



HopgoodGanim

LAWYERS

26 July 2018

Ms Elizabeth Johnstone,  
Chair  
ASX Corporate Governance Council  
C/- Ms Mavis Tan

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Dear Ms Johnstone

### **Joint Submission to ASX Corporate Governance Council**

We **attach** a joint submission from Effective Governance Pty Ltd and HopgoodGanim Lawyers on the Proposed 4<sup>th</sup> Edition of the Corporate Governance Principles and Recommendations.

Thank you for the opportunity and to the ASX Corporate Governance Council for considering the comments and observations we raise within our submission.

Yours faithfully

**Effective Governance  
HopgoodGanim Lawyers**

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**Submission to the ASX Corporate Governance Council in relation to  
the proposed fourth edition of the Corporate Governance Principles and  
Recommendations**

<u>Topic</u>	<u>Proposal</u>
<b>Principle 1: Lay Solid Foundations for Management &amp; Oversight</b>	
Introduction to Principle 1	The proposed amendments to the wording of the Introduction are supported.
Recommendation 1.1	The proposed amendments to the wording of the Recommendation are supported.
Commentary to Recommendation 1.1	The proposed amendments to the wording of the Commentary are supported.
Recommendation 1.2 [appointment checks]	The proposed amendments to the wording of the Recommendation are supported.
Commentary to Recommendation 1.2	The proposed amendments to the Commentary are supported in principle.  However, any requirement for directors to make additional declarations in respect of their legal and fiduciary duties should be a matter for the board and not subject to further regulation.
Recommendation 1.3 [Appointment letters]	Not being amended.
Commentary to Recommendation 1.3	The proposed amendments to the Commentary are supported, and in particular the proposal that a director should 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.
Recommendation 1.4 [Company Secretary]	Not being amended.
Commentary on Recommendation 1.4	Not being amended.
Recommendation 1.5 [Diversity]	The proposed amendments to the wording of the Recommendation are supported.
Commentary on Recommendation 1.5	The proposed amendments to the wording of the Commentary are supported.
Recommendation 1.6 [Board, committee and individual director performance evaluations]	The proposed amendments to the wording of the Recommendation are supported.
Commentary on Recommendation 1.6	Noting Effective Governance's professional interest in this matter, the following observations are made in order to assist the Council, and to provide support for the proposed amendment to the wording of the Commentary (subject to the comments below).

	<p>There is still a reluctance on the part of many boards, committees and individual directors for their processes and dynamics to be subject to external review. In fact, and some board members still strongly resist any possibility of their performance being evaluated in a meaningful and rigorous way. This, surely, is not acceptable in today's corporate environment.</p> <p>It is agreed that it is not necessary for boards to undertake external reviews on an annual basis. However, where internal reviews occur, they can often be of a cursory nature, as opposed to a formal and rigorous process that was facilitated internally with the intention of improving board processes.</p> <p>Ideally, externally facilitated board reviews should be conducted by an experienced person at least every three years, to ensure that boards have the opportunity to consider whether process and performance improvements that reflect leading governance practice at the time might be necessary.</p> <p>There is precedent for consideration of this approach, as FTSE350 entities are required to undertake external reviews every three years and to identify the external evaluator in the annual report, as well as whether it has any connection with the company or individual directors.</p> <p>Accordingly, it is suggested that a similar expectation might be set for entities within the ASX300.</p>
<p>Recommendation 1.7 [senior executive performance evaluations]</p>	<p>The proposed amendments to the wording of the Recommendation are supported.</p>
<p>Commentary to Recommendation 1.7</p>	<p>It is suggested that the Commentary could be further amended to note that performance evaluations of senior executives should incorporate the achievement of behavioural objectives to ensure the sustainability of the entity and an appropriate corporate culture. This would enable the Board to understand <i>what</i> senior executives have achieved (i.e. which performance metrics) and <i>how</i> they have achieved them (i.e. behavioural objectives).</p>
<p><b>Principle 2: Structure the Board to be effective and add value</b></p>	
<p>Introduction to Principle 2</p>	<p>The proposed amendments to the wording of the Introduction are supported.</p>
<p>Recommendation 2.1 [Nomination Committee]</p>	<p>Not being amended.</p>
<p>Commentary on Recommendation 2.1 [</p>	<p>No comment.</p>
<p>Recommendation 2.2 [Board Skills Matrix]</p>	<p>No comment.</p>

