



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Whistleblower Policies) Instrument 2019/1146

This is the Explanatory Statement for *ASIC Corporations (Whistleblower Policies) Instrument 2019/1146*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

Summary

1. This legislative instrument relieves public companies limited by guarantee that are not-for-profits or charities and have an annual consolidated revenue of less than \$1 million, from the requirement to have a whistleblower policy under subsection 1317AI(1) of the *Corporations Act 2001* (the *Act*).

Background

2. The revised whistleblower protection regime in Part 9.4AAA of the Act includes a requirement for all public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy and make it available to their officers and employees. This requirement commences on 1 January 2020.
3. The whistleblower policy must include information about:
 - (a) protections available to whistleblowers, including under the Act;
 - (b) to whom disclosures that qualify for protection under the Act may be made, and how they may be made;
 - (c) how the company will support whistleblowers and protect them from detriment;
 - (d) how the company will investigate disclosures that qualify for protection under the Act;
 - (e) how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection under the Act, or to whom such disclosures relate;
 - (f) how the policy is to be made available to officers and employees.

Purpose of the instrument

4. The Revised Explanatory Memorandum for the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 at para 2.149 – 2.150 states:
 - (a) the legislative intent behind requiring only large or public entities to have a whistleblower policy was to minimise the risk of any disproportionate regulatory burden that would result from making it a universal company requirement irrespective of company or business size; and
 - (b) the rationale for providing ASIC with a power to relieve certain classes of companies from this requirement was to provide it with flexibility in determining whether, in some limited circumstances, the benefits of this requirement in encouraging good corporate governance could be outweighed by reduced flexibility and high compliance costs.
5. ASIC considers that the requirement to have a whistleblower policy would impose a disproportionate burden on public companies that are small not-for-profits or charities, many of which have limited staff and financial resources.
6. The purpose of the instrument is to relieve certain classes of public companies from the obligation to have a whistleblower policy. The class of public companies relieved from the obligation are not-for-profit public companies limited by guarantee whose annual consolidated revenue is less than \$1 million.
7. The consolidated revenue threshold of \$1 million aligns with the threshold for:
 - (a) the full financial reporting and auditing requirements that apply to companies limited by guarantee under the Act; and
 - (b) “large” not-for-profits and charities registered with the Australian Charities and Not-for-profits Commission (ACNC).
8. This relief only applies to the requirement to have a whistleblower policy under subsection 1317AI(1) of the Act. The whistleblower protections provided by the Act remain available to any discloser who makes a disclosure that qualifies for protection, regardless of whether the entity the subject of the disclosure is required to have a whistleblower policy.

Consultation

9. Before making this instrument, ASIC released Consultation Paper 321 *Whistleblower policies* (CP 321) in August 2019. CP 321 consulted on:
 - (a) a proposed regulatory guide to help entities establish, implement and maintain a whistleblower policy that complies with the Act; and

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- (b) whether ASIC should provide relief to public companies that are small not-for-profits or charities from the requirement to have a whistleblower policy, and if so, what the most appropriate threshold should be.
10. ASIC received a total of 40 responses on CP 321 (including eight confidential responses) from industry and professional bodies, legal and consulting firms, companies, not-for-profit organisations, academics, and members of the public.
11. ASIC received 21 submissions on the issue of providing relief to public companies that are small not-for-profits or charities from the requirement to have a whistleblower policy. Eighteen of those supported the idea of providing relief. The key reasons for supporting relief included:
- (a) the whistleblower policy requirement would impose a compliance burden that outweighs the benefits of encouraging good corporate culture and governance and of uncovering misconduct;
 - (b) the requirement for all public companies that are not-for-profits or charities to have a whistleblower policy appears unfair when viewed in relation to the exemption for small proprietary companies;
 - (c) the summary of the Regulation Impact Statement annexed to the Revised Explanatory Memorandum for the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 had indicated there was no expected compliance costs for individuals or community organisations;
 - (d) the establishment of the ACNC recognised the need for a dedicated regulator to provide appropriate and tailored regulation to the not-for-profit sector. Accordingly, the ACNC is best placed to set guidance for whistleblower policy and framework for charities;
 - (e) it is undesirable to discriminate between not-for-profits and charities based on legal form, of which public companies limited by guarantee is a small percentage. The requirement creates inconsistencies across the charitable sector, placing undue burden on some entities;
 - (f) the whistleblower policy requirement in the Act had arisen in response to misconduct in the corporate and financial services sector (events unrelated to the charitable sector).
12. While the majority of respondents supported ASIC providing such relief, there was no overwhelming consensus on the most appropriate threshold. The two thresholds receiving the strongest support were:
- (a) annual consolidated revenue of \$1 million, in line with the full financial reporting and auditing requirements that apply to companies limited by guarantee under the Act, and the definition of ‘large’ not-for-profits and charities registered with the ACNC;

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- (b) the small proprietary company threshold under subsection 45A(2) of the Act. A small proprietary company is one that satisfies at least two of the following criteria:
- (i) the consolidated revenue for the financial year of the company and any entities it controls is less than \$50 million;
 - (ii) the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than \$25 million; and
 - (iii) the company and any entities it controls has fewer than 100 employees at the end of the financial year.
13. ASIC has determined to provide relief to public companies limited by guarantee that are not-for-profits or charities with annual consolidated revenue of less than \$1 million from the requirement to have a whistleblower policy.

Operation of the instrument

14. The class of companies that can rely on the relief are public companies limited by guarantee which are operated on a not-for-profit basis, provided their annual consolidated revenue remains below the \$1 million threshold.
15. To accommodate circumstances where a company was within the threshold for a financial year but exceeds the threshold for a subsequent financial year, the relief will continue until 6 months after the end of the subsequent financial year. This is intended to provide the company with sufficient time to transition to compliance with the obligation to have a whistleblower policy.

Example

An eligible public company has consolidated revenue of \$600,000 for its financial year ended 30 June 2021 and therefore is not required to have a whistleblower policy. For the subsequent financial year ended 30 June 2022, the company has consolidated revenue of \$1.2 million. In these circumstances, the company can continue to rely on the relief until 31 December 2022. The company must have whistleblower policy by 1 January 2023.

16. Once an eligible public company becomes subject to the obligation to have a whistleblower policy, it can no longer rely on the relief for a subsequent financial year even if its annual consolidated revenue for the subsequent financial year were to return to a level below the \$1 million threshold.
17. To accommodate newly formed eligible public companies, the instrument also provides a transitional deferral exemption. An eligible public company whose first financial year ends on or after 1 January 2020 is not required to have a whistleblower policy until 6 months after the end of its first financial year. If the company has an annual consolidated revenue below \$1 million, it is not required to have a whistleblower policy for so long as it remains below that threshold.

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18. “Consolidated revenue” is determined according to accounting standards. The accounting standards are made under section 334 of the Act and are disallowable legislative instruments.
 19. A trustee of a registrable superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) is excluded from being able to rely on the relief under any circumstances.
 20. The instrument commences on the later of 1 January 2020 and the day after it is registered on the Federal Register of Legislation.

Legislative authority

21. The instrument is made under section 1317AJ of the Act.
22. Section 1317AJ provides that ASIC may, by legislative instrument, make an order in respect of a specified class of company relieving companies in the class from all or specified requirements of section 1317AI of the Act (the requirement to have a whistleblower policy that sets out specified matters and to make that policy available to officers and employees of the company).
23. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

24. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Whistleblower Policies) Instrument 2019/1146

Overview

1. This legislative instrument relieves public companies limited by guarantee that are not-for-profits or charities and have an annual consolidated revenue of less than \$1 million, from the requirement to have a whistleblower policy under subsection 1317AI(1) of the *Corporations Act 2001*.

Assessment of human rights implications

2. This instrument does not engage any of the applicable rights or freedoms.
3. The instrument provides relief from the requirement to have a whistleblower policy without affecting the whistleblower protections provided by the Act. The whistleblower protections remain available to any individual discloser who makes a disclosure that qualifies for protection, regardless of whether the entity the subject of the disclosure is required to have a whistleblower policy.

Conclusion

4. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.