

6 May 2024

ASX Corporate Governance Council
Exchange Centre
20 Bridge St, Sydney, NSW, 2000

Dear ASX Corporate Governance Council,

JOINT CIVIL SOCIETY SUBMISSION TO THE CONSULTATION ON THE ASX CORPORATE GOVERNANCE COUNCIL PRINCIPLES AND RECOMMENDATIONS - 5TH EDITION UPDATE

A. INTRODUCTION

This submission is prepared on behalf of 11 Australian civil society and academic organisations, who work to strengthen respect for human rights by Australian businesses. Thank you for the opportunity to provide a submission to the ASX Corporate Governance Council's (**Council**) consultation on the *ASX Corporate Governance Council Principles and Recommendations - 5th edition update (Draft Principles)*. This submission provides feedback on Principle 3 (Section B) and then to select questions in the [Background Paper and Consultation Questions](#) (Section C).

Poor corporate human rights governance can lead to serious and lasting negative impacts on local communities, workers, consumers and the environment. In Australia in recent years, we have seen this in the destruction of cultural heritage sites by mining companies, modern slavery and wage theft scandals linked with Australian retailers, brands and horticulture, privacy and data breaches by telecommunications companies, unlawful dismissals by airlines and major financial misconduct by banks and accounting firms.

As the Draft Principles recognise, failure to effectively manage human rights and other sustainability risk creates material risk over the short and long term. Mismanagement of human rights issues increasingly attracts legal and regulatory risks, investor scrutiny, consumer backlash, civil society campaigns, talent attraction issues, opposition from local communities and reputational damage. We therefore welcome the areas of increased focus on Environmental, Social and Governance issues in the Draft Principles. Overall, we see the Draft Principles as an improvement on previous editions. However, they do not yet reflect effective corporate governance of human rights risk.

Community and market expectations of business conduct have evolved since the 4th Edition of the Principles in 2019. It is in this context, that our **key recommendation is that the draft Principles should be better (and expressly) informed by authoritative international standards on responsible business conduct:** the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) and the [OECD Guidelines for Multinational Enterprises on Responsible Business Conduct](#) (OECD Guidelines).

B. PRINCIPLE 3: INSTIL A CULTURE OF ACTING LAWFULLY, ETHICALLY AND RESPONSIBLY

Acting responsibly

We agree with Principle 3 that “(a) listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly...”. However, as highlighted by Professor Paul Redmond in his journal article, *‘The ASX Corporate Governance Principles and*

Recommendations and the Idea of Corporate Responsibility’ (2023)¹, it is unclear what ‘responsibly’ means. We endorse and **recommend** Professor Redmond’s view that the meaning of ‘responsibly’ should be directly informed by two key authoritative, international standards: the UNGPs and the OECD Guidelines. They provide settled standards of responsible business conduct expected by the Australian Government, which are essential to observe, to avoid reputational and other risk and create long term sustainable value.

The UNGPs are the global, authoritative standard on business and human rights. The Australian Government co-sponsored the introduction of the UNGPs at the UN in 2011, and has supported them since their inception.² The UNGPs outline the business responsibility to respect human rights. They provide that businesses can meet this responsibility by: having a policy commitment to respecting human rights; conducting risk-based human rights due diligence to identify and address the business’ human rights risks and harms arising from its activities and relationships (e.g. supply chains); and remediating harms, where appropriate.

The OECD Guidelines are a set of government-backed recommendations to business on responsible business conduct. Australia is one of 51 signatory countries to the OECD Guidelines, and like other signatories has ‘National Contact Point,’ which handles complaints from affected persons about breaches of the Guidelines (see the [AusNCP](#) housed in Treasury). The OECD Guidelines set out standards across a wide range of issues including human rights, the environment, consumer interests and corruption. They expressly align with the UNGPs, and also expect entities conduct risk-based due diligence to identify and address risk responsible business conduct risks.

