8 May 2024

Ms Kelly Boschenok
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ASX Corporate Governance Council Secretariat

By email: ASXCorporate.GovernanceCouncil@asx.com.au

Dear Ms Boschenok

ASX CGC's Corporate Governance Principles and Recommendations

This submission by the Law Council of Australia's Business Law Section has been prepared by the Corporations Committee. It has been designed to thematically address the ASX Corporate Governance Council's consultation materials for the proposed 5th edition of the Corporate Governance Council Principles and Recommendations in a thematic way.

The Corporations Committee would be pleased to discuss any aspect of this submission. Please contact the Committee C\hair Robert Sultan at robert.sultan@nortonrosefulbright.com, if you would like to do so.

Yours faithfully

Dr Pamela Hanrahan
Chair
Business Law Section

ASX Corporate Governance Council consultation materials for a proposed 5th edition of the Corporate Governance Council Principles and Recommendations

ASX Corporate Governance Council

8 May 2024

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Executive Summary

1. The first section of the submission looks at how the ASX Corporate Governance **Council**'s *Corporate Governance Principles and Recommendations* (**CGPR**) fits into the broader framework of corporate law and directors' and officers' duties. It explains how the CGPR are used by courts when considering directors' and officers' duties of (a) care and diligence and (b) best interests.

2. We suggest that the CGPR have become an integral part of the way the community and courts look at the duties of directors and officers of ASX-listed entities, and are influential in setting expectations. The submission concludes that the CGPR accurately reflect contemporary Australian corporate law with respect to those duties.

3. The second section of the submission explores whether the changes proposed in the Council's Consultation Document reflect contemporary thinking about "best practice" governance. In particular, it asks whether the proposed changes to the CGPR take adequate account of the lessons learned since the 4th edition (especially in light of various investigations and inquiries into governance failures).

4. We suggest that there is a growing community expectation that the modern ASX-listed entity should embrace governance that promotes and protects its social capital, and that increasingly this includes an expectation that those entities have an overt commitment to responsible business conduct.

5. The third section of the submission examines the specific recommended changes in the Consultation Document and raises some concerns about their effective operation in Australia's premium market for securities.

6. The CGPR have come to occupy a significant position in Australian corporate governance theory and practice since the 1st edition was released some 20 years ago. The CGPR have been adopted formally and informally elsewhere, including in other self-regulatory codes for not-for-profit and government organisations. However, these comments focus specifically on the application of the CGPR to listed entities and in particular how the 5th edition will help those entities operate in a globally competitive capital market.

The CGPR and contemporary corporate law

7. The CGPR inhabit a complex legal environment that prescribes the duties of officers and directors of corporations that arise from common law, equity and statute law.[1] It is an environment heavily shaped by community norms. These norms are expressed in judicial attitudes, legislative developments, and reviews and inquiries (including Royal Commissions) into entity or sector governance failures like the Perth Casino Royal Commission.[2] Each of these forms part of a positive feedback loop that reviews, shapes and reflects the community's expectations for corporations with which the community interacts every day as a direct or indirect investor.

8. Simply put, directors and officers must discharge their functions with care and diligence, and carry out their responsibilities having regard to the best interests of the corporation as a whole, considering the interests of: existing members (who have the most immediate financial stake in a solvent company); the corporation as a commercial enterprise (as opposed to the interests of individual members); creditors of the company (in certain circumstances especially as the organisation approaches insolvency);[3] and beneficiaries (if the organisation is a responsible entity or trustee).[4]

9. This complex legal web describes and prescribes the duty of directors and officers. The CGPR are woven into the web. The legal duties of directors and officers are sufficiently general in their description that, in exercising their duties, those individuals can have regard to a wide variety of matters all of which are part of the threads that comprise the duty to act with care and diligence in the best interests of the corporation.[5]

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[1] The duties of directors and officers of statutory corporations and charitable organisations is generally the subject of specific legislation.

[2] Perth Casino Royal Commission - Final Report Decision: The final report following an enquiry into the affairs of Crown Casino Perth at https://www.wa.gov.au/government/publications/perth-casino-royal-commission-final-report includes as Appendix E a detailed exploration of corporate governance theory.

[3] *Walker v Wimborne* (1976) 137 CLR 1, finding that, in the case of near insolvency, giving priority to the interests of creditors over shareholders is part of the fiduciary duty to the corporation as a whole.

[4] Section 601FD of the *Corporations Act 2001* (Cth) (**Corporations Act**), which imposes various statutory duties on directors of a responsible entity. These include a duty to 'act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests'. See also *ASC v AS Nominees Ltd* (1995) 18 ACSR 459: the director is required to exercise 'the degree of care and diligence that a reasonable person in the position of director of the trustee would exercise in the trustee's circumstances'. See generally Hanrahan, Pamela F, Trustee Directors' Liability to Members (February 17, 2011). Available at SSRN: https://ssrn.com/abstract=1781473 or http://dx.doi.org/10.2139/ssrn.1781473 see also P Hanrahan *Funds Management in Australia: Officers' Duties and Liabilities*, while it is obviously convenient to lump all directors and officers together the obligation thus imposed on RE directors to exercise their powers and discretions in the interests of the members of the scheme may provide a basis for quite different duties.

