

Australian Council of Superannuation Investors

Codes of Conduct, Whistleblowing and Corporate Culture



An analysis of ASX200 companies

March 2018

acsi

ABOUT ACSI

Established in 2001, we provide a strong, collective voice on environmental, social and governance (ESG) issues on behalf of our members.

Our members include 38 Australian and international asset owners and institutional investors (Appendix 3). Collectively, they manage over \$2.2 trillion in assets and own on average 10 per cent of every ASX200 company.

Our members believe that ESG risks and opportunities have a material impact on investment outcomes. As fiduciary investors, they have a responsibility to act to enhance the long-term value of the savings entrusted to them.

Through ACSI, our members collaborate to achieve genuine, measurable and permanent improvements in the ESG practices and performance of the companies they invest in.

ACSI undertakes a year-round program of research, engagement, advocacy and voting advice. These activities provide a solid basis for our members to exercise their ownership rights.



ACKNOWLEDGEMENTS

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FOREWORD

It's sometimes said that one of the challenges facing companies seeking to improve their culture is defining what is meant by this concept. To an extent, corporate culture is intangible and develops organically over time. However, it is possible to identify tangible 'building blocks' which lay the foundations for good culture.

Codes of conduct and whistleblowing systems are two building blocks that can have an important influence on behaviour of employees. Effective design and implementation encourages ethical performance and provides protection against inappropriate behaviours. But the quality of these tools is critical.

Which is why I find it disappointing that so many of Australia's largest listed companies tolerate significant gaps in their codes of conduct and whistleblowing systems. This is a material risk to their reputation, licence to operate and value, not to mention a missed opportunity.

The fact that one hundred and ninety-nine ASX200 companies now disclose a code of conduct is a great improvement on a decade ago. Yet only 11 of these meet our definition of leading practice. Fewer than half of the ASX200 address key business risks, including cyber-security, anti-money laundering and human rights.

I also have doubts about how committed companies are to implementing their codes of conduct. Most do not have an introduction by the CEO and don't provide practical tools to help employees apply the code of conduct. Our research suggests that many companies adopt a 'set and forget' mentality and don't regularly review their code of conduct.

Whistleblowing is intrinsically linked to ethical conduct. It is the initial source for a significant number of detected frauds – even more fruitful than internal audit systems. Yet we found that many whistleblowing systems omit critical features necessary to operate effectively and don't adequately support or protect users.

Corporate culture is a major topic of debate at present, and rightly so. Culture failings have been the cause of many scandals that have rocked corporate Australia in recent years. Public trust in business is at an all-time low. Clearly, companies and their boards need to focus on how business is done in addition to what is done.

We have identified a significant opportunity for companies to promote a more resilient culture by addressing shortcomings in their codes of conduct and whistleblowing systems. We're urging companies to move beyond a tick the box mentality and ensure their approach works in practice.

We encourage investors to support this process, by asking directors and senior managers questions about their codes of conduct and whistleblowing systems. For our part, ACSI is advocating for leading practices to be enshrined in the legislation that applies to listed companies.



Louise Davidson
Chief Executive Officer
Australian Council of Superannuation Investors

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EXECUTIVE SUMMARY

Poor corporate culture can have a profound impact on a company's reputation, social licence to operate and value. Investors recognise that poor culture is a material risk to the value of their portfolios. Codes of conduct and whistleblowing systems are important resources which companies can leverage to support good corporate culture. This research compares codes of conduct and whistleblowing systems of ASX200 companies against a set of leading practice indicators and identifies key gaps in their coverage and content.

COVERAGE OF KEY TOPICS IN CODES OF CONDUCT IS WEAK

Sixty-seven per cent failed to cover five of the 13 recommended topics in their code of conduct (Figure 1). The omissions include several well-known business risks, including: fair dealing/product responsibility, data protection and cybercrime, anti-money laundering and counter-terrorism finance (AML/CTF). Overall, ASX50 companies had better coverage than the ASX51-200, but there were still significant gaps among their coverage. Companies whose codes of conduct do not include key topics miss an important opportunity to manage these risks.

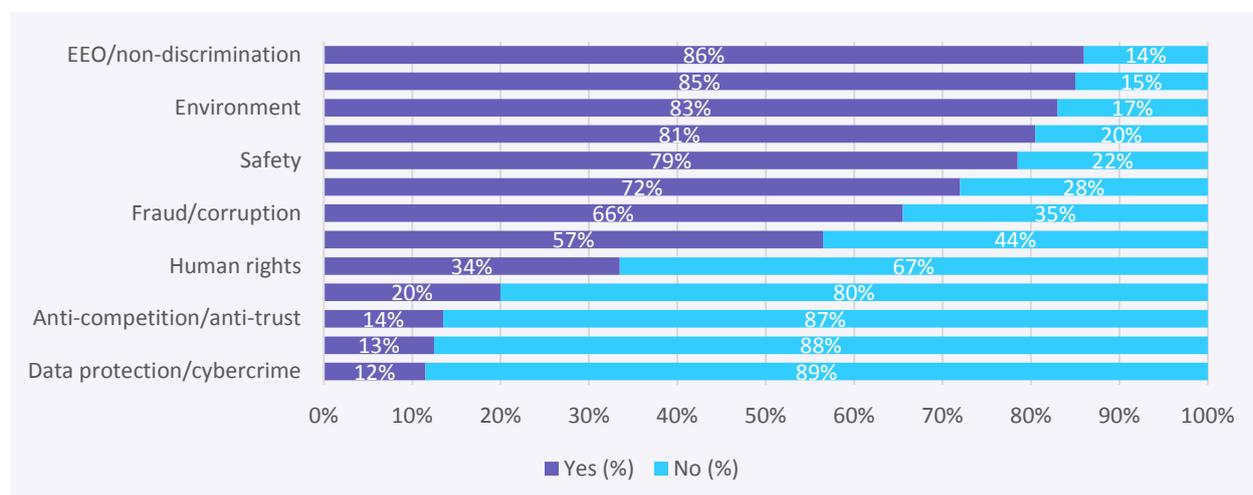
CODES OF CONDUCT ARE NOT BEING REGULARLY REVIEWED

Guidance issued by the New York Stock Exchange (NYSE) recommends that codes of conduct be reviewed after significant corporate compositional changes or two years. We found that 116 ASX200 codes of conduct (58 per cent) had not been reviewed in last two years or were undated. Fifteen codes of conduct (8 per cent) five years or older.

'TONE FROM THE TOP' AND USABILITY NEEDS TO BE IMPROVED

Endorsing a code of conduct (via an introduction) is a signal of support by the Chief Executive Officer (CEO) and an essential element in setting the tone from the top. Only 56 ASX200 codes of conduct (28 per cent) include an introduction by the CEO. A key factor in determining whether a code of conduct will be effective is the ease with which it can be read, interpreted and put in to action. The use of case studies, questions and answers (Q&As) and frequently asked questions (FAQs) contributes to readers' understanding of a code of conduct, yet only 34 ASX200 companies (17 per cent) do this.

Figure 1 Topic coverage in the ASX200 codes of conduct (%)



VERY FEW CODES OF CONDUCT DEMONSTRATE LEADING PRACTICE

Across the ASX200, only 11 codes of conduct (6 per cent) demonstrated leading practice, as measured by being two years old or less, using examples, Q&As or case studies and setting a tone from the top by having a CEO introduction. Clearly, there is significant opportunity for ASX200 companies to improve the quality of their codes of conduct.

VITAL FEATURES ARE MISSING FROM MANY WHISTLEBLOWING SYSTEMS

There are a range of essential features that should be included in a whistleblowing policy and implemented to make a whistleblowing system effective (Table 1). Many ASX200 companies do not disclose if they offer anonymity (91 companies or 45 per cent), 24-hour availability¹ (97 companies or 48 per cent) or a commitment that retaliation is not acceptable (71 companies or 36 per cent).

Whistleblowing is the initial source of detection for 39 per cent of frauds² and the code of conduct is the document most widely distributed to employees. Yet 38 ASX200 codes of conduct (19 per cent) had no reference to whistleblowing. This is a significant missed opportunity for companies to detect fraud as well as other types of wrongdoing.