The UNGPs and the OECD Guidelines are increasingly reflected in corporate policy and practice, industry standards, benchmarks and laws and policies globally.³ For example, the *Modern Slavery Act 2018* (Cth) (**MS Act**) reporting criteria and the Government’s [guidance](#) for entities reporting under MS Act are expressly grounded in the UNGPs. In April the EU Parliament [approved](#) the *Corporate Sustainability Due Diligence Directive*, which mandates human rights and environmental due diligence in line with the UNGPs / OECD Guidelines for large EU companies, and non-EU companies with significant turnover in the EU market. The EU is Australia’s third largest trading partner. Entities that supply to the EU can expect increased scrutiny of their human rights risk management.

We **recommend** the changes to Commentary to Recommendation 3.2 as below (additions in bold):

~~“Entities may also wish to consider published guidelines when considering what constitutes~~
Responsible business conduct means the standards outlined in the UNGPs, the OECD Guidelines and complementary guidance. [Fn: GCNA, KPMG and UTS ‘The Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples (2020).]”

Human rights policy

We also **recommend** a new Recommendation is added to Principle 3, outlining the expectation that

¹ Paul Redmond AM, ‘The ASX Corporate Governance Principles and Recommendations and the Idea of Corporate Responsibility’ (2023) 40 *Company and Securities Law Journal* 116.

² Australian Government, [Universal Periodic Review – National Report of Australia UPR 2021: Annex 2 Australia’s Voluntary Commitments – Second Cycle UPR 2015 – Status of Implementation](#), (Report, 24 December 2020) 6.

³ Examples include: GRI Standards; Corporate Human Rights Benchmark; The Equator Principles; Aluminium Stewardship Initiative; *EU Taxonomy Regulation*; the pending *EU Corporate Sustainability Reporting Directive*; *California Transparency in Supply Chain Act*; *Modern Slavery Act* (UK); *Duty of Vigilance Law* (France); *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (Canada); *Supply Chain Due Diligence Act* (Germany); *Transparency Act* (Norway) and proposed laws in NZ, South Korea and elsewhere. For further examples see GBI and Clifford Chance, [Business and Human Rights, Navigating a Changing Legal Landscape](#), (January 2022).

entities not just have and disclose a code of conduct and a diversity and inclusion policy, but also a policy commitment to human rights. This update would reflect a key expectation of the UNGPs (echoed in the OECD Guidelines), that businesses should have public, policy commitment to meet their responsibility to respect human rights.⁴

A human rights policy forms the foundation of an entity's governance of human rights risk. The policy should also outline the expectations of the Board, senior executives, employees, suppliers and other business partners,⁵ including conducting human rights due diligence and providing remediation, where appropriate. Its expectations should be embedded in the entity's wider policies, procedures, accountabilities and training.⁶ The content and purpose of a human rights policy is different to a code of conduct.⁷ Many leading ASX listed entities already have human rights policies referencing the UNGPs, in line with international trends.

Stakeholder engagement

Q9. Principle 3: Do you support the proposed amendments to Principle 3 (acting lawfully, ethically and responsibly), to include references to an entity's stakeholders?

Yes. We welcome the proposed, important update to Principle 3 (underlined): *"(a) listed entity should instil and continually reinforce a culture of acting lawfully, ethically and responsibly, within the organisation and its dealing with external stakeholders, to create long-term sustainable value."*

Q10. Recommendation 3.3: Does this new Recommendation appropriately balance the interests of security holders, other key stakeholders, and the listed entity?

Yes. We welcome the important updates to Recommendation 3.3 (underlined) however we **recommend** the addition in bold:

*"A listed entity should have regard to the interests of the entity's key stakeholders, including having processes for the entity to **meaningfully** engage with them and to report material issues to the board."*

Having regard to the interests of stakeholders, including through engagement, is an essential element of responsible business conduct.⁸ It is necessary to protect an entity's reputation and sustainability,⁹ and outlined in the Background Paper, is also increasingly expected in corporate governance codes in other jurisdictions. Our recommended addition of the word 'meaningful' seeks to avoid engagement with stakeholders that is a superficial, 'tick box' exercise. The OECD Guidelines expect 'meaningful engagement' with relevant stakeholders as part of due diligence on responsible business conduct risks.¹⁰ The OECD Guidelines define meaningful engagement as *"ongoing engagement with stakeholders that is two-way, conducted in good faith by the participants on both sides and responsive to stakeholders' views."*¹¹

⁴ See further: UNGP 15(a) and UNGP 16; OECD Guidelines, pp.25 and 27; GRI Disclosure 2-23 (Policy Commitments); the UN Global Compact Network's [Guide for Business: How to Develop a Human Rights Policy](#). See also the prominence of human rights policies in World Benchmarking Alliance's Corporate Human Rights Benchmark's [scoring methodology](#), p.14.