[5] In 2022 the Australian Institute of Company Directors briefed Bret Walker AO KC and Gerald Ng on the duty to act in good faith in the best interests of the corporation. In the opinion, Walker and Ng affirm that stakeholders are a legitimate concern of directors. Shareholder/member interests are central to decision-making but taking account of stakeholder considerations ties back to the long-term interests of the organisation. This work follows from the multiple opinions of Mr Noel Hutley KC and Mr Sebastian Hartford Davis on directors' duties with regard to climate change. *"while the text of s 181 of the Corporations Act omits any reference to the directors' subjective understanding of the best interests of the corporation, it is difficult to understand why a Court might be any more inclined, in applying that provision, to intervene in the commercial decision-making of a company. In particular, s 181 of the Corporations Act cannot be read in isolation from s 180." [26].* In Downer EDI Limited v Gillies [2012] NSWCA 333 (18 October 2012) the court said:

> *[76] Section 180, in its terms, is to be analysed objectively. Both ss 181 and 182 are also to be determined objectively: R v Byrnes [1995] HCA 1; 183 CLR 501 at 514-515 and Doyle v Australian*

10. In this context, over the last 20 years the CGPR have become part of the soft law that helps judges form views about what the law means by phrases such as "a director or officer of a corporation in the corporation's circumstances," or "occupied the office held by, and had the same responsibilities within the corporation as, the director or officer."[6] The CGPR have a standard-setting function as regards the community generally (and certainly with proxy advisers) and courts.

11. In *ASIC v Rich*[7] and later in *ASIC v Vines (No 2)*,[8] the NSW Supreme Court looked at the question of whether the relevant director or officer had exercised the required degree of care and diligence. The case confirmed that the conduct of a director or officer should be assessed by reference to "contemporary community expectations".

12. The CGPR have been part of judges' considerations in a number of judgments over the last 10 years.[9] These cases demonstrate that the CGPR have become a significant part of the process for courts seeking to understand the norms for directors and officers in the exercise of their duties.

13. For this reason, the Committee is concerned that the level of detail in the commentary to the CGPR might serve to entrench that commentary as 'best practice' statements and help convey a sense that corporate governance is just a matter of meeting the standard as described. We suggest that the Council might consider a model where the Principles and Recommendations are separated from the commentary to emphasise that the Principles and Recommendations are high level concepts that can and should be moulded into the specific circumstances of the listed entity, including the commercial context in which it operates.

14. Listed entities should be encouraged to see corporate governance as something that has to be tailored to suit the particular circumstances of the organisation.[10] The circumstances surrounding each entity are different from others and are continually changing: thus, the corporate governance system should be flexible and dynamic.

15. Our concern is that, because of the sheer volume of commentary in the Consultation Document, there is a risk that the commentary will influence a court to set a prescriptive standard rather than embracing a principles-based regime that allows listed entities to modify the CGPR to better reflect their particular circumstances.

Securities and Investments Commission [2005] HCA 78; 227 CLR 18 at 28-29 [35]- [37]. By "objectively" is meant the standards of conduct that would be expected of a person in the position by reasonable persons with knowledge of the duties, power and authority of the position, and the circumstances of the case, including the commercial context: Doyle at 28 [35].

[6] Section 180 says that:

> *Care and diligence--directors and other officers*
> *(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:*
> *(a) were a director or officer of a corporation in the corporation's circumstances; and*
> *(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.*

[7] ((2003) 21 ACLC 450) dismissing the application to strike out ASIC's action against Mr Greaves, the chairman of OneTel.

[8] (2004) 22 ACLC 37.

[9] See Appendix 1.

[10] Perth Casino Royal Commission - Final Report Decision: The final report following an enquiry into the affairs of Crown Casino Perth at https://www.wa.gov.au/government/publications/perth-casino-royal-commission-final-report includes as Appendix E paragraphs 22-26.

The CGPR and the duty to act in the best interests of the corporation.

16. As discussed above, the "best interest duty" imposed on directors and officers by the Corporations Act and the common law is generally expressed to be an obligation to act in the best interests of the "corporation". This is usually taken to mean the best interests of the shareholders as a group or as a whole or "the best interests of the current and future shareholders".[11]

17. Australian corporate law grants directors a wide range of protection from liability for decisions that sacrifice shareholders' immediate financial interests in favour of other corporate interests including long-term sustainable value.[12]

18. The Consultation Document implicitly and explicitly prefers a wider view of the best interests duty. The present law is effectively neutral on the question of stakeholder interests or long-term sustainable value, so long as they are consistent with the interests of the shareholders.[13] In particular, new Recommendation 3.3 proposes that an entity should have regard to its key stakeholders' interests. It does not require an entity to act in the interests of its key stakeholders but it says that:

    > *It is in the best interests of an entity to have regard to its impact and interaction with its key stakeholders, as appropriate, to support creation of long-term sustainable value for security holders.*

19. We agree that recognition and consideration of relevant stakeholder interests can protect and preserve a listed entity's corporate reputation and create long-term sustainable value. Further, that corporate reputation is part of the assets of an organisation.[14] But the task of promoting and protecting that asset is complex and requires that the board carefully manage a range of often competing interests.

20. The Consultation Document discusses the identification of key stakeholders but offers no guidance as to the basis for doing so. In the absence of a meaningful attempt to articulate a standard of responsible business conduct, we query the

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[11] See *Ngurli Ltd v McCann* (1953) 90 CLR 425; *Reid v Bagot Well Pastoral Co Pty Ltd* (1993) 12 ACSR 197 at 206; *International Swimwear Logistics Ltd v Australian Swimwear Company Pty Ltd* [2011] NSWSC 488; *Idylic Solutions Pty Ltd; ASIC v Hobbs* [2012] NSWSC 1276 at 1488

[12] At equity, courts have for many years dealt with an analogous problem of trustees needing to balance the interests of income (present) versus capital (future) beneficiaries. See *Cowan v Scargill* [1984] 2 All ER 750 discussed above where the House of Lords held that the trustees had an overriding duty to invest with the primary objective of increasing the fund's value for the beneficiaries, despite their personal views or moral reservations on the choice of the most suitable investments. See also Mitchell R, O'Donnell A and Ramsay I, *Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law* (Centre for Corporate Law and Securities Regulation and Centre for Employment and Labour Relations Law, The University of Melbourne, 2005).