<p>Commentary on Recommendation 2.2</p>	<p>The proposal to encourage more transparent disclosure of the analysis underlying director skills matrices is strongly supported.</p> <p>Contemporary boards should be skills-based. Frequently, skills assessments (resulting in a skills matrix) are undertaken where directors self-assess the type of skills they possess, but overlook the extent or depth of their skill levels, due to appropriate evaluation criteria not being considered.</p> <p>Accordingly, the wording of the final paragraph of the Commentary on Recommendation 2.2, being <i>“Whichever format it follows, the entity should explain what it means when it refers to a particular skill in its board skills matrix and the criteria a director must meet to be considered to have that skill.”</i> is strongly supported.</p> <p>It is suggested that entities be required to explain how they have assessed directors’ skills - and that self-assessment without objective measurement criteria not be considered sufficient for the purpose of this Recommendation.</p> <p>Further, linking an in-depth, objective skills assessment to a board, committee or individual director performance review should assist a board in identifying whether directors are regularly delivering their skill-set to their assessed skill-level in board and committee meetings. This process should more easily enable boards to make an assessment in support of the requirement of last bullet point in the Commentary to Recommendation 1.2 (being <i>“a statement by the board as to whether it supports the election or re-election of the candidate and a summary of the reasons why”</i>).</p>
<p>Recommendation 2.3 [Director independence]</p>	<p>The proposed amendments to the wording of the Recommendation are supported.</p>
<p>Commentary on Recommendation 2.3</p>	<p>The proposed amendments to the wording of the Commentary are supported.</p> <p>However, given the proposed increase in breadth of relevant relationships, succinct disclosure should be considered adequate in order to prevent reporting the obligations of boards in connection with this Recommendation becoming unreasonably onerous.</p>
<p>Recommendation 2.4 [Majority of independent directors]</p>	<p>Not being amended.</p>
<p>Commentary on Recommendation 2.4</p>	<p>The proposed amendments to the wording of the Commentary are supported.</p>
<p>Recommendation 2.5 [Independent Chair]</p>	<p>Not being amended.</p>
<p>Commentary on Recommendation 2.5</p>	<p>It is acknowledged that the ‘If not, why not?’ approach enables listed entities to not appoint an independent Chair or to appoint one person act as both Chair and CEO.</p>

	<p>Due to the risk of that individual dominating the board and its processes, it is suggested that entities which opt to have a non-independent Chair or the roles of CEO and Chair performed by the one individual, should be subject to a higher level of transparency in relation to the disclosure of board performance evaluations.</p> <p>Noting Effective Governance’s professional interest in this matter, it is suggested that entities in this position should be encouraged to obtain an independent, externally-facilitated review of board performance every two years by an appropriately-experienced person.</p> <p>This approach would provide investors with a level of comfort that the Board is being provided with an independent view of its governance processes. The use of an external facilitator would provide other board members with an ability to provide ‘de-identified’ feedback on the performance of the non-independent Chair or Chair &amp; CEO, something which may not be possible where there is a dominant individual in the role.</p>
Recommendation 2.6 [Director induction and professional development]	The proposed amendments to the wording of the Recommendation are supported.
Commentary on Recommendation 2.6	The proposed amendments to the wording of the Commentary are supported.
Recommendation 2.7 [language fluency]	The proposed wording of the Recommendation is supported.
Commentary to Recommendation 2.7	The proposed wording of the Commentary is supported.
<b>Principle 3: Instil the desired culture</b>	
Introduction to Principle 3	<p>The proposed amendments to the wording of the Introduction are supported.</p> <p>Given the many recently publicised examples of organisations underpaying employees or not having internal systems which support whistleblowers, it is suggested that the 4<sup>th</sup> bullet point be amended to include a reference to employees (such that the wording then appears as “dealing honestly and fairly with <u>employees</u>, customers and suppliers”).</p>
Recommendation 3.1 [Values]	The proposed amendment to the wording of the Recommendation is supported.
Commentary on Recommendation 3.1	<p>The proposed amendments to the Commentary are supported.</p> <p>However, it is suggested that the Commentary be amended to make it clear that it is the board that is ultimately responsible for corporate culture. It is considered that boards should be explaining to investors the steps they have taken to understand the</p>