Table 1 Features of ASX200 whistleblowing policies and systems

| | Number of companies | % of ASX200 |
|---|---------------------|-------------|
| Anonymity | 109 | 55 |
| Available 24/7 | 103 | 52 |
| Statement that retaliation not acceptable | 129 | 65 |
| Accessible to suppliers and contractors | 57 | 29 |

RECOMMENDATIONS TO REDUCE THE RISK OF POOR CORPORATE CULTURE

We have developed three recommendations for investors and companies to address gaps in ASX200 codes of conduct and whistleblowing systems. First, investors and directors should ask relevant questions of boards and company management. Active questioning will encourage boards to have more robust oversight of codes of conduct and whistleblowing systems. This research includes a list of suggested questions regarding the code of conduct and whistleblowing.

Second, the ASX ‘Corporate Governance Principles and Recommendations’ (ASX Principles and Recommendations) are due for revision in 2018. We are actively advocating for improvements to address weaknesses in companies’ codes of conduct and whistleblowing systems identified by this research. Finally, the Commonwealth Government introduced the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 in December. We think the draft Bill does not go far enough to promote effective whistleblowing protections. We will be advocating for additional protections and encourage other investors to do the same.

¹ Leading practice for ‘24-hour availability’ means that the whistleblowing line is always answered by a trained person. This assists organisations to receive high quality information and whistleblowers (or reporters) to be treated with respect and diligence. Based on public disclosures, it is not possible to know with complete certainty if during some parts of the day the line might go to an answering machine, however, given that commercial whistleblowing services that we are aware of have team members answering calls, ACSI has assumed that 24-hour availability means that calls are answered by a trained person.

² The American Association of Certified Fraud Examiners research indicates that 39.1 per cent of fraud is detected through internal whistleblowing systems (compared to 16.5% of internal audit systems). American Association of Certified Fraud Examiners, *Developing an Integrated Anti-Fraud, Compliance, and Ethics Program* (2018) <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/review/diafp/08-Implementing-a-Whistleblower-Helpline.pdf>.

BACKGROUND

Poor corporate culture³ can have a profound impact on a company's reputation, social licence to operate⁴ and value. In addition, corporate culture impacts the value of investment portfolios, as a major problem in one company can affect the whole sector. A series of scandals in Australian listed companies in recent years suggests that existing strategies to promote ethical conduct have not been sufficient.

Recent conduct-related allegations affecting ASX200 companies include:

- The financial planning arms of National Australia Bank (NAB), Commonwealth Bank (CBA), Westpac, ANZ and AMP were investigated by ASIC following complaints about financial planning advice between 2009 to 2015. As of December 2016, approximately \$30 million had been paid by these institutions to 1347 customers. In addition, CBA paid compensation in relation to fees-for-no-service issues and for other remediation programs totalling approximately \$80 million. Conflict of interest was found to be a cause of the problems at these companies.⁵
- In February 2017, the Federal Court ordered Woolworths to pay penalties of \$3.057 million following evidence of misleading and deceptive conduct and false or misleading representations about product safety. In some cases, Woolworths was aware of serious injuries resulting from product defects but did not remove the products from sale and recall them.⁶
- In August 2017, the Australian Transaction Reports and Analysis Centre (AUSTRAC) initiated civil proceedings against CBA after it failed to respond to 53,800 alleged breaches of anti-money laundering rules. AUSTRAC alleged that the bank knew about the alleged breaches for more than two years but had not adequately reported or addressed them. The Australian Prudential Regulation Authority (APRA) announced a review (also in August 2017) into CBA's governance, culture and accountability.⁷
- In late 2016, the Fair Work Ombudsman (FWO) began investigating Domino's Pizza franchisees over allegations that they underpaid employees.⁸ In May 2017, the FWO expanded its review of Domino's, revealing an additional 10 investigations (on top of 16 existing probes) into underpayment across the network.

These and other failures have resulted in reputational damage and a decline in business trust in Australia. In each of these cases, the actions of the companies in question appear to be inconsistent with ASX Principle 3 which states that listed entities should act ethically and responsibly.⁹

³ Corporate culture refers to shared assumptions, values and beliefs and it is manifested in many ways, including formal rules and policies, norms of daily behaviour, physical settings, mode of dress, special language, myths, rituals, heroes and stories. To assess and understand a corporate culture requires knowledge of the organisation's history and values, along with systematic analysis of multiple formal and informal organisational systems. Extracted from: Linda Travino and Katherine Nelson, *Managing Business Ethics* (Wiley, 2014), 151.

⁴ Geert Demuijnck and Björn Fasterling, 'The Social License to Operate', (2016) 136(4) *Journal of Business Ethics*, 675-685; and John Morrison, *The Social License: How to Keep Your Organization Legitimate* (Palgrave Macmillan, 2014).

⁵ Australian Securities and Investment Commission, *Financial advice: Review of how large institutions oversee their advisers*, Report 515 (17 March 2017) <<http://download.asic.gov.au/media/4186280/rep515-published-17-march-2017.pdf>>.

⁶ Australian Competition and Consumer Commission, *Woolworths misled consumers over product safety hazards - Ordered to pay over \$3 million in penalties* (5 February 2016) <<https://www.accc.gov.au/media-release/woolworths-misled-consumers-over-product-safety-hazards-%E2%80%93-ordered-to-pay-over-3-million-in-penalties>>.

⁷ AUSTRAC, *AUSTRAC expands civil penalty case against CBA* (14 December 2017) <<http://www.austrac.gov.au/media/media-releases/austrac-expands-civil-penalty-case-against-cba>> and Jonathan Shapiro, Phillip Coorey and James Evers, 'APRA probe risks CBA rating', *The Australian Financial Review* (on line), 28 August 2017 <<http://www.afr.com/business/banking-and-finance/financial-services/apra-probe-risks-cba-rating-20170828-gy5m71>>.

⁸ D Marin-Guzman, 'Domino's Pizza under investigation over underpayment claims', *Australian Financial Review* (on line), 5 February 2017

<<http://www.afr.com/news/policy/industrial-relations/dominos-pizza-under-investigation-over-underpayment-claims-20170203-gu4wz4>>.

⁹ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 3rd Edition (2014)

<<http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>>.

FACTORS WHICH INFLUENCE CORPORATE CULTURE

Directors and senior management are responsible for setting the tone from the top which is important in aligning a company’s stated values with its demonstrated behaviours. They are responsible for overseeing the development and implementation of systems and processes which facilitate an ethical culture. But how are they to do so?

There is no ‘silver bullet’ that can influence culture in desired ways, rather, culture is influenced by comprehensive, systematic and integrated interventions linked to company policies and practices. Moreover, some interventions (including incentive structures) can have perverse effects. As illustrated in Figure 2, multiple factors can influence an organisational system and the conduct of people within it. Therefore, trying to promote desired conduct in large complex organisations such as those in the ASX200 can be a challenging task for directors and managers.

Figure 2 Factors influencing corporate culture

| | Formal | Informal |
|----------|--|---|
| External | <p>A</p> <ul style="list-style-type: none"> ▪ Legislation (e.g. <i>Corporations Act 2001</i> (Cth)) ▪ Standards ▪ Guidelines and principles (e.g. the ASX Principles and Recommendations) ▪ Shareholder action at AGMs ▪ Withholding funding by providers of capital (e.g. shareholders and banks) | <p>B</p> <ul style="list-style-type: none"> ▪ ‘Grass roots’ consumer movements and boycotts ▪ Non-government organisation and other stakeholder actions |
| Internal | <p>C</p> <ul style="list-style-type: none"> • Code of conduct and whistleblowing systems • Company policies • Training • Risk management systems • Performance and reward systems • Monitoring and auditing systems • Hiring, promoting and firing practices | <p>D</p> <ul style="list-style-type: none"> • Ethical leadership and leadership role modelling • ‘Speak up’ cultures • Ethical climate • Organisational justice • Levels of trust |

Relative to internal mechanisms (quadrants C and D), directors and managers have far less ability to influence factors external to organisations, including formal rules and regulations (quadrant A) and informal factors such as consumer movements (quadrant B). Arguably, the best way an organisation can avoid heightened regulatory oversight or pushback from customers, financiers and shareholders is to behave in an ethical, sustainable and financially responsible manner.

Quadrant D contains the most difficult drivers of organisational conduct to influence – these are the various factors that come together to create an organisational culture. The primary way in which directors attempt to positively influence these cultural elements is through oversight of the levers listed in quadrant C; the policies, processes, frameworks and systems that make up an organisation’s ‘formal’ systems.¹⁰

The focus of this research is on two formal mechanisms; the code of conduct and the related whistleblowing system.¹¹ The narrow focus is deliberate and is chosen for two reasons. First, the code of conduct is a foundational document for any organisation. When it is well-written, it supports the organisation’s purpose, values and principles and acts as a behavioural guide for employees and others who influence the organisation’s reputation (including contractors and suppliers). Moreover, supported by the actions of leadership and reinforced with relevant training, it forms the basis for a strong organisational culture.

¹⁰ Directors, senior executives and other managers, through their actions, choices and decisions, can directly influence some factors in Quadrant D like ethical leadership and leadership role modelling and the presence (or otherwise) of a ‘speak up’ culture.

¹¹ Typically a whistleblowing system consists of a number of parts including: a formal policy, a mechanism for raising issues (via email, phone and other avenues such as a web-based system), an accountability structure, a protocol for investigating issues and an reporting system whereby senior management and the board are informed of key issues including the nature, frequency, and materiality of issues raised and investigated.

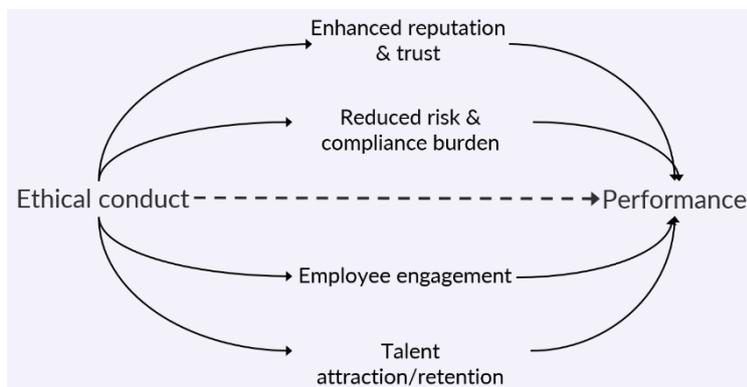
A robust corporate culture enables a capacity for ‘self-correcting’ behaviours – that is, while inappropriate behaviours will still occur, team members or managers or others are more likely to recognise and address them either locally (ideally) or via a whistleblowing (‘speak up’) system. The result can be that poor conduct is corrected before it escalates to a point where it might be costly to the company, its shareholders and other stakeholders.

LINKS BETWEEN ETHICAL CONDUCT AND COMPANY PERFORMANCE

The link between ethical behaviour and performance operates through multiple pathways, four of which are illustrated in Figure 3. Some of these pathways are more direct and exert a stronger influence than others:

1. Ethical conduct leads to enhanced reputation and trust internally and externally. This can lead to lower costs, higher sales and the ability to charge higher prices (due to stronger intangible brand value).¹²
2. Ethical conduct can reduce risk, the compliance burden and enable companies to operate with fewer layers of supervision.
3. Employees are more engaged when there is consistency between the stated values of the organisation and its demonstrated behaviours.
4. Workers are more attracted to firms with a reputation for social responsibility.¹³

Figure 3 The pathways between ethical conduct and corporate performance



There is no single mechanism – formal or informal – that will switch on all four pathways. Rather, for ethical conduct to have strong performance effects, all pathways need to be working simultaneously. The challenge for businesses is to ensure their systems support both managers and employees buying in to desired ethical norms. The code of conduct and whistleblowing system enable this to occur.

¹² Mooweon Rhee and Pamela Haunschild, ‘The liability of good reputation: A study of product recalls in the US Automotive Industry’, (2006) *Organizational Science* 17, Issue 1.

¹³ Daniel Greeing and Daniel Turban, ‘Corporate Social Performance as a Competitive Advantage in Attracting a Quality Workforce’, (2000) 39 (3) *Business & Society*, 254.

WHAT FACTORS CONTRIBUTE TO AN EFFECTIVE CODE OF CONDUCT?

Research into codes of conduct and their impact on ethical conduct has produced mixed results.¹⁴ While there is evidence demonstrating that they can be extremely effective,¹⁵ it has also been demonstrated that codes of conduct have little effect on whether corporations and some individuals act illegally.¹⁶ At the extreme, there is also research that suggests that the existence of a code of conduct can have detrimental effects on organisational conduct.¹⁷ The disparate findings can be attributed to the quality of codes of conduct and how they are implemented.

Stock exchanges in Australia, the United Kingdom (UK), the United States (US) and New Zealand provide guidance on codes of conduct and make references to whistleblowing. These examples of guidance are discussed in Appendix 1. Table 2 compares the treatment of nine key features in this guidance.

The four examples of guidance have similar themes, highlighting the importance of the company's values and the role of communication and training. In terms of practical advice, the NYSE offers granular guidance regarding the inclusion of Q&As and case studies. It also recommends updating codes of conduct after two years or after any major corporate compositional change.

The New Zealand guidance suggests that boards should (a) encourage independent verification of the implementation and effectiveness of codes of conduct, (b) review steps taken to implement the code of conduct, (c) monitor compliance and (d) review serious instances of unethical behaviour. ACSI believes that these practices are important and, as part of this research, we assess publicly available ASX200 codes of conduct against the first two of these measures. The other measures (independent verification and monitoring of compliance by the board) cannot be assessed based on publicly available information.

In terms of content, the ASX Principles and Recommendations are a source of guidance regarding what topics should be included in a code of conduct. Companies typically identify key areas relevant to their business and sector by assessing risks that arise internally and by undertaking benchmarking studies.

To improve guidance to companies on what to topics include, a group of Harvard University Business School researchers¹⁸ examined a set of corporate codes of conduct and global multisector guidelines (including the OECD Guidelines on Multilateral Enterprises and the UN Global Compact). They identified a core set of eight principles and corresponding behavioural standards that are applicable to any company operating globally (Table 3).

¹⁴ M Kaptein, and MS Schwartz, The effectiveness of business codes: A critical examination of existing studies and the development of an integrated research model, (2008) *Journal of Business Ethics*, 77, 111.

¹⁵ B Stevens, 'Corporate ethical codes: Effective instruments for influencing behavior', (2008) 78 *Journal of Business Ethics*, 601.

¹⁶ M. McKendall, B DeMarr, and C Jones-Rikkens, 'Ethical compliance programs and corporate illegality: Testing the assumptions of the corporate sentencing guidelines', (2002) 37 *Journal of Business Ethics*, 367.

¹⁷ Rebecca Goodell, *Ethics in American business: Policies, Programs and perceptions*, (Ethics Resource Center, 2004).

¹⁸ L Paine, R Deshpandé, J Margolis, K Bettcher, Up to Code: Does your company's Code of conduct meet world class standards? (2005) Harvard Business Review, <<https://hbr.org/2005/12/up-to-code-does-your-companys-conduct-meet-world-class-standards>>.

Table 2 Comparison of corporate governance guidance in different jurisdictions

| | ASX Corporate Principles and Recommendations ¹⁹ | LSE Corporate Governance Practical Guide ²⁰ | NZ FMA Corporate Governance Handbook ²¹ | NYSE Best Practice in Code Development ²² |
|---|--|--|---|--|
| Language, tone, values link | Should include statement of core values | | Should have meaningful statement of values | Should make clear the values link; focus on affirmative conduct rather than prohibitions |
| Applicability | Directors, senior management and employees | | Directors, executives, 'other personnel' | |
| Communication and Training | Should be promoted across the organisation and reinforced by proper training | | Have system to implement the code with appropriate training | Supplement codes with Q&As, case studies |
| Frequency of review | | Must be kept in 'regular review' | | Update after 2 years or after any mergers and acquisitions or other corporate compositional change |
| Whistleblowing (WB) elements | Identify measures for reporting; includes protection for whistleblowers or reporters | Allow reporter to come forward independent of management | | |
| Audit, verification or third party system evaluation | | | Encourage third party verification of code implementation and effectiveness | |
| Self-assessment or certification | | Key staff to sign statement of compliance to the board | Code to have a process for recording and evaluating compliance | Assumes all companies will have an annual certification process |
| Role of board | To lead by example | | Review steps taken to implement code, monitor compliance and serious instances of unethical behaviour | Endorse the code |
| Discipline | Should be reinforced by proportionate disciplinary action for breaches | | Code to have measures for dealing with breaches | |

Our analysis of code of conduct content for the ASX200 draws on the topics specified in the ASX Corporate Governance Principle 3 and Table 3.

¹⁹ ASX Corporate Governance Council, Corporate Governance Principles and Recommendations <<http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>>.

²⁰ RSM Robson Rhodes, in association with the London Stock Exchange, *Corporate Governance: A Practical Guide* (2004) <<http://www.ecgi.global/code/corporate-governance-practical-guide>>.

²¹ Financial Markets Authority, *Corporate Governance in New Zealand, Principles and Guidelines*, (December 2014) <<https://fma.govt.nz/assets/Reports/141201-FMA-Corporate-Governance-Handbook-Principles-and-Guidelines2014.pdf>>.

²² New York Stock Exchange, NYSE: Corporate Governance Guide, (2014) <https://www.nyse.com/publicdocs/nyse/listing/NYSE_Corporate_Governance_Guide.pdf>.

Table 3 Global principles and standards²³

| Principle | Concept | Behavioural standards |
|-----------------------|---|---|
| Fiduciary | The responsibility to act in the best interest of shareholders | Conflicts of interest, gifts and hospitality, insider trading and using company resources only for company purposes |
| Property | Respect property and the rights of those who own it | Fraud, theft (including intellectual property), other misappropriation, and the avoidance of waste |
| Reliability | Addresses trust and promise-keeping behaviours including fulfilling explicit and implicit obligations | Pay suppliers and partners on time and on agreed terms, deliver products and service promised to customers |
| Transparency | Conducting business in a truthful and open manner | Make timely disclosures of material information while respecting obligations of confidentiality and privacy |
| Dignity | Respect employees, contractors, customers | Health, safety, privacy and human rights |
| Fairness | Engage in free and fair competition, deal with all parties fairly and equitably and practice non-discrimination in employment and contracting | Non-discrimination, fair compensation, preference for suppliers that respect international labour practices; require suppliers and partners to refrain from bribery and improper payments |
| Citizenship | Be responsible by respecting the law, protecting public goods, avoiding improper political involvement and contribute to community betterment | Respect the spirit and the letter of tax and environmental laws; do not launder money or finance terrorism |
| Responsiveness | Be responsive to stakeholders that are affected by company actions | Respect shareholder's views, respond to employee and customer complaints and collaborate with community groups to promote economic and social development |

WHAT FACTORS CONTRIBUTE TO AN EFFECTIVE WHISTLEBLOWING SYSTEM?

Extensive guidance exists on whistleblowing system effectiveness. In addition to upholding the principles of anonymity, confidentiality and no retaliation, this guidance recommends 24-hour availability in all relevant languages, being third party-run and, where relevant, offering accessibility to contractors and suppliers.²⁴

Leading practice also suggests that the board should be provided with reports by management which monitor a range of metrics including the rate of use of the system, the rate of substantiated claims and the areas of the company (both in terms of business line and geography) that are most frequently implicated in the reports. In a May 2017 report, Brown and Lawrence published results from a survey of whistleblowing practices which identified the importance of dedicated support strategies for protecting staff who raise wrongdoing concerns.²⁵ They also highlighted the importance of remediation policies for whistleblowers that suffer reprisals or other detrimental impacts. These factors may be included in Australian Commonwealth whistleblowing protection legislation as it moves towards becoming law in 2018.²⁶

²³ L Paine, R Deshpandé, J Margolis, K Bettcher, Up to Code: Does your company's Code of conduct meet world class standards? (2005) Harvard Business Review, <<https://hbr.org/2005/12/up-to-code-does-your-companys-conduct-meet-world-class-standards>>.

²⁴ K, Kobi, 'Elements of an Effective Whistleblower Hotline', Harvard Law School Forum on Corporate Governance and Financial Regulation (October 2014) <<https://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline/>> and CSA Group, 'Whistleblowing systems - A guide', (2016) <<http://shop.csa.ca/en/canada/risk-management/whistleblowing-systems-a-guide/invt/whistleblowing-guide>>.

²⁵ AJ Brown and Sandra Lawrence, Strength of Organisational Whistleblowing Processes-Analysis from Australia (May 2017) <<http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2017/05/WWTW2-Strength-of-whistleblowing-processes-report-Australia-Griffith-University-2May2017.pdf>>.

²⁶ Australian Government, The Treasury, Treasury Laws Amendment (Whistleblowers) Bill 2017- Exposure Draft <<https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/>>.

METHODOLOGY

The research and conclusions in this report are based on a review of the relevant literature and a desktop analysis of publicly available codes of conduct and separate whistleblowing policies. The ASX200 codes of conduct and whistleblowing policies examined in this research were accessed between January and March 2017.

A searchable database was created using the codes of conduct and whistleblowing policies and processes for the ASX200. The database was analysed using key word searches for risk topics, including conflict of interest and bribery. The codes of conduct were also assessed for various proxy indicators of quality, including:

- the use of illustrative examples to instil meaning for users
- the frequency of review (to assess how up to date and relevant codes of conduct are for the current business structure)
- the use of CEO introductions (to assist in setting the 'tone from the top')
- the length of codes of conduct (to ensure that they are not so brief as to lack meaning and applicability).

An assessment of whistleblowing systems was also undertaken and examined a set of quality indicators including:

- whether systems permit anonymity
- if they are available 24 hours a day
- if a statement is made that retaliation is not accepted.

RESEARCH FINDINGS: CODES OF CONDUCT

All ASX200 companies had a publicly available code of conduct except for one. This compares to research from a decade before which showed that many ASX companies did not have a code of conduct.²⁷ This is a significant improvement and reflects the impact of ASX Corporate Governance Principle 3 and the promotion of codes of conduct by other organisations.

For the purposes of our analysis, the dataset was split between ASX50 and ASX51-200 companies, recognising that the largest companies have more resources to invest in ESG governance and disclosure.

RISK TOPIC COVERAGE

Based on the risk topic coverage identified in the ASX Principles and Recommendations (Appendix 1) and the Harvard University study 'Does your company's code of conduct meet world class standards?',²⁸ 13 key risks were selected and used in our analysis of the content of codes of conduct. Seven of these were sourced from the ASX Corporate Governance Principle 3 (conflict of interest, bribery, equal employment opportunity (EEO) and non-discrimination, safety, human rights, fair dealing and product responsibility and environment). The others were sourced from the Harvard University study (data protection and cybercrime, AML/TCF, and anti-competition and anti-trust).

ACSI notes that while companies may have detailed separate policies for topics such as fraud, bribery, conflict of interest and whistleblowing, the code of conduct (which is the document most consistently made available to employees, contractors and suppliers) should include guidance on these important topics. Companies whose code of conduct does not include guidance on relevant key topics miss an important opportunity to manage these risks.

ASX50 coverage

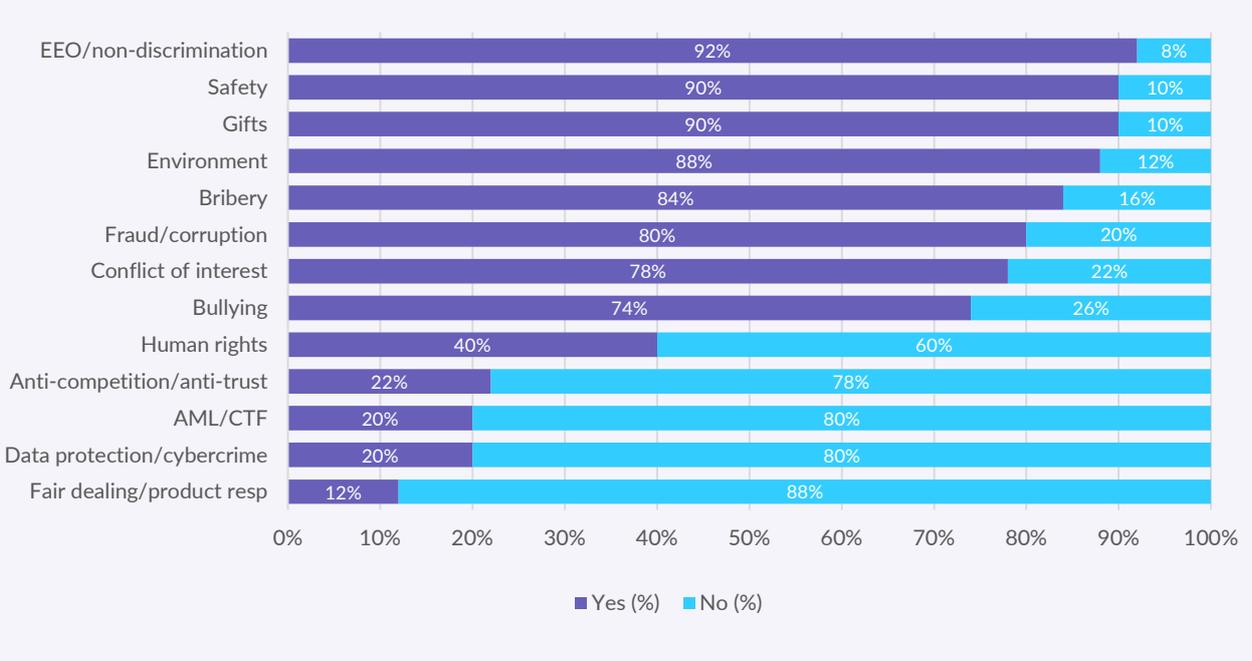
The ASX50 failed to cover five of the 13 risk topics comprehensively (an average of 77 per cent or fewer covered the topics). The most poorly covered topics (in order of weakness) are fair dealing and product responsibility, data protection and cybercrime, anti-money laundering and counter-terrorism finance (AML/CTF), anti-competition and anti-trust and human rights.

There is also significant room for improvement in the coverage of bullying, conflict of interest, fraud and corruption and bribery (which are not covered by 13 companies (26 per cent), 11 companies (22 per cent), 10 companies (20 per cent) and 8 companies (16 per cent) of the ASX50, respectively). While some of these topics have been receiving more attention by regulators and boards since the ASX Corporate Governance Council published the ASX Principles and Recommendations in 2014, we expect the 200 largest companies in Australia to inform their employees about appropriate conduct in respect of these topics. The code of conduct is a practical way of doing this.

²⁷ J. Pascoe and M. Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011), 40(2), *Common Law World Review* 144.

²⁸ L Paine, R Deshpandé, J Margolis, K Bettcher, 'Up to Code: Does your company's Code of conduct meet world class standards?' (2005) *Harvard Business Review*, <<https://hbr.org/2005/12/up-to-code-does-your-companys-conduct-meet-world-class-standards>>.

Figure 4 Risks covered in ASX50 codes of conduct (percentage)



Based on the sub-optimal coverage of these important risk categories among the 50 largest listed companies and the challenges of implementing ethical policies in large companies, it is not surprising that there have been a range of incidents which have damaged some companies' reputations. For example, some of the banks which were fined in relation to problems with financial planning advice still did not include guidance in their codes of conduct regarding fair dealing or product responsibility.

We undertook an analysis of the same risk topics in the annual reports and the corporate governance statements of the ASX50. Cybercrime was the only topic covered in greater depth in these documents than in the codes of conduct; cybercrime was discussed in 28 (56 per cent) of the annual reports of the ASX50.

ASX51-200 coverage

Risk coverage in ASX51-200 codes of conduct was weaker. Six topics (fraud and corruption, bullying, human rights, and fair dealing/product responsibility) were covered by approximately 50 per cent or fewer codes of conduct (Figure 5). In addition, 48 codes (32 per cent) of ASX51-200 companies did not cover bribery, 38 companies (25 per cent) did not provide guidance for safety, 28 (19 per cent) did not include conflict of interest, and 25 companies (17 per cent) of codes of conduct did not highlight the importance of managing the receipt or offering of gifts. These gaps in coverage are significant and need to be addressed.

Figure 5 Risks covered in ASX51-200 codes of conduct (percentage)



Sectoral coverage

We also undertook an analysis to determine if the content of codes of conduct differed between sectors. In general, the sector did not make a difference except that the finance sector was more likely to cover anti-money laundering and counter terrorism finance, fair dealing, and cybercrime. Human rights was covered by 36 per cent of the materials sector, 32 per cent of consumer discretionary companies and 57 per cent of consumer staples companies respectively. Given the reputational risk associated with modern slavery and other supply chain issues, these gaps are significant. Bullying was covered by only 33 per cent of the IT sector, 50 per cent of telecommunications companies and 50 per cent of the utilities sector.

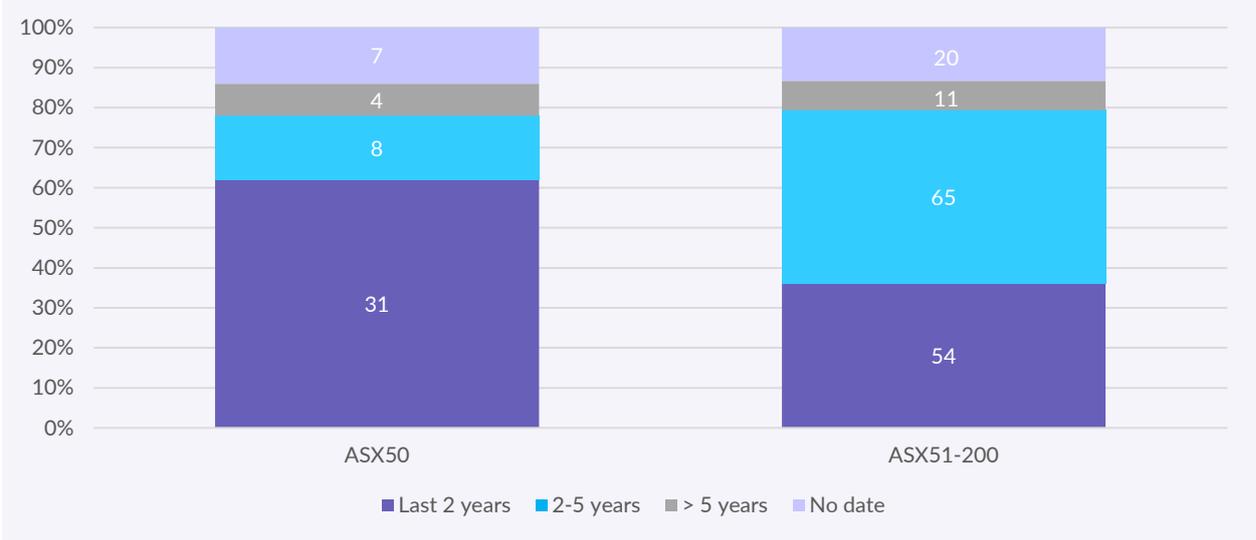
FREQUENCY OF REVIEW

It is important that codes of conduct are kept relevant and updated. Mergers, acquisitions or changes to a business have implications for the types of risks that are relevant. Other changes including environmental, regulatory and technological factors also influence the relevance of topic coverage.

As noted in the NYSE guidance,²⁹ leading practice suggests that codes of conduct should be updated after significant corporate compositional changes or reviewed every two years. We found that ASX50 companies are more likely to regularly review their code of conduct than the ASX51-200. A total of 31 (62 per cent) ASX50 companies had reviewed their code of conduct within two years compared to 54 (36 per cent) of the rest of the ASX200 (Figure 6). Seven (14 per cent) ASX50 companies had undated codes of conduct and four (8 per cent) reported having an outdated (older than five years) code of conduct. This compared with 20 (13 per cent) undated and 11 (7 per cent) outdated codes of conduct in the rest of the ASX200.

²⁹ New York Stock Exchange, *Corporate Governance Guide*, 2014, NYSE Governance Services.

Figure 6 Frequency of review percentage and number)



CEO INTRODUCTION, USE OF EXAMPLES AND LENGTH OF CODES

Codes of conduct which are endorsed and promoted by leaders and include an explanation of why they are important help set the tone from the top. As a proxy measure for tone from the top, we examined how many ASX200 codes of conduct included an introduction by the CEO. We found that only 25 companies (50 per cent) of the ASX50 and 31 companies (21 per cent) of the ASX51-200 have an introduction by the CEO.

A factor in determining whether a code of conduct will be effective is the ease with which it can be read and interpreted. One measure of ease of comprehension is the use of Q&As, FAQs, checklists, examples, and cases studies.³⁰ For example, a code of conduct which says that bribery is not acceptable is much less helpful than one which also gives an example of what and how a colleague has experienced and managed situations where they have encountered bribery. Case studies are most relevant and useful as a learning tool when they arise from actual issues that have been reported within the company.

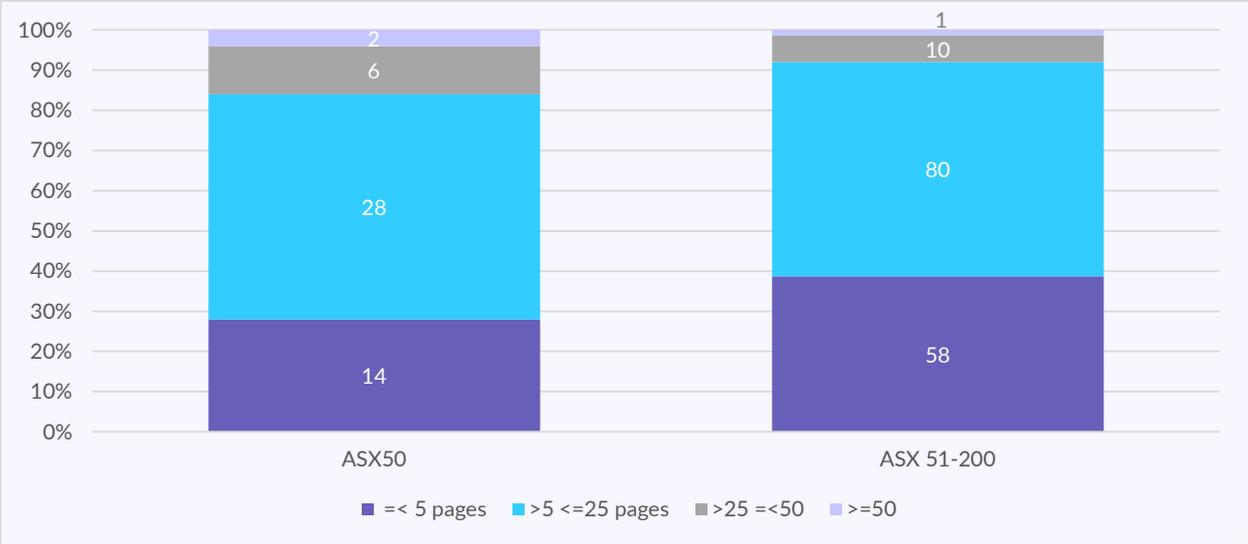
Moreover, to be effective, code of conduct training using case studies is important. Very few ASX200 companies publicly disclose details of their ethics training, so this research focuses on whether case studies are included in the code of conduct. Our research revealed that ASX50 codes of conduct were better than ASX51-200 codes of conduct, with 14 companies (28 per cent) and 20 companies (21 per cent) using Q&As, FAQs, checklists, examples and cases studies, respectively.

When analysing the length of codes of conduct, we found that 28 ASX50 codes of conduct (56 per cent) were greater than five pages but less than 25 pages (Figure 7). A total of 80 ASX51-200 companies (53 per cent) had codes of conduct which fell into the same category. Trevino and Nelson state that the longer the code of conduct, the less likely it is to be read but the shorter it is, the broader and more abstract the guidance will be.³¹ In our judgement, investors should be concerned when codes of conduct are too short to provide proper guidance. This risk is high when they are five pages or less. Fourteen ASX50 companies (28 per cent) and 58 ASX51-200 companies (39 per cent) had codes that are fewer than (or equal to) five pages in length.

³⁰ PM Erwin, 'Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance', (2011) 99(4) *Journal of Business Ethics* 535.

³¹ Linda Trevino and Katherine Nelson, *Managing Business Ethics* (Wiley, 2014), 151.

Figure 7 Length of codes of conduct (percentage and number of companies)



OVERALL ASSESSMENT

Only 11 ASX200 companies (6 per cent) had codes of conduct that were two years old or less, used Q&As, case studies or vignettes and had an introduction by the CEO. Half of these were ASX50 companies. All 11 companies covered bribery, fraud/corruption, gifts, and non-discrimination in their codes of conduct. Ten companies (5 per cent of the ASX200) covered safety and environment while nine companies (4.5 per cent) covered conflict of interest. The coverage of other topics was much less consistent.

A total of 68 ASX200 codes of conduct (34 per cent of the ASX200) did not provide examples, were older than two years (or did not have a date) and did not have an introduction from the CEO. Thirty-seven codes (19 per cent) had codes that were five pages or less.

Based on our analysis, we conclude that there is the most room for improvement in 52 ASX200 codes of conduct (26 per cent).

RESEARCH FINDINGS: WHISTLEBLOWING SYSTEMS

Thirty-eight ASX200 companies (19 per cent) do not mention whistleblowing in their code of conduct. A total of 60 ASX200 companies (30 per cent) disclose that they have standalone whistleblowing policies outside their code of conduct. Of these, we were able to locate 39, which we included in our analysis. Where we could not locate a standalone document, our analysis was based on the whistleblowing content in the code of conduct. Other results are presented in Table 7.

We find that 84 ASX51-200 companies (23 per cent) do not discuss whistleblowing in their code of conduct (Table 7). Unless codes of conduct provide guidance to employees on where to go to report misconduct (and other important information such as how reporters will be protected) then whistleblowing systems are unlikely to be effective. This is because fear of reprisal is a major impediment to reporting.

KEY FEATURES

Anonymity

Twelve ASX50 companies (24 per cent) did not specify that whistleblowers can choose to remain anonymous, while 79 of the ASX51-200 (53 per cent) did not disclose if anonymity was permitted. Where anonymity is offered, companies typically explain that it is not possible to maintain anonymity in all situations and offer to support and protect the whistleblower in these circumstances. For example, one company states that “it will do everything possible to protect the whistleblower’s identity and will not disclose identity without their consent.” This company adds that if the matter proceeds, in “a very few cases” it may not be possible to ensure complete confidentiality.

24-hour availability

It is often easier for employees and other stakeholders to use whistleblowing systems outside of work hours. Thirty-six ASX50 companies (72 per cent) allow whistleblowers to make disclosures at any time but only 67 ASX51-200 corporations (45 per cent) do so.

Preventing retaliation

Fear of retaliation is a major barrier to whistleblowing and a statement indicating that retaliation is not acceptable is essential. The majority (76 per cent) of ASX50 companies formally stated that retaliation is not acceptable but only 91 ASX51-200 companies (61 per cent) do so.

To be effective, companies need to offer dedicated support strategies for protecting staff who raise wrongdoing concerns. In addition, it is important to have remediation policies for whistleblowers who suffer reprisals or other detrimental impacts.

Suppliers and contractors

Depending on the company and that role that suppliers and contractors take in the business, they may gain insights into the activities of a company in a way that employees may not. Where it may be relevant, it is valuable for companies to encourage them to report inappropriate behaviour where they observe it. Only 22 ASX50 companies (44 per cent) and 35 ASX51-200 companies (23 per cent) encourage or allow contractors and suppliers to report wrongdoing through the company's whistleblowing system. We think this is a missed opportunity.

Table 4 Features of whistleblowing systems (number of companies and percentage)

| | ASX 50 | ASX51-200 | ASX200 |
|---|----------|-----------|-----------|
| Location of whistleblowing policy | | | |
| Mentioned in the code of conduct | 46 (92%) | 116 (77%) | 162 (81%) |
| Standalone document | 26 (52%) | 34 (23%) | 60 (30%) |
| Whistleblowing system features | | | |
| Anonymity | 38 (76%) | 71 (47%) | 109 (55%) |
| 24-hour availability | 36 (72%) | 67 (45%) | 103 (69%) |
| Statement that retaliation not acceptable | 38 (76%) | 91 (61%) | 129 (86%) |
| Accessible to suppliers and contractors | 22 (44%) | 35 (23%) | 57 (38%) |

OVERALL ASSESSMENT

Given that whistleblowing is intrinsically linked to ethical conduct, it is surprising that there are 38 ASX200 companies that have no reference to whistleblowing in their code of conduct. ACSI believes that it is essential for whistleblowing systems to offer three key features: anonymity, 24-hour availability and a statement that retaliation is not acceptable. It is also essential that any formal commitment is supported in practice. For example, if employees learn or hear that retaliation does occur and anonymity is not respected, a whistleblowing procedure is less likely to be used.

Our research shows that only 33 ASX50 companies (66 per cent) and 63 ASX51-200 companies (44 per cent) offer anonymity, 24-hour availability and a commitment that retaliation is not acceptable. On this basis, we conclude that there is significant opportunity to improve listed company whistleblowing systems.

RECOMMENDATIONS

As this research demonstrates, there are significant gaps in the quality and coverage of codes of conduct and limitations in the whistleblowing systems of a significant number of ASX200 companies. ACSI has identified three recommendations for investors and companies to address these shortcomings.

First, we have developed a set of questions for investors to ask boards and for directors and senior management to consider internally (below). We recommend that these questions be asked to identify gaps in the quality of the codes of conduct and whistleblowing systems.

Second, the ASX Principles and Recommendations are due for revision in 2018. ACSI is a member of the ASX Corporate Governance Council and is actively advocating for improvements to the Principles. We are recommending that the following practices be included in the revised edition:

1. Regular review codes of conduct to ensure that they are relevant.
2. Use of practical case studies, Q&As and FAQs and a framework for ethical decision-making in codes of conduct to promote education and understanding.³²
3. Independent testing of the implementation of codes of conduct (including communication and training effectiveness) and whistleblowing systems.
4. Encourage the inclusion of questions in engagement surveys which test companies' ethical climate in engagement surveys. For example, it is useful to assess the consistency of behaviour compared to espoused company values.
5. Whistleblowing systems should allow users to remain anonymous and be available 24 hours a day.
6. Ensuring that staff that report wrongdoing are not only protected against retaliation, but also supported.
7. Establishing and implementing a whistleblower remediation policy for those who are found to suffer retaliation for reporting wrongdoing.
8. Including remediation policies for whistleblowers who suffer reprisals or other detrimental impacts.
9. Provision for services to answer queries regarding the code of conduct (a 'helpline') as well as for reporting wrongdoing ('hotline' services).

Finally, the Commonwealth Government introduced the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill in December 2017. We made a [submission](#) to the Parliamentary Joint Committee on Corporations and Financial Services addressing whistleblowing protections and are also supporting a major three-year research project on this whistleblower protection.³³ The draft Bill does not address all the issues raised by us and we will continue to liaise with the Government to promote effective reform of whistleblowing protections. We encourage other investors to do the same.

In combination, these recommendations can play a critical role in reducing the risk of poor corporate conduct.

³² Appendix 2 provides an example of a framework for ethical decision-making.

³³ The *Whistling While They Work 2* Project will enhance understanding and make recommendations on how to improve whistleblowing in Australia. For more information on this project see http://www.whistlingwhiletheywork.edu.au/?page_id=11.

QUESTIONS FOR INVESTORS, DIRECTORS AND SENIOR MANAGEMENT

Codes of conduct

1. Does the code of conduct reflect the company's values framework so that users are encouraged to make decisions based on company values rather than a narrow set of rules?
2. Does the code of conduct provide a framework for ethical decision-making? An example of such a framework is provided in Appendix 2.
3. Is the code of conduct written and designed so that it has universal application to employees and relevant others irrespective of status or hierarchy (including, where relevant, contractors, suppliers, agents)?
4. Does the code of conduct include guidance on expected behaviours for all relevant ethical risks given the company's size, structure and sector?
5. When was the code of conduct last revised and is it sufficiently up-to-date for the current scope of the business and ethical risk environment?
6. Is code of conduct training regularly undertaken, refreshed and tailored to the types of ethical risks that different roles and groups are exposed to?
7. How is the code communicated and implemented? For example, are local and other leaders involved in delivering regular messages about the importance of value-aligned behaviours (e.g. in setting the tone from the top) and are they approachable and effective as role models?
8. Do engagement surveys ask if employees observe consistency of behaviour between actual and proscribed values in their teams and among leaders? What actions are taken if inconsistencies are found?
9. Does the code of conduct (and related training) make clear what behaviours are appropriate or inappropriate and what to do when uncertain?

Whistleblowing

1. Does the system offer anonymity, confidentiality with multiple access points, and is it available 24 hours a day?
2. Can all relevant parties (including, where relevant, contractors, suppliers) use the system?
3. Does the system offer advice on questions that users may have (a helpline) in addition to providing a service to report potential wrongdoing (a hotline)?
4. Does it prohibit retaliation, have a designated support system for whistleblowers and have remediation policies for reporters who suffer reprisals or other detrimental impacts?
5. Do senior management and the board receive regular reports of whistleblowing data? This should include the type of issues raised, where they arise, how they are resolved, and the number of warnings or dismissals.
6. Is the system regularly tested and audited to ensure that it is working as intended?

APPENDIX 1: CORPORATE GOVERNANCE GUIDANCE ON ETHICS – EVIDENCE FROM AUSTRALIA AND OVERSEAS

AUSTRALIA

In Australia, ASX listed companies are required to benchmark their corporate governance practices against the ASX Corporate Governance Council's recommendations (under Listing Rule 4.10.3). This rule encourages listed companies to 'comply or explain'.

The most recent version of the ASX Principles and Recommendations was released and took effect in 2014. ASX Corporate Governance Principle 3 says a listed entity should act ethically and responsibly and have a code of conduct for its directors, senior executives and employees and disclose it (or a summary of it). The accompanying commentary states that the code of conduct should:

- include a meaningful statement of core values
- be promoted across the organisation
- be reinforced by proper training and proportionate disciplinary action if it is breached.

The board is charged with leading by example when it comes to acting ethically and responsibly and should charge management with the responsibility for creating a culture that promotes ethical and responsible behaviour.

The following ethical issues are referenced in ASX Corporate Governance Principle 3 and are suggested as content for a code of conduct:

- complying with the law
- acting with honesty and integrity
- not using company information or property for personal gain
- description of processes for preventing bribery or other unlawful or unethical payments and inducements (including 'business courtesies' and facilitation payments)
- description of processes for handling actual or potential conflicts of interest
- description of processes of whistleblowing and protections for whistleblowers.

In addition, the commentary flags that acting ethically and responsibly goes beyond legal obligations and includes being a 'good corporate citizen' by:

- respecting human rights of employees
- creating a safe and non-discriminatory workplace
- dealing honestly and fairly with suppliers and customers
- acting responsibly towards the environment
- only dealing with business partners who demonstrate similar ethical and responsible business practices.

UNITED KINGDOM

The UK Corporate Governance Code adopts a 'comply or explain' approach based on the underlying principles of accountability, transparency, probity and focus on the sustainable success of an entity over the long term.³⁴ The Code states that the key roles for the board include establishing the culture, values and ethics of the company, setting the correct tone from the top, leading by example and ensuring that good standards of behaviour permeate all levels of the organisation to help prevent misconduct and unethical practices.

The London Stock Exchange has published a 'Corporate Governance Practical Guide'³⁵ which states that one of the critical issues for company codes of ethics is for them to be seen to be upheld when difficult choices must be made. Key points include:

- The practical application of the code of ethics must be regularly reviewed to avoid the risk that management behaviour, decisions and the way incentives are granted become corrosive.
- Whistleblowing systems should allow people with concerns about ethical breaches or other irregularities to come forward and – if needed – be independent from management.
- Formal self-assessment processes involving staff in key positions which require them to give a signed statement to the board certifying compliance with the company's ethical code, among other requirements.

NEW ZEALAND

The New Zealand Financial Markets Authority (FMA) 'Corporate Governance Handbook',³⁶ covers similar issues to ASX Corporate Governance Principle 3 with a few important additional recommendations:

- That every code of conduct includes processes for recording and evaluating compliance and measures for dealing with breaches.
- That every board have a system to implement and review the code.
- That public reporting includes information about the steps taken to implement the code of conduct and monitor compliance including any serious instances of unethical behaviour and the action taken.
- Entities are encouraged to periodically seek independent verification of the implementation and effectiveness of the code of conduct.

New Zealand listed entities are required to report how they comply with the FMA principles, which is less onerous than the ASX 'comply or explain' approach.

³⁴ Financial Services Council, *The UK Corporate Governance Code* (April 2016) <<https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf>>.

³⁵ RSM Robson Rhodes, in association with the London Stock Exchange, *Corporate Governance: A Practical Guide* (2004) <<http://www.ecgi.global/code/corporate-governance-practical-guide>>.

³⁶ Financial Markets Authority, *Corporate Governance in New Zealand, Principles and Guidelines*, (December 2014) <<https://fma.govt.nz/assets/Reports/141201-FMA-Corporate-Governance-Handbook-Principles-and-Guidelines2014.pdf>>.

UNITED STATES

In the US, there is no equivalent to the ASX Principles and Recommendations 'comply and explain' requirement. However, the US Federal Sentencing Guidelines (FSG) have had an important impact on corporate codes and ethical programs. US federal judges are required to use the FSG to determine whether a defendant organisation has an 'effective compliance program' in place to prevent the violations for which it has been charged.³⁷ If an organisation has implemented and maintained such a program, the judge will consider the acts of due diligence in trying to prevent the illegality when deciding whether to increase or mitigate sentences.³⁸

The FSG has numerous requirements for organisations including to:

- Promote an organisational culture that encourages ethical conduct and a commitment to compliance with the law.
- Establish, at minimum, that:
 - the board is knowledgeable about the ethical program's content and operation, and exercise oversight with respect to its implementation and effectiveness
 - high-level personnel are assigned overall responsibility for the program
 - appropriately resourced individuals are assigned with operational responsibility of the program
 - the program is periodically evaluated.

Sarbanes Oxley legislation, which was introduced in the US to prevent a repeat of behaviours like that of Goldman Sachs³⁹ during the lead-up to the 2008 Global Financial Crisis, sets out expectations for audit committees. This includes requirements to establish procedures for the receipt, retention, and treatment of complaints regarding accounting, internal controls or auditing matters, and confidential, anonymous submissions made about questionable accounting or auditing matters. In addition to Sarbanes Oxley legislation and the FSG requirements, the NYSE has published documentation on leading practice regarding the development of codes of conduct(below).⁴⁰

³⁷ United States Sentencing Commission, (Federal Sentencing) *Guidelines 2016* <<https://www.ussc.gov/guidelines>>.

³⁸ Juliana Morehead, 'The Revised Federal Sentencing Guidelines' (2005) *Fraud Magazine*, <http://www.fraud-magazine.com/article.aspx?id=4294967781>.

³⁹ According to a \$US5.06 billion (\$6.7 billion) regulatory settlement, Goldman Sachs knew about risks in mortgage-backed securities but didn't disclose the issues to investors during the lead-up to the global financial crisis. The investment bank acknowledged that it marketed and sold tens of billions of dollars in residential mortgage-backed securities without weeding out questionable loans as investors had been promised. The failure of those loans contributed to the sub-prime crisis in the US, which led to a global economic slowdown. Goldman Sachs' role in the financial crisis was highlighted in the book and Hollywood movie 'The Big Short'. "This resolution holds Goldman Sachs accountable for its serious misconduct in falsely assuring investors that securities it sold were backed by sound mortgages, when it knew that they were full of mortgages that were likely to fail," said Acting Associate Attorney-General Stuart Delery, as the Department of Justice, state attorneys-general and other officials announced the finalised agreement. Source: <http://www.afr.com/business/banking-and-finance/investment-banking/goldman-sachs-pays-7b-for-role-in-global-financial-crisis-20160412-go4igz>.

⁴⁰ New York Stock Exchange, *Corporate Governance Guide*, 2014, NYSE Governance Services.

NEW YORK STOCK EXCHANGE: EXTRACT OF 'BEST PRACTICE IN CODES OF CONDUCT DEVELOPMENT'

A code of conduct provides the tools to allow employees, irrespective of role, to 'spot red flags' for the company's most important risk areas. It should make clear the behavioural expectations and company values – with the best codes focusing on affirmative conduct rather than prohibitions. 'Codes that focus on rules rather than values tend to be overly formal and difficult to read, having clearly been written by a team of lawyers'.

'While a single document cannot anticipate every possible situation, a code should provide effective guideposts'. A code should facilitate employee's understanding of the critical nature of compliance and ethical decision-making and enable recognition of when to seek guidance and reporting of concerns.

A code's success is defined by its ability to energise employees and motivate them to ethical behaviour- in order to achieve such success, the language and tone used must be appropriate to the employee base.

Risk topic coverage should be a function of a company's industry, size and structure. The relevant risks will include those that are systemic to the company and unique to the industry. Benchmarking against peers and leveraging internal audits and compliance risk assessments will provide focus as to which topics are relevant.

Codes need to be supplemented with learning aids such as Q&As, case studies or vignettes. The document should be available in all relevant local languages.

Codes should be updated after significant corporate compositional changes (M&A or overseas expansion) or after two years. Refreshing the code does not necessarily require changes to the precepts but can be updating case studies, comprehension aids, interactive elements and refreshing the presentation to ensure readers will be engaged. A static code will quickly lead to perfunctory review by employees and will undercut the purpose of a code and the annual certification process.

APPENDIX 2: A FRAMEWORK FOR ETHICAL DECISION MAKING⁴¹

1. RECOGNISE THE ETHICAL ISSUE

Could this decision or situation be damaging to someone or to some group? Does this decision involve a choice between a good and bad alternative, or perhaps between two 'goods' or between two 'bads'?

Is this issue about more than what is legal or what is most efficient? If so, how?

2. GET THE FACTS

What are the relevant facts of the case? What facts are not known? Can I learn more about the situation? Do I know enough to make a decision?

What individuals and groups have an important stake in the outcome? Are some concerns more important? Why?

What are the options for acting? Have all the relevant persons and groups been consulted? Have I identified creative options?

3. EVALUATE ALTERNATIVE ACTIONS

Evaluate the options by asking the following questions:

- Which option will produce the most good and do the least harm? (The utilitarian approach)
- Which option best respects the rights of all who have a stake? (The 'rights-based' approach)
- Which option treats people equally or proportionately? (The 'justice' approach)
- Which option best serves the community as a whole, not just some members? (The 'common good' approach)
- Which option leads me to act as the sort of person I want to be? (The 'virtue' approach)

4. MAKE A DECISION AND TEST IT

Considering all these approaches, which option best addresses the situation?

If I told someone I respect or told a television audience -which option I have chosen, what would they say?

5. ACT AND REFLECT ON THE OUTCOME

How can my decision be implemented with the greatest care and attention to the concerns of all stakeholders?

How did my decision turn out and what have I learned from this specific situation?

⁴¹ Markkula Center for Applied Ethics at Santa Clara University. Primary contributors include Manuel Velasquez, Dennis Moberg, Michael J. Meyer, Thomas Shanks, Margaret R. McLean, David DeCosse, Claire André, and Kirk O. Hanson. <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/a-framework-for-ethical-decision-making/>

APPENDIX 3: ACSI MEMBERS

AUSTRALIAN MEMBERS



INTERNATIONAL MEMBERS



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