[13] A view that is consistent with the leading case of *Cowan v Scargill* [1985] Ch 270 where the Vice-Chancellor observed (at 288):

> *In considering what investments to make trustees must put on one side their own personal interests and views. Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investments. Yet under a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reason of the views that they hold.*

[14] The Hon T F Bathurst Ac Chief Justice Of New South Wales *Directors' And Officers' Duties In The Age Of Regulation* Speech Delivered At The Conference In Honour Of Professor Baxt Ao 26 June 2018 available at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180626.pdf The Chief Justice considered that a stepping stone case might emerge where ASIC alleges that a director or officer was liable for conduct falling short of a strict breach of the law, but was nevertheless inappropriate or unethical, where such conduct results in significant reputational damage and consequent financial implications ie that it was the duty of a director or officer to preserve the reputation of their business

usefulness of articulating some possible stakeholders.[15] We also submit that, if the list of possible stakeholders is retained, law makers and regulators should be excluded.

21. As discussed below, the Committee suggests that the Council commend the OECD Guidelines as a basis for assessing and prioritising the community actors who should be considered by the listed entity when determining its policy.

22. The Consultation Document suggests that ASX-listed entities act by reference to the best interests of the entity to create long-term sustainable value. While the Committee accepts that the best interests of the entity will generally align with a reasonable view as to long-term sustainable value, we do not think that is the end of the matter.

23. The Committee is concerned that the longer form of Principle 3, which contemplates that a listed entity should act lawfully as well as acting ethically and responsibly, should make it clear that an entity's obligation to obey the law is not in any way subject to demonstration of long-term sustainable value. Rather it should be clear that long-term sustainable value qualifies only ethical and responsibility elements of Principle 3.

The CGPR as consistent but not overlapping guidelines

24. The CGPR should be consistent with (but not duplicate) existing legal requirements. The Consultation Document is an improvement on the 4th edition in this respect and the Committee supports that approach.

The CGPR in the context of contemporary governance

25. The Committee considered whether draft recommendations in the Consultation Document should change to reflect current thinking about "good" governance and the lessons learned from corporate governance failures since the 4th edition.

26. In short, the Committee believes that one of the reasons that ASX-listed entities have engaged in conduct that deviates from the community norms is that many organisations' corporate governance policies lack an overt ethical underpinning.

27. The community is likely to be sceptical of statements of value or purpose that are not linked to a material commitment to operating as responsible corporate citizens by embracing ethical values such as those enunciated by the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.*[16] The Council should consider including express support for governance that is, and is said to be, designed by reference to this global standard for responsible business conduct.

[15] The list of stakeholders includes security holders, employees, customers, suppliers, Aboriginal and Torres Strait Islander peoples, local community, law makers and regulators and organisations that represent the interests of stakeholders, such as unions, environmental groups, or consumer groups. This selection ignores key elements of responsible business conduct that include employment and industrial relations, environment, consumer interests and human rights of stakeholders beyond First Nations peoples.

[16] *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* https://read.oecd.org/10.1787/81f92357-en?format=pdf The OECD Guidelines are recommendations aim to encourage positive contributions enterprises can make to economic, environmental and social progress and to minimise adverse impacts on matters that may be associated with an enterprise's operations, products and services. The Guidelines cover all key areas of business responsibility, including human rights, labour rights, environment, bribery, consumer interests, disclosure, science and technology, competition, and taxation. The 2023 edition of the Guidelines provides updated recommendations for responsible business conduct across key areas, such as climate change, biodiversity, technology, business integrity and supply chain due diligence.

Reviewing foundations of and experience under Principle 3

28. Principle 3 serves the important function of setting the ethical compass of business not necessarily for its own sake but because it ensures that the entity is preserving and building its social capital. But how effective have the CGPR been, since the publication of the 4th edition, in driving organisations to preserve and build social capital?

29. Several high-profile examples of listed entities taking action that was not illegal, but nonetheless breached community expectations, present themselves. Breaches of community norms have caused significant loss, not only of market capitalisation, but of reputational capital, and social opprobrium. Breaches that have also been career blighting for senior executives and some directors.[17]

History of Principle 3

30. From the 1st edition of the CGPR in 2003, Principle 3 has concerned ethical and responsible conduct. The first two editions simply said, 'Promote ethical and responsible decision-making'. The 2nd edition (2007, revised 2010) added commentary that listed entities 'should also consider the reasonable expectations of their stakeholders including: shareholders, employees, customers, suppliers, creditors, consumers and the broader community in which they operate'.[18]

31. Preparation of the 4th edition took place in the context of a loss of community trust in business revealed in the hearings of the Royal Commission into Misconduct into the Banking, Superannuation and Financial Services Industry.[19] The Final Report was released only three weeks before publication of the 4th edition. From the outset, corporate culture and values informed work on the edition. They were seen as 'critical governance issues' and there was a recognition that governance included responsible business conduct. The alignment of culture and values with community expectations was considered 'imperative' to arrest loss of trust in business.[20] That was to be primarily affected through the revision of Principle 3.

32. The Consultation Document proposed recasting Principle 3 in these terms: 'A listed entity should instil and continually reinforce *a culture* across the organisation of acting lawfully, ethically *and in a socially responsible manner*' (emphasis added). The draft introduced the concept of a company's 'social licence to operate'. Social licence was seen as one of the most valuable corporate assets.

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[17] Perth Casino Royal Commission - Final Report Decision: The final report following an enquiry into the affairs of Crown Casino Perth at https://www.wa.gov.au/government/publications/perth-casino-royal-commission-final-report - Appendix E..

[18] In this edition the commentary described reputation as one of an entity's most valuable assets; that a failure to meet reasonable expectations of investors and the broader community 'is likely to destroy value over the longer term.' It gave examples of 'good corporate citizen[ship]' that mark ethical and responsible conduct:

- respecting the human rights of its employees (for instance, by not employing forced or compulsory labour or young children even where that may be legally permitted);
- creating a safe and non-discriminatory workplace;
- dealing honestly and fairly with suppliers and customers;
- acting responsibly towards the environment; and
- only dealing with business partners who demonstrate similar ethical and responsible business practices.