	<p>culture that actually operates within an organisation (in order to understand whether this is the culture that they want, or to take steps to change it).</p> <p>Further, in order to ensure that it is clear that ‘tone from the top’ does not emanate solely from management, it is suggested that a reference to the board be included in the paragraph <i>“Management should draft, and the board should approve, an entity’s statement of core values. Once approved, management should be charged with inculcating those values across the organisation. This includes ensuring that all employees receive appropriate training on the values and <u>the board and management continually referencing and reinforcing those values in their interactions with staff (i.e. setting the “tone at the top”).”</u></i></p>
Recommendation 3.2 [Code of Conduct]	The proposed amendments to the wording of the Recommendation are supported.
Commentary on Recommendation 3.2	<p>The proposed amendments to the wording of the Commentary are supported.</p> <p>However, it is noted that the Commentary current suggests that the senior executive be continually and consistently enforcing the code of conduct, including by taking appropriate and proportionate disciplinary action against those who breach it.</p> <p>It is suggested that the Commentary be amended to incorporate a similar obligation on the Board and the CEO in relation to their respective direct reports.</p> <p>It is suggested that the Commentary also incorporate a periodic audit or review of the code of conduct and related procedures to check if reports made under the code of conduct were appropriately recorded, investigated and responded to, and whether any changes are required to the entity’s code of conduct or procedures.</p> <p>This would ensure that an approach consistent with that proposed in the last bullet points of the Commentary on Recommendations 3.3 and 3.4 is taken.</p>
Recommendation 3.3 [Whistleblower Policy]	The proposed wording of the Recommendation is supported.
Commentary on Recommendation 3.3	The proposed wording of the Commentary is supported.
Recommendation 3.4 [Anti-Bribery & Corruption Policy]	The proposed wording of the Recommendation is supported.
Commentary to Recommendation 3.4	The proposed wording of the Commentary is supported.
<b>Principle 4: Produce corporate reports of high quality and integrity</b>	
Introduction to Principle 4	The proposed amendments to the wording of the Introduction are supported.

Recommendation 4.1 – Audit Committee	Not being amended.
Commentary on Recommendation 4.1	No comment.
Recommendation 4.2 [CEO & CFO sign-off]	No comment.
Commentary on Recommendation 4.2	Not being amended.
Recommendation 4.3 [Auditor attending AGM]	Not being amended.
Commentary on Recommendation 4.3	Not being amended.
Recommendation 4.4 [Validation of reports]	The proposed Recommendation as it presently worded is not supported.  Further clarification as to what is meant by “ <i>any other corporate reports</i> ” is suggested, as the current wording is ambiguous. As the proposed Recommendation currently stands, the obligations for disclosure would appear to be onerous.
Commentary on Recommendation 4.4	No comment.
<b>Principle 5: Make timely &amp; balanced disclosure</b>	
Introduction to Principle 5	No comment.
Recommendation 5.1 [Continuous disclosure policy]	No comment.
Commentary on Recommendation 5.1	No comment.
Recommendation 5.2 [Continuous disclosure announcements to Board]	The proposed wording of the Recommendation is supported.
Commentary on Recommendation 5.2	The proposed wording of the Commentary is supported.
Recommendation 5.3 [Disclosure of analyst presentations]	The proposed wording of the Recommendation is supported.
Commentary on Recommendation 5.3	The proposed wording of the Commentary is supported.
<b>Principle 6: Respect the rights of security holders</b>	
Introduction to Principle 6	No comment.
Recommendation 6.1 – Website disclosure	Not being amended.
Commentary on Recommendation 6.1	The proposed amendments to the wording of the Commentary are supported.