⁵ UNGP 16.

⁶ UNGP 16 Commentary.

⁷ As outlined in Box 3.2 of the Draft Principles. Though they could potentially be combined if the minimum criteria outlined in the UNGPs are met.

⁸ See OECD Guidelines, pp.14, 15 and 20.

⁹ AICD, [Directors' "best interests" duty in practice](#), (July 2022).

¹⁰ OECD Guidelines, pp. 15 and 20.

¹¹ OECD Guidelines, p.20.

The UNGPs expect an entity will undertake ‘*meaningful* consultation’ with potentially affected groups, as appropriate to the entity’s size and the nature of the operation, as part of the human rights due diligence process.¹² This includes paying special attention to vulnerable groups who may be most at risk of harm.¹³ Therefore, we welcome the updates to the Commentary to Recommendation 3.3, but we **recommend** the Commentary is updated to discuss the above guidance from the UNGPs and OECD Guidelines.

In line with the OECD Guidelines, “stakeholders” should include (among others) those who may be adversely impacted by the entity.¹⁴

We **recommend** the additions in bold to the Commentary to Recommendation 3.3:

*“Stakeholders may include security holders, employees, customers, suppliers, **suppliers’ workers**, **Aboriginal and Torres Strait Island peoples**, **local community**, **law makers and regulators**... **may also include organisations which represent the interests of stakeholders such as unions, **human rights groups**, **environmental groups**, or **consumer groups**.... An understanding of stakeholder perspectives can inform decision-making throughout the organisation. For example, this could include decision-making in relation to customer policies, **modern slavery risk management**, **governance of data and technology**....”***

C. FEEDBACK ON OTHER SELECT CONSULTATION QUESTIONS

Q3. Recommendation 2.2: The Council already recommends disclosure of a board skills matrix or skills a board is looking for. Do you support disclosure of the following information about board skills?

a. Recommendation 2.2(a): current board skills and skills that the board is looking for?

Yes. However, human rights risk management is a distinct skill set to environmental risk management. ASX disclosures of Board skill sets generally combine these two areas (e.g. under ‘Sustainability’). Therefore, it is often unclear whether a Board only has environmental skills (which are more common) or only human rights skills, or both. This can reduce stakeholder trust in the Board’s ability to provide effective oversight of human rights risk. We **recommend** the Commentary to Recommendation 2.2 is updated to say that these skills should be assessed / disclosed separately.

b. Recommendation 2.2(b): the entity’s process for assessing that the relevant skills and experience are held by its directors?

Yes. However, we **recommend** that Recommendation 2.2(b) is updated as follows (in bold):

*“A listed entity should disclose its process **and criteria** for how it assesses the relevant skills and experience are held by its directors.”*

¹² UNGP 18(b).

¹³ UNGP 18(b) Commentary.

¹⁴ Recommendation 3.3’s Commentary in the Draft Principles could draw on the OECD Guideline’s (p.20) definition of “relevant stakeholders” as “persons or groups, or their legitimate representatives, who have rights or interests related to the matters covered by the Guidelines that are or could be affected by adverse impacts associated with the enterprise’s operations, products or services.”

Qs 4 and 5. Recommendation 2.3. Do you support raising the S&P/ASX300 measurable objective to a gender balanced board? Do you support the proposed disclosure of any other relevant diversity characteristics (in addition to gender) which are being considered for the board’s membership?

Yes and yes. The Council should also consider the diversity of stakeholder perspectives in its own membership.

Q11. Recommendation 4.2: Do you support the proposed disclosure of processes for verification of all periodic corporate reports (including the extent to which a report has been the subject of assurance by an external assurance practitioner)?

Yes. This would increase transparency reporting generally, and help ensure it remains in line with evolving market and community expectations.