19 In his Interim Report, Commissioner Hayne said that '[m]uch, if not all, of the conduct identified in the first round of hearings can be traced to entities preferring pursuit of profit to pursuit of any other purpose.'Vol 1, p54.

20 Elizabeth Johnstone, 'Launch of the 4th Edition of the Corporate Governance Principles & Recommendations' (27 February 2019).

Its preservation required the directors and officers to have regard to the views and interests of a range of community actors beyond shareholders.

33. In this sense community trust was seen as the foundation of long-term, sustainable value creation, to be secured through engagement with stakeholders so that the listed entity is seen to be a 'good corporate citizen'.[21] The concepts of 'social licence to operate', 'good corporate citizenship' and 'socially responsible' conduct were not otherwise developed. The Council did not, however, persist with the social licence concept.[22]

34. The Consultation Document proposes a longer form statement of Principle 3 to make it clear that the culture of acting lawfully, ethically and responsibly should apply both within the organisation and in its dealings with the communities in which it operates.

35. The Consultation Document proposes a change to the commentary to Recommendation 1.1 that would make board definition of corporate purpose discretionary rather than presumptive. In consequence, the proposed commentary to Recommendation 3.1 now merely proposes that corporate values be aligned with any purpose that has been articulated, as well as with its strategic objectives and risk appetite. The Consultation Document's commentary sees responsible business conduct as a possible, but not necessary, element of corporate purpose although it acknowledges that its inclusion 'may more effectively drive ethical, lawful and responsible behaviour'.

<u>Uncertain efficacy of reliance upon values</u>

36. Principle 3 asks listed entities to instil a culture of acting ethically and responsibly. The primary mechanism offered to achieve this is through Recommendation 3.1 with the articulation and disclosure of corporate values.

37. The commentary to the Consultation Document describes the entity's values as being the guiding principles and norms that define what type of organisation it aspires to be, and what it requires from its officers and employees to achieve that aspiration.

38. It is the Consultation Document's apparent intention that the identification of entity values will carry the primary load of instilling and reinforcing the desired responsibility culture. This is so because neither of the other recommended measures—a code of conduct and recognition of stakeholder interests—specifies any explicit or necessary connection to norms of responsible conduct. The Committee suggests that values disclosure, however, involves a process that bears no necessary connection with corporate responsibility.

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21 The consultation draft gave examples of potential stakeholder groups and referred in footnotes to international standards of corporate responsibility including OECD Guidelines for Multinational Enterprises on Responsible Business Conduct; United Nations Guiding Principles on Business and Human Rights.

22 Launching the 4th edition, the Council Chair said that '[al]most all investor interest groups, accounting bodies and standards setters strongly supported the concept of "social licence to operate" and the recognition of broader stakeholder accountability: Johnstone, op cit. She noted, however, that some other stakeholders were troubled by the term, arguing that it was 'vague, subjective and elastic.' They also pointed out the particular difficulties that it could cause for listed entities legitimately operating in particular sectors that some parts of society are opposed to—such as companies involved in the gaming, alcohol, tobacco, fast food, coal and coal seam gas sectors.' The Council, she said, 'saw the force of these arguments' and the term was replaced with references to 'reputation and standing in the community' on the basis that the two terms were 'essentially synonymous'. The terminology was also seen as more likely to be better understood and therefore more consistently applied by companies.

39. The values and purpose of a listed entity, where disclosed, are usually expressed in such generality as to say little about the key matters that are germane to a wider sense of corporate responsibility. In some cases, they appear to be little more than motherhood statements that signal worthy aspirations but do not address the actual moral, human rights and reputational risks confronting the business.

40. The Committee suggests that it might be better for the CGPR to include a Recommendation that requires a listed entity to establish a standard of responsible conduct that might better equate to the expectations of the community. This could include support for the OECD Guidelines, which provide an ethical lens that removes some of the subjectivity and replaces it with internationally-agreed standards ready to be incorporated into thoughtful governance and corporate decision-making processes.

41. This type of statement of corporate responsibility says that where individuals may be directly affected by decisions, an organisation will consider the legal, regulatory, moral and actual rights of those involved and, where practicable, include affected persons in the decision-making process through communication and consultation—an organisation taking such an approach will not only ask the question 'can we?' but 'should we?'[23]

The content of corporate responsibility

42. As discussed above, the Committee proposes that the Consultation Document recommend that listed entities consider adopting the OECD Guidelines[24] which are in many ways reflective of the current authoritative standard expression of corporate responsibility contained in the *Guiding Principles on Business and Human Rights* (**UNGPs**)[25] adopted by the United Nations in 2011. The OECD Guidelines include three complementary pillars including that the business should respect human rights.[26]

43. This obligation to social responsibility to respect rests upon social norms and expectation not upon binding legal obligation although, of course, enterprises must comply with the domestic legal regimes of the countries where they operate. In this sense the commitment is not voluntary since it is a norm that has 'acquired near-universal recognition within the global social sphere in which multinationals operate.'[27] These standards have already received support from states and business, including the Australian Government and leading companies.

Summary

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[23] Corporate governance and ethics post-Banking RC: could a human rights approach be the answer? as https://www.corrs.com.au/insights/corporate-governance-and-ethics-post-banking-rc-could-a-human-rights-approach-be-the-answer

[24] The OECD Guidelines include due diligence provisions that provide the architecture of the reporting requirement under the *Modern Slavery Act 2018* (Cth)—the requirement upon reporting entities under s 16(1) to identify and map modern slavery risks, and to report actions they have taken to assess and address those risks, including through due diligence and remediation processes.