Recommendation 6.2 [Investor relations program]	No comment.
Commentary on Recommendation 6.2	The proposed amendments to the wording of the Commentary are supported, and in particular, the inclusion of the statement “ <i>Where significant comments or concerns are raised by investors, they should be conveyed to the entity’s board and relevant senior executives</i> ”.
Recommendation 6.3 [Meetings of holders]	No comment.
Commentary on Recommendation 6.3	No comment.
Recommendation 6.4 [Polls]	The proposed new Recommendation requiring mandatory polls is not supported, as it may result in an undue administrative and potential cost burden for listed entities.
Commentary on Recommendation 6.4	As a result of the view taken in relation to the proposed new Recommendation 6.4, the proposed wording in the Commentary on Recommendation 6.4 is not supported in its current form.
Recommendation 6.5 [Electronic communications]	Not being amended.
Commentary on Recommendation 6.5	Not being amended.
<b>Principle 7: Recognise &amp; manage risk</b>	
Introduction to Principle 7	The proposed amendments to the wording of the Introduction are supported.
Recommendation 7.1 [Risk Committee]	Not being amended.
Commentary on Recommendation 7.1	The proposed amendments to the wording of the Commentary are supported.
Recommendation 7.2 [Risk Management Framework]	The proposed amendments to the wording of the Recommendation are supported.
Commentary on Recommendation 7.2	The proposed amendments to the wording of the Commentary are supported, but it is also suggested that listed entities be required to disclose the <i>process</i> that was undertaken by the board in arriving at an assessment that the risk management framework within the organisation continues to be sound.
Recommendation 7.3 [Internal Audit]	Not being amended.
Commentary on Recommendation 7.3	No comment.
Recommendation 7.4 [Economic, Environment & Social Sustainability risk disclosure]	No comment.

Commentary on Recommendation 7.4	No comment.
<b>Principle 8: Remunerate fairly &amp; responsibly</b>	
Introduction to Principle 8	The proposed amendments to the wording of the Introduction are supported.
Recommendation 8.1 [Remuneration Committee]	No comment.
Commentary to Recommendation 8.1	No comment.
Recommendation 8.2 [Disclosure of director & executive remuneration]	No comment.
Commentary on Recommendation 8.2	<p>Current remuneration reporting is more focused on <i>how much</i> is being paid to senior executives rather than <i>how</i> executives have met or exceeded KPIs, in order to earn bonuses.</p> <p>When disclosing remuneration policies and practices in relation to executive directors and other senior executives, listed entities should not be required to disclose the key performance indicators (KPIs) that they are applying, as this could create a competitive disadvantage. However but information disclosed to investors about remuneration practices frequently does not contain a visible correlation between performance achieved and bonuses paid.</p> <p>Consideration could be given to requiring boards which retain an ability to apply their own discretion to the awarding of bonuses to executive directors and other senior executives to make disclosure of the percentage of the total bonus amount that has been awarded to executive directors and other senior executives during the reporting period as a result of the application of that discretion.</p> <p>This would ensure that investors are aware of the extent to which boards may be rewarding executive directors and other senior executives beyond the direct application of the organisation's published remuneration policy.</p>
Recommendation 8.3 [Hedging]	No comment.
Commentary on Recommendation 8.3	Not being amended.
Recommendation 8.4 [Consultancy services]	The proposed amendments to the Recommendation are supported in principle. However, the new Recommendation as proposed may result in an undue administrative and potential cost burden for listed entities, particularly where the agreement in question is not of a material nature and where there are already checks and balances in place in respect of related party transactions pursuant to Part 2E of the Corporations Act.

	<p>It is suggested that this proposed new Recommendation apply only in respect of an agreement of a material nature, which would be determined by the board, as are other matters which have a ‘materiality’ qualification.</p>
<p>Commentary on Recommendation 8.4</p>	<p>It is also suggested that the Commentary for the new proposed Recommendation 8.4 clarify whether Recommendation 8.4 is intended to apply in respect of agreements or contracts entered through a personal services company in respect of the supply of services by a director, as is contemplated by the proposed amendment to the commentary for Recommendation 1.3.</p>

## **Background on HopgoodGanim Lawyers**

HopgoodGanim Lawyers is a full service commercial law firm. Our firm has 43 partners and more than 270 staff. We operate nationally and internationally with a focus on Asia from our two key locations of Brisbane and Perth. We offer highly skilled and agile legal teams across key sectors and areas of practice. In all of our areas of speciality, our lawyers are recognised by legal publications as leaders in their fields.

