn.com/abstract=1573222>>

² Ibid.

³ Ibid, 3-4.

due to inadequate risk management. We further propose that the ASX Corporate Governance Council include an explicit statement in the proposed new or changes to existing recommendations about the importance of regulatory compliance as an integral part of good corporate governance practices. Even if compliance might be embedded implicitly or 'between the lines' of various proposed new and changes to existing recommendations, a statement about compliance will make it clear that it is imperative.

End of submission