[25] Almost 25,000 organisations across the globe have joined the UN Global Compact with formal commitments to report annually on their progress on respecting human rights, environmental rights, and labour rights. see https://unglobalcompact.org/

[26] OECD Guidelines IV. Human Rights

[27] J G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Co, 2013), p 92. See also Law Council of Australia, *Business and Human Rights and the Australian Legal Profession Background Paper* (2016), 5, < https://lawcouncil.au/publicassets/23a50215-bed6-e611-80d2-005056be66b1/1601-Position-Paper-Business-and-Human-Rights-and-the-Australian-Legal-Profession.pdf>.

44. The Committee considers that values disclosure under the 4th edition would not seem to have yet adequately influenced notions of corporate responsibility to avoid a disconnect between ASX-listed entities' values and community expectations. We suggest that this is not surprising despite measures now proposed by the Council with respect to engagement with stakeholders.

45. The recommendations proposed for the implementation of Principle 3 are weakened by the absence of guidance as to settled standards of corporate responsibility. In consequence, the Consultation Documentation gives little guidance to the directors and officers listed entities as to measures that would protect them against threats to the organisation's reputation capital.

Analysis of specific aspects of the Recommendations

Definition of "social risks"

46. The Committee is aware of the changes proposed to this definition by Animal Welfare Lawyers in its recent submission to the Council, and supports the submission of Animal Welfare Lawyers regarding the definition of "social risks".

Recommendation 2.2

<u>Board skills matrix</u>

47. The CGPR currently require listed entities to disclose a board skills matrix that sets out the mix of skills that the board currently has or is looking to achieve in its membership. However, Recommendation 2.2(a) of the Consultation Document proposes that entities need to have and disclose a skills matrix of the board's current skills and those it is looking to achieve.

48. Board skills matrices have the potential to be useful tools for listed entities to think about and for key stakeholders to understand the competencies and priorities of a board. However, there is currently varied practice in the approach taken by listed entities in disclosing under the existing Recommendation 2(a) because of the broad and discretionary way in which the recommendation is framed. This also means there is varied utility in interpreting these disclosures individually and in making comparisons between entities.

49. The Committee is aware of the changing norms as regards board composition and succession planning and the corresponding increase in general levels of disclosure being made in board skills matrices across the market. Through this lens, the Committee considers that the changes to Recommendation 2.2(a) proposed in the Consultation Document are positive and moving in the same direction as the market in that it provides more clarity and purpose as to what a skills matrix is intended to achieve as a forward-looking tool.

50. The Committee suggests that board skills matrices should and will continue to vary between entities (in particular, whether skills are reported collectively or individually for board members, and whether they are given a binary or graded assessment), but believes it will be incumbent on investors and other key stakeholders to articulate their expectations as practice continues to evolve.

<u>Identification of the skills of individual directors</u>

51. The draft commentary accompanying this Recommendation 2.2(b) suggests that better practice is to include information on the skills of individual directors (rather than reporting that the board as a whole possesses a particular skill) and to explain specific skills and the criteria for directors to be deemed to possess those skills.

52. The Committee believes this new requirement will lead to a proliferation of consultants (costs) to provide external assessments of the skills of individual directors, however the Committee queries if the disclosure resulting from this process will be meaningful.

53. The Committee expects listed entities will be reticent to over-disclose information in their corporate governance statements and so only limited disclosures will flow from the implementation of this recommendation.

54. It is particularly difficult to envisage an entity volunteering any information relating to adverse outcomes or shortcomings identified in a review. Rather, practice may emerge that involves summary disclosure that a process has occurred and a high-level description of the process, without providing details of the substance of the review or the findings, other than whether it was performed internally or externally. Through this lens, we query the utility in inserting this new recommendation.

Recommendation 2.3

Diversity

55. Recommendation 2.3 now primarily requires two types of disclosure:

    (a) disclosure of a measurable objective and time frame for achieving gender diversity; and

    (b) disclosure of any other relevant diversity characteristics the board is considering.

56. Whilst the members of Committee had differing views on the utility (or otherwise) of gender quotas, we accept that similar jurisdictions have imposed similar quotas. We would, however, prefer to retain the current 30 per cent “floor” in addition to or instead of a 40/40/20 target. The Committee was universally concerned how this recommendation applies in its application to smaller boards.

57. The Committee is concerned by the inclusion of a requirement to disclose other relevant diversity characteristics being considered. As a point of reference, for example, under the *Disability Discrimination Act 1992* (Cth), the Australian Human Rights Commission has issued guidance indicating that in most circumstances, a person does not have an obligation to share information about their disability with their employer.[28] We submit that this recommendation should not be pursued without further careful consideration.

58. Boards should be encouraged to focus on gender diversity (if that is what has been determined as the most important factor). The number of zero-women boards has remained in the vicinity of 15 per cent and the Committee believes that number should be improved.

59. In addition, the Committee is concerned that there seems to have been little to no increase in women being appointed as chair of the board.

60. The Committee supports the concept of diversity more generally in an effective governance system. We suggest that cognitive diversity is also critical for high-functioning boards.[29]

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[28] Australian Human Rights Commission, IncludeAbility Guide, *Identifying as a person with disability in the workplace*, 2021, <https://includeability.gov.au/sites/default/files/2021-07/11_-_includeability_-_guide_-_identifying_as_a_person_with_disability_in_the_workplace.pdf>.

[29] Jared Landaw, Barington Capital Group LP, on Tuesday, July 14, 2020 “Maximizing the Benefits of Board Diversity: Lessons Learned From Activist Investing” at https://conference-board.org/pdfdownload.cfm?masterProductID=20869

Recommendation 3.2 breach reporting

61. Oversight at board level of material code of conduct breaches and actions is important as one of the tools and indicators for boards and senior management in oversight and embedding culture, including through consequence management. However, the Committee is concerned that the information should be deidentified.