Our Corporate Advisory and Governance team advises public and private entities on the legal issues which most regularly impact their business. We make it our first priority to understand the businesses we advise, from any sector, and work with our other specialist practice areas including taxation and revenue, intellectual property, competition and trade practices, and employment and industrial relations, to provide a complete and connected corporate and commercial advisory service. Our team are subject matter experts, who are across the detail and have a thorough understanding of the laws that govern corporate and other commercial enterprises and their operations. We take the time to understand you and your business, looking for the most effective and efficient solution to any challenge.

Advising on governance (ethics, duties, liabilities, remuneration and conflicts) and compliance (including relevant rules and Acts), our team is well-versed in the range of strategic and practical issues that can arise for businesses operating in Australia and offshore. We help our clients see around corners and past hurdles and our people speak plainly about your options so you can be confident in your next strategic move.

Our experience includes advising boards, individual directors and senior executives on:

- the interpretation and application of various rules and regulations
- corporate governance issues and guidance on effective board structures
- commercial matters, such as preparing and reviewing contractual documentation
- preparing for, running and hosting AGMs and EGMs
- liaising with ASX and ASIC
- disclosure and reporting, including annual and half-yearly financial reporting requirements, shareholder meeting advice (including notice of meetings), directors' reports
- investor and ASX disclosures

## **Areas of expertise**

- Capital raisings
- Private equity and venture capital
- Entry and exit strategies, including trade sales, private placements, management and secondary buy outs and listing on securities exchanges (including IPOs and backdoor listings)
- Innovative structuring
- Takeovers and defence strategies - on market and off market
- Schemes of arrangement
- Mergers and demergers
- Divestments and acquisitions of shares and assets
- Joint venture arrangements
- Cross border transactions, including FIRB compliance
- Leveraged buy-outs and debt financing
- Distressed asset sales
- Buy backs

- Privatisations
- Mezzanine capital
- Advising boards, individual directors and senior executives on regulatory compliance, corporate governance issues, liaising with ASIC and ASX and disclosure and reporting
- Drafting and reviewing commercial agreements

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## Background on Effective Governance Pty Ltd

Effective Governance is part of the HopgoodGanim Advisory Group and is the largest and oldest specialist corporate governance advisory firm in Australia. Having been in operation for over 22 years, we have a highly-skilled staff of 20 advisors in Queensland, New South Wales, Victoria and Western Australia.

Effective Governance works with clients across all industry sectors throughout Australia and overseas. We have worked for large and small listed and unlisted companies, family businesses, not-for-profit groups, schools, and member-based and public sector organisations, including university councils.

We provide advice and professional services to establish an effective board or advisory board, implement good corporate governance practices and comply with Australia governance requirements.

In the last 5 years, Effective Governance has conducted over 350 board reviews. Given this breadth of experience, we are able to identify governance trends and provide highly targeted and practical advice to clients on how best to address any given governance issue, along with the research to demonstrate the value of those solutions.

Our services include:

- Reviewing the performance of the board, chair, directors and committees
- Identifying current and required skills for directors and boards
- Developing tailored policies and charters
- Assisting with the CEO remuneration and evaluation process
- Professional development tailored for your organisation's needs
- Facilitating the development of strategy
- Establishing effective risk governance processes
- Working with organisations to establish boards to enhance the organisational performance

In addition, we provide boards and senior executives with governance advice to improve their overall effectiveness.

Effective Governance is the author of a number of leading corporate governance publications:

- *Reviewing your Board: A guide to Board and Director Evaluation (published by the Australian Institute of Company Directors);*
- *Directors at Work: A Practical Guide for Boards;*
- *Boards that Work;* and
- *Board Director and CEO Evaluation.*