Q13. Recommendation 7.4: Do you support the proposal that the entity identify and disclose its material risks, rather than identifying specific risks for all entities to disclose against?

No. We are concerned the updates to Recommendation 7.4 and its Commentary suggest entities would not necessarily need to report on environmental and social risks. This is a step backwards from the 4th Edition text, at a time when greater transparency around these risks is expected by investors and communities (as highlighted in the proposed deletions in the Commentary). It is unlikely any ASX entity would have no material human rights and environmental risks, especially over the long term. However, the de-emphasis on these risks in the updates suggests this might be the case, and discourages disclosure of such risks.

The Council appears alive to this concern given a proposed update to the Commentary notes: *“(e)ntities that believe that their prospects may not be impacted by any material environmental, social or governance risks should consider carefully their basis for that belief.”* In our view this caution is not sufficient, given human rights risk is still not well understood or correctly identified as material, and the ISSB reporting standard’s current lack of focus on human rights.¹⁵ We **recommend** that Recommendation 7.4 should revert to the 4th Edition text.

Human rights risk management in line with the UNGPs requires entities to identify and address their risks *to people*, not just risks *to the business*, though these risks will usually converge. Therefore, human rights risks, which exist in all businesses, should be reported on by all entities (which is more clearly reflected in double materiality reporting approaches).

Q19. Do you wish to provide any other comments on the content of the *Consultation Draft*, including any other changes you would propose?

Principle 8: Remunerate fairly and responsibly

The need for remuneration to be appropriately aligned with incentives was a key finding in the Banking Royal Commission.¹⁶ The Commentary to Recommendation 8.1 notes, “(r)emuneration is a key driver of culture.” The UNGPs expect that policies that set financial and other performance incentives, should align with the business’ commitment to human rights.¹⁷ Effective management of human rights risks can easily be deprioritised in the face of short-term financial metrics, especially if

¹⁵ Principles for Responsible Investment, [A call for an ISSB reporting standard on human rights and social issues](#) (September 2023).

¹⁶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

¹⁷ See UNGP 16, Commentary.

they are only considered material in the long term. The UNGPs expect risk of harm to people is addressed regardless of whether it has been identified as material. To ensure human rights risks are effectively managed we **recommend** updating Principle 8 to link executive (including at least one Board member's) remuneration to human rights performance.¹⁸ This would help avoid short-termism, incentivise a culture of respect for human rights and enhance stakeholder trust.

D. CONCLUSION

This submission is not a comprehensive review of how the Principles should be updated to reflect responsible business conduct standards. **We recommend the Council commission an independent review of the Principles against the expectations of the UNGPs and the OECD Guidelines, publish the review findings, and update the Principles in line with the review's findings before the 6th update to the Principles.** The review should involve experts from civil society, academia and business with demonstrated expertise in business and human rights and sustainability. This would enhance stakeholder confidence in the Principles, and help ensure entities' governance aligns with responsible business conduct standards and remains competitive in international markets.

We are happy for this submission to be published. We would be pleased to provide more information if it would assist. We can be contacted through Lauren Zanetti, Senior Lawyer, Human Rights Law Centre (lauren.zanetti@hrlc.org.au).

Yours sincerely,

Organisations

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2. Professor Justine Nolan, Director, Australian Human Rights Institute, UNSW Sydney
3. Carolyn Kitto, Co-Director, Be Slavery Free
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5. Amy Sinclair, Regional Representative, Business and Human Rights Resource Centre
6. Kerry Weste, President, Australian Lawyers for Human Rights
7. Dr Luke Fletcher, Executive Director, Jubilee Australia
8. Susie Hughes, Executive Director, International Coalition to End Transplant Abuse in China (ETAC)
9. Grace Wong, Chief Advocacy Officer, International Justice Mission Australia
10. Dr Mark Zirnsak, Senior Social Justice Advocate, Uniting Church in Australia, Synod of Victoria and Tasmania
11. Gregory Morgan (Lieut. Colonel), Secretary for Mission, The Salvation Army

¹⁸ This is an indicator in the [Corporate Human Rights Benchmark methodology](#) (2023).