62. Because of the difficulty in effectively de-identifying the breaches in a great number of organisations we see merit in disclosure in more general terms of the types of actions taken by the entity to breaches of the code of conduct rather than specific incidents and actions. For example, the ACSI's Governance Guidelines (**ACSI Guidelines**)[30] recommend meaningful disclosures in relation to corporate culture, such as assessments of culture, relevant policies and action taken to promote compliance with corporate values and policies.[31] In relation to consequences, it recommends that an entity consider reporting the number of breaches and related consequences, which arguably still could be met through more a more general disclosure.

63. The UK Corporate Governance Code 2024[32] says: "The board should assess and monitor culture and how the desired culture has been embedded. Where it is not satisfied that policy, practices or behaviour throughout the business are aligned with the company's purpose, values and strategy, it should seek assurance that management has taken corrective action. The annual report should explain the board's activities and any action taken"—again a recommendation that could be met by more general disclosure.

64. Accordingly, we suggest the Council include a recommendation for disclosure of the types of actions taken by the entity to address breaches of the code, rather than specific incidents and related actions. This still promotes transparency and remediation and potentially allows for more fulsome disclosures of the types of actions along the lines of the examples given in the commentary.

65. However, if this change is not made, then the exclusion should be built into the proposed recommendation (e.g. "subject to any legal constraints"), rather than only by way of examples in the commentary, together with expanded examples in the commentary as set out above.

Recommendation 7.4

66. In the 4th edition, Recommendation 7.4 required disclosure of 'any material exposure to environmental or social risks.' The Consultation Document in paragraph (a) would extend disclosure to all 'material risks (including its material environmental, social and governance risks)'. The Committee agrees with the proposed discarding of the concept of 'material exposure' of risk since it implies a reasonably high level of both probability and impact, whereas the proposed new definition of 'material risk' allows entities to disclose risks without necessarily representing that both probability and impact are significant.

67. The proposed language is consistent with the OECD Guidelines that 'disclosure policies of enterprises should include, but not be limited to, material information on … foreseeable risk factors'.

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[30] ACSI's Governance Guidelines https://acsi.org.au/wp-content/uploads/2023/12/Governance-Guidelines-December-2023.pdf
[31] Section 5.5. Corporate Culture
[32] https://www.frc.org.uk/documents/6709/UK_Corporate_Governance_Code_2024_kRCm5ss.pdf

68. The Committee sees benefit in disclosure of 'identified areas of significant impacts or risks, the adverse impacts or risks identified, prioritised and assessed, as well as the prioritisation criteria' under due diligence conducted by the entity as would be suggested by the OECD Guidelines.

69. The Consultation Document's proposed commentary says that entities 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. The Committee considers that this is sound advice but recommends, following the OECD Guidelines, that entities go further by communicating how social risk is addressed through their due diligence processes.

Recommendation 8.3 Clawback and other pecuniary penalty mechanisms

70. Clawback and other pecuniary mechanisms are becoming increasingly commonplace for performance-based remuneration of senior executives of larger listed entities—and for some regulated entities it is already mandatory—and the Committee appreciates this is a useful tool to align the long-term interests of executives and shareholders and support good governance of those organisations, albeit that the circumstances where clawback provisions are triggered is extremely rare. In addition, actually applying the provision can be challenging. First, the requirement for recovering typically involves the notion of "fraud or dishonesty" - unless convicted of a crime, an executive will argue that there should be no legal clawback of a payment. Second, once the money is paid the burden is on the organisation to get it back and that can be difficult if the money has been spent. [33]

71. However, the Committee is concerned that this may be an unduly burdensome standard when applied to smaller listed entities or entities that operate in industries with known higher risk appetites. In particular, it may create barriers to those entities being able to attract appropriate senior personnel into roles (as opposed to in an unlisted counterpart or in another jurisdiction) and create disproportionately higher costs in an enforcement scenario.

72. The Committee queries the utility of the strident way in which the recommendation is framed. Perhaps it could be better framed by requiring listed entities to consider whether clawback arrangements are appropriate, rather than mandating them for all listed entities, and allowing the market to continue to decide what is appropriate, particularly when the market already seemed to have required larger entities to voluntarily move in this direction.

73. The Committee is concerned that such a strident position may cause investors and other stakeholders, including proxy advisers, to reject remuneration proposals without clawback even though that may be appropriate in the particular circumstances.

74. There are already detailed remuneration reporting requirements mandated under the Corporations Act that require disclosures in relation to the application of clawback for key management personnel. Listed entities also have continuous disclosure obligations which may be enlivened in relation to clawback scenarios (potentially triggered by both an underlying event and the decision to apply

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[33] Sanjai Bhagat and Charles M. Elson Why Executive Compensation Clawbacks Don't Work Harvard Business Review March 22, 2021 at https://hbr.org/2021/03/why-executive-compensation-clawbacks-dont-work

clawback). Application of clawback could then also trigger ASX filings for changes in the quotation of securities.

75. In addition to these legal requirements, investor and broader stakeholder scrutiny may demand transparency of listed entities for how matters are resolved and consequences are applied in relation to events giving rise to clawback.

76. In light of these concerns and the significant formal disclosure framework and channels that already exist for informing the market of material developments, the Committee queries the need for disclosures to be extended.

77. Further, the Committee has reservations about the blanket expectation for disclosure of clawback as:

    - it shares the more broadly articulated concerns for this recommendation regarding privacy—even on a de-identified basis, it may be possible to connect or at least speculate (rightly or wrongly) how known incidents may have been dealt with, and this may not be appropriate in all circumstances; and

    - this may have the impact of disincentivising the use of clawback by listed entities where it otherwise may have been warranted so as to avoid the need for disclosure.

