



5 December 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600
Via email: Senator.Hume@aph.gov.au
CC: Shelby.Brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Exemption from primary legislation

Scrutiny principle 23(3)(j) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which provide exemptions or modifications to primary legislation.

The instrument provides an exemption for 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* (Corporations Act).

The committee notes that the exemption appears to be authorised under section 1317AJ of the Corporations Act, which provides that the Australian Securities and Investments Commission may make an order, by legislative instrument, relieving companies from all or specified requirements of section 1317AI. The committee further notes that subsection 1317AJ(2) of the Corporations Act allows these orders to continue indefinitely.

Nevertheless, the committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto

amendment to the principal Act. In this instance, the committee is particularly concerned that the instrument is intended to continue indefinitely.

Where a lawmaker intends to make exemptions to primary legislation by delegated legislation, rather than amending primary legislation, the committee expects a sound explanation to be included in the explanatory materials. In this regard, the explanatory statement to the instrument explains that the exemption is necessary as:

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.

However, the explanatory statement does not appear to explain why it is necessary to include the exemption in delegated legislation, instead of amending the Corporations Act, noting the additional parliamentary scrutiny inherent in such processes. Similarly, it does not appear to explain why it is necessary for the exemption to continue indefinitely.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to use delegated legislation to make exemptions from the requirements of subsection 1317A(1) for an indefinite period of time, instead of amending the Corporations Act.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

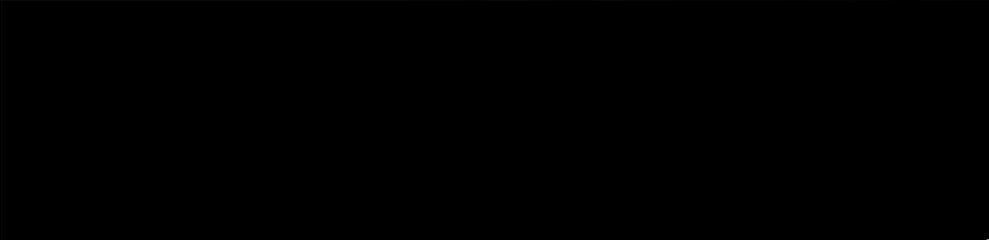
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **19 December 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-003144

18 DEC 2019

Senator Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

I am writing in response to your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), dated 5 December 2019, which requested advice relating to the *ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]* (the Instrument). The Committee has sought advice as to why it is considered necessary and appropriate to use delegated legislation to make exemptions from the requirements of subsection 1317AI(1) for an indefinite period of time, instead of amending the *Corporations Act 2001* (Corporations Act).

Background on the Instrument

The Instrument provides 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 under subsection 1317AI(1) of the Corporations Act.

Under section 1317AI of the Corporations Act, all public companies, large proprietary companies, and proprietary companies that are trustees of registrable superannuation entities must have a whistleblower policy and make the policy available to their employees and officers. The provision was inserted into the Corporations Act by *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, which contained the Government's reforms to strengthen the corporate sector whistleblower protection regime.

The corporate sector whistleblower protection regime applies to all companies, but the express requirement to have a whistleblower policy applies only to public companies, large proprietary companies, and proprietary companies (regardless of size) that are trustees of registrable superannuation entities.

In relation to proprietary (private) companies, the Parliament has legislated an express size and function test for when the company must have a whistleblower policy. That is, only large proprietary companies or proprietary companies that act as trustees of registrable superannuation entities must have a whistleblower policy.

However, the Parliament has not legislated a size or function test for when a public company must have a whistleblower policy, and instead, imposed the obligation on all public companies, together with legislating a power for ASIC to grant relief from the requirement.

The use of delegated legislation

The relief was framed following public consultation (please see additional information) and consideration of the existing regulatory framework for public companies and not-for-profit and charitable public companies limited by guarantee in particular.

The Instrument uses the power given by the Parliament to ASIC and allows ASIC to modify the operation of the Corporations Act to provide a tailored and flexible regulatory environment that is fit for purpose for public company structures. The relief responds to the current circumstances where the class of small public companies limited by guarantee may experience a disproportionate regulatory burden by facing a requirement to have a whistleblower policy.

Including this relief in the text of the statute would result in additional cost and unnecessary complexity for other users of the Corporations Act, and lack the flexibility to respond to potential changes to policy settings from future reviews to the regulatory framework for these entities.

The Instrument is subject to sunseting in 10 years, and the need for the relief can also be reconsidered at that time.

Additional Information - Reasons for the relief

The pairing of the whistleblower policy requirement with the relief power allows ASIC to respond to circumstances where a class of public companies facing a requirement to have a whistleblower policy may experience a disproportionate regulatory burden.

Without the relief, the whistleblower policy requirement applies equally to for-profit businesses structured as public companies limited by shares (such as ASX-listed companies) and not-for-profit organisations or charities structured as public companies limited by guarantee. As described in the Explanatory Statement to the Instrument, in Consultation Paper 321 Whistleblower policies (CP 321), ASIC consulted on the exercise of the power to relieve the class of public companies that are limited by guarantee and operate on a not-for-profit basis, and what an appropriate relief threshold would be.

ASIC received 21 submissions on this issue, and 18 of those submissions supported the idea of providing relief to this class of public companies. Respondents noted that, particularly when compared with for-profit public companies limited by shares, many not-for-profits and charities have few or no paid staff (or are run by volunteers). Many have limited financial resources and, as they do not have dedicated compliance or human resources functions, would incur higher costs to obtain professional advice or training to implement a whistleblower policy. This contrasts significantly with the circumstances of for-profit public companies limited by shares.

The key reasons contained in submissions in support of the proposed relief included:

- the whistleblower policy requirement would impose a compliance burden that outweighs its benefits;
- 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; and
- 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.

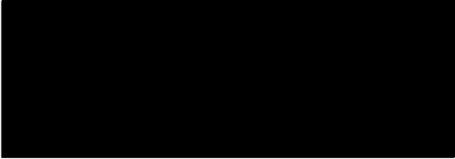
Following consideration of the regulatory framework for public companies and analysis of submissions to CP 321, ASIC determined to provide relief to public companies limited by guarantee that are not-for-profits or charities with annual consolidated revenue of less than \$1 million.

This threshold aligns with the full financial reporting and auditing requirements that apply to companies limited by guarantee under the Corporations Act, and the definition of 'large' not for-profits and charities registered with the Australian Charities and Not-for-profits Commission (ACNC).

In addition, submissions did not support limiting the relief to a particular time period. In this context, ASIC was aware that section 1317AK of the Corporations Act requires the Minister to initiate a review of the operation of the corporate sector whistleblower protection regime, including the whistleