



HERBERT  
SMITH  
FREEHILLS

Mavis Tan  
ASX Corporate Governance Council  
c/o ASX Limited  
PO Box H224  
AUSTRALIA SQUARE NSW 1215  
mavis.tan@asx.com.au

27 July 2018

Dear Ms Tan

## **Submission on the Review of the ASX Corporate Governance Council's Principles and Recommendations**

This submission is made by the Head Office Advisory Team at Herbert Smith Freehills in response to the consultation paper titled 'Review of the ASX Corporate Governance Council's Principles and Recommendations' (**Consultation Paper**) and the consultation draft of the 4<sup>th</sup> edition of the Corporate Governance Principles and Recommendations (**Consultation Draft**) released by the ASX Corporate Governance Council on 2 May 2018.

We are broadly supportive of the changes proposed in the Consultation Paper and the Consultation Draft. We generally see these changes as being appropriate for dealing with emerging corporate governance issues and for reflecting the community's changing expectations of Australian listed companies. We have set out below our concerns in relation to two of the changes that are proposed in the Consultation Draft.

### **1 Process to validate corporate reports**

The Consultation Draft proposes to introduce a new Recommendation 4.4, which recommends that a listed entity should have and disclose its process to validate that its annual directors' report and other corporate reports are accurate, balanced and understandable and provide investors with appropriate information to make informed investment decisions.

We acknowledge the importance of protecting investors from misinformation and of ensuring that the market operates on a fully and properly informed basis. Corporate reports of Australian listed companies are already subject to a range of laws, including those relating to the publication of false or misleading statements, misleading and deceptive conduct and misrepresentation and specific audit requirements.

We are concerned that the proposed Recommendation 4.4 does not define what is meant by a "process to validate" corporate reports. For example, validation could mean anything from prospectus-style verification to simply having an internal review with CEO and CFO sign-off or undertaking an external audit process. In addition, as the Recommendation applies to all corporate reports a listed entity releases, its application is much broader than the corporations law (which specifies documents that require auditing) and may impose a new standard of verification of corporate reports that goes beyond the requirements of Australian corporations law.

It is also unclear from the Consultation Paper and the Consultation Draft how this new requirement will interact with existing laws. The existing statutory provisions and general law principles have created a robust legal regime that, in our view, are adequate to protect investors. In addition, the broad spectrum of potential disclosures by listed entities in response to this Recommendation could expose some listed entities to liability or adverse consequences.



We therefore submit that Recommendation 4.4 and the associated commentary not be included in the 4<sup>th</sup> edition of the Corporate Governance Principles and Recommendations. If Recommendation 4.4 is retained in the final version, at a minimum, the concept of validation should be removed and 'corporate reports' should be clearly defined.

## 2 Social licence to operate

The community increasingly expects Australian listed entities to operate in a socially responsible manner with due regard to a broader range of stakeholders and we are supportive of the proposal to recognise this concept in the 4<sup>th</sup> edition of the Corporate Governance Principles and Recommendations.

However, the proposed commentary to Principle 3 does not include a definition of 'social licence to operate' and does not provide sufficient clarity to allow Australian listed entities to confidently determine what is expected of them. The phrase 'social licence to operate' is being used in many different public contexts. We submit that the commentary to Principle 3 should more clearly define what is meant by this concept or consideration should be given to removing this phrase from the commentary and focusing on social and ethical responsibility instead.

In addition, it is unclear how the concept of 'social licence to operate' is intended to interact with directors' existing duty to act in the best interests of the company. From a legal perspective, directors may only consider the interests of stakeholders other than shareholders if doing so would ultimately be in the best interests of the company. We assume that the concept of preserving a company's 'social licence to operate' is intended to operate within the limits of this existing legal framework, however we submit that to avoid confusion in relation to this aspect, the commentary to Principle 3 should specify that the concept of 'social licence to operate' is not intended to create additional duties for directors beyond those owed by directors under statute or general law. The Corporate Governance Principles and Recommendations should not seek to alter the well-established legal requirements and we consider that any changes to the existing duties of directors should be the subject of legislative or judicial amendments.

\* \* \*

If you have any questions or comments on the above submission, please do not hesitate to contact us.

Yours sincerely

**Stefanie Wilkinson**  
Partner  
Herbert Smith Freehills  
+61 3 9288 1526  
stefanie.wilkinson@hsf.com

**Anna Coroneo**  
Senior Associate  
Herbert Smith Freehills  
+61 2 9225 5125  
anna.coroneo@hsf.com

**Barry Wang**  
Solicitor  
Herbert Smith Freehills  
+61 2 9225 5765  
barry.wang@hsf.com

Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership ABN 98 773 882 646, are separate member firms of the international legal practice known as Herbert Smith Freehills.