Horizon issues for the Corporate Governance Council

78. As discussed above, the Committee accepts the importance of the need for the Commentary and the need for it to remain current. Unfortunately, there is an argument that the Commentary in its current form is both too little and not enough. While it is no doubt intended to be instructive, it can encourage conformance over innovation.

79. As such the Committee believes the Council should reconsider its approach before it begins work on the 6th edition. The CGPR could be more concise, consistent and clearer. As the Council is no doubt aware, other jurisdictions have produced more succinct and streamlined guidance in order to encourage listed entities to move away from a compliance mindset and adopt thoughtful corporate governance practices that will best support their long-term business objectives.

80. If useful, the Committee would welcome the opportunity to work with the Council to produce a new model, based on the final form of the 5th edition, and to explore with the Council how it might be possible to produce a more succinct and streamlined model for ASX-listed entities including, possibly, separating the Commentary from the Principles and Recommendations.

Appendix A: Cases where the courts have considered the CGPR

Cases in the last 10 years where the courts have considered the ASX Governance Principles and Recommendations.

ASX Governance Principles and Recommendations (**CGPR**)		
Case	**Principle/Recommendation**	**Context**
Jaworski v Australian Information Commissioner [2022] FCA 1400, [37]	Principle 5 and 6 4th edition, 2019 Make timely and balanced disclosure Respect the rights of securityholders [Note: no judicial commentary, only referenced in submissions]	Suggesting that a company is required to disclose the names of the individuals involved in the proposition of a motion via Principle 6 and Recommendation 6.1.
Metalicity Ltd v Allen (No 2) [2022] WASC 420, [251]	Recommendation 1.2 4th edition, 2019 Directors were required in the explanatory memorandum accompanying the notices of meeting for the AGM and EGM to set out their recommendations to shareholders on the proposed resolutions for the election or removal of directors.	Validity of resolutions affecting the composition of the board, where nominees of Metalicity were not elected. Querying whether the directors were acting in understanding, agreement or concert with each other.

ASX Governance Principles and Recommendations (CGPR)		
Case	**Principle/Recommendation**	**Context**
In the matter of Maitland Benevolent Society Ltd (in liq) [2020] NSWSC 1284, [47]	Recommendation 8.1 4th edition, 2019 Non-Executive Directors fees should not involve performance-based remuneration.	In the context of liquidation of aged care home, when attempting to construe an Association's constitution in comparison to the liquidated company's constitution.
Shafran v Repatriation Commission (No 2) [2020] FCA 1072, [20]	Recommendation 2.5 4th edition, 2019 References the CGPR in the sense that it is generally recommended that the offices of board chairman and Managing Director/CEO not, for reasons of independence, be held by the same person, although the presence on a board of a Managing Director/CEO is unremarkable	Context of Parliamentary Secretary who may be appointed as a commissioner, or both a commissioner and President of the Commission, despite the Commission's role being to call into question legality of decisions made by aforementioned Secretary.
Australian Securities and Investments Commission v King [2020] HCA 4, [94]	Principle 6 4th edition, 2019 Ordinarily, the board is involved in setting strategy, approving business plans, making key management decisions (such as major expenditure decisions) and monitoring the performance of management and the returns of the business.	Noting role of the board whilst trying to ascertain whether King was an 'officer of the corporation' whilst negotiating extensions to repayment plans in Nov 2007, despite ceasing to be a director in Feb 2007.

ASX Governance Principles and Recommendations (CGPR)		
Case	**Principle/Recommendation**	**Context**
ASIC v Mitchell (No 2) [2020] FCA 1098 (31 July 2020) [1400], [1417]	Recommendation 2.5 3rd edition, 2014 Chairman of a listed entity should be an independent director and should not be the same person as the CEO. Chairman may have greater responsibility for ensuring the board implements the appropriate corporate governance structure.	Context of questioning whose responsibility it was to put forward to the board of directors the offers of Channels 9 and 10 before continuing negotiations with Seven News in re coverage of the Australian Open.
RBC Investor Services Australia Nominees Pty Ltd v Brickworks Ltd [2017] FCA 756, [113], [225]	Principle 2 3rd edition, 2014 Structuring board with adequate number of independent directors Recommendation 2.3 The CGPR do not go so far to suggest any director who would not be considered independent under those principles is necessarily incapable of discharging his or her duty (of acting in the best interests of the company). Describing a director as independent carries with it a particular connotation that the director is not allied with the interests of management, a substantial shareholder /	Considering whether two directors qualified as 'independent' in circumstances in which they are related, and where their family is represented across boards.

ASX Governance Principles and Recommendations (CGPR)		
Case	**Principle/Recommendation**	**Context**
	relevant stakeholder and will bring independent judgment to the position. [Note: no specific principle/recommendation cited]	
Australian Securities and Investments Commission v Planet Platinum Ltd [2015] VSC 682, [77]–[78], [103]–[104]	Recommendation 4.2 3rd edition, 2014 CEO must make declaration that in their opinion the financial records have been properly maintained and give a fair and true view of the financial performance of the company. Principle 5 Make timely and balanced disclosure [Note: no specific principle/recommendation cited]	Director relied entirely on external advisers to manage the corporate governance of his company. Director failed to meet reporting and disclosure requirements to ASIC and ASX.

Appendix B: Consultation questions on the Consultation Document

	Consultation questions	BLS Response
	Reducing regulatory overlap	
1	Do you support deletion of the following 4th Edition Recommendations, on the basis that there is significant regulation under Australian law?	As a general principle the Committee supports the idea that it is appropriate to eliminate from the CGPR any areas that are adequately delt with by other Australian regulations and listing rules like: whistle-blowing, communications with shareholders and executive remuneration.
2	In particular, the Council encourages feedback on the proposed deletion of **Recommendation 3.3** (disclosure of whistleblower policy). Would you prefer to retain this Recommendation?	See above.
3	**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?	The Committee supports there being more clarity and purpose as to what a skills matrix is intended to achieve as a forward-looking tool. But does not support entities disclosing the skills matrix of the board's current members.
4	**Recommendation 2.3**: Women hold approximately 35% of all S&P/ASX300 directorships. This exceeds the existing measurable objective of at least 30% of each gender for those boards. Do you support raising the S&P/ASX300 measurable objective to a gender balanced board?	The Committee is concerned about the application of this standard to organisations with smaller boards. The Committee would prefer to retain the current 30 per cent "floor" in addition to the new target. The Committee is concerned about the persistence of the number of zero women boards and female chairs.

	Consultation questions	BLS Response
5	**Recommendation 2.3(c)**: The Council already recommends disclosure of a board's approach and progress on gender diversity. 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?	The Committee suggests that this recommendation should not be pursued without further careful consideration.
6	**Recommendation 3.4(c)**: The Council already recommends disclosure of an entity's diversity and inclusion policy and disclosure of certain gender metrics. Do you support the proposal to also recommend disclosure of the effectiveness of an entity's diversity and inclusion practices?	Yes
	Independence of directors	
7	**Recommendation 2.4**: Do you support increasing the security holding reference included in Box 2.4 (factors relevant to assessing the independence of a director) from a substantial holder (5% or more) to a 10% holder (10% or more)?	Yes
	Corporate conduct and culture	
8	**Recommendation 3.2(c)**: The Council already recommends that a listed entity should have a code of conduct and report material breaches of that code to its board or a board committee. Do you support the proposed disclosure (on a de-identified basis) of the outcomes of actions taken by the entity in response to material breaches of its code?	The Committee is concerned that breach reporting will be difficult to de-identify. Because of the difficulty in effectively de-identifying the breaches in a great number of organisations we see merit in disclosure in more general terms of the types of actions taken by the entity to breaches of the code of conduct rather than specific incidents and actions.

	Consultation questions	BLS Response
	Stakeholder relationships	
9	**Principle 3**: Do you support the proposed amendments to Principle 3 (acting lawfully, ethically and responsibly), to include references to an entity's stakeholders?	While we accept the wider view of duties the Committee is concerned that the commentary as to who are stakeholders is not especially helpful. The better approach would be to explore in general terms how ASX entities ought to determine who are their key stakeholders. The OECD Guidelines might provide a useful basis for such an inquiry. In any event the Committee does not agree that lawmakers and regulators should be considered stakeholders. The Committee is concerned that the longer form of Principle 3 which contemplates that a listed entity should act lawfully, as well as acting ethically and responsibly should make it clear that an entity's obligation to obey the law is not in any way subject to demonstration of long-term sustainable value.
10	**Recommendation 3.3**: Does this new Recommendation appropriately balance the interests of security holders, other key stakeholders, and the listed entity? *"A listed entity should have regard to the interests of the entity's key stakeholders, including having processes for the entity to engage with them and to report material issues to the board."*	The Committee would like to see overt references in the Recommendations to compliance with ethical standards like the OECD Guidelines as a basis for assessing and prioritising the community actors who should be considered by the organisation when determining the organisation's policy.

	Periodic corporate reports and assurance	
11	**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
12	**Recommendation 4.3**: Do you support the proposed disclosure of an entity's auditor tenure, when the engagement was last comprehensively reviewed and the outcomes from that review?	Yes
	Management of risk	
13	**Recommendation 7.4**: The Council is seeking to enhance the quality of existing reporting of material risks to an entity's business model and strategy, such as in the operating and financial review in its directors' report. 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?	In broad terms the Committee is supportive of discarding the concept of "material exposure." The proposed wording allows entities to disclose risks without necessarily representing that both probability and impact are significant.
	Remuneration	
14	**Recommendation 8.2**: This proposed Recommendation reflects and simplifies existing commentary in the 4th Edition. Do you support this proposed Recommendation that non-executive directors not receive performance- based remuneration or retirement benefits?	
15	**Recommendation 8.3**: Do you support the following proposed clawback Recommendations?	

	a. **Recommendation 8.3(a)**: remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration?	
	b. **Recommendation 8.3(b)**: disclosure of the use of those provisions (on a de-identified basis) during the reporting period?	No - the Committee queries the need for disclosures to be extended to be covered under the 5th Edition. Further, the Committee has reservations about the blanket expectation for disclosure of clawback as: • it shares the more broadly articulated concerns for this recommendation regarding privacy—even on a de-identified basis, it may be possible to connect or at least speculate (rightly or wrongly) how known incidents may have been dealt with, and this may not be appropriate in all circumstances; and • this may have the impact of disincentivising the use of clawback by listed entities where it otherwise may have been warranted so as to avoid the need for disclosure.
	Additional Recommendations that apply only in certain cases	
16	Do you support the inclusion of the following new Recommendations for entities established outside Australia, on the basis that these Recommendations generally reflect expectations under Australian law?	
	a. **Recommendation 9.3** (CEO and CFO declaration for financial statements)?	
	b. **Recommendation 9.4** (substantive security holder resolutions on a poll)?	

	c. **Recommendation 9.5** (offering electronic communications to security holders)?	
	d. **Recommendation 9.7** (policy on hedging of equity-based remuneration)?	
	Externally managed entities	
17	Should any new or amended Recommendations in the *Consultation Draft* apply differently to externally managed entities, compared to the manner proposed in *The application of the Recommendations to externally managed listed entities*?	
	Effective Date	
18	Do you support an effective date for the 5th Edition of the first reporting period commencing on or after 1 July 2025?	
	Other comments	
19	Do you wish to provide any other comments on the content of the *Consultation Draft*, including any other changes you would propose?	

Annexure C: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Dr Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Caroline Coops
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

The Section's website is www.lawcouncil.asn.au/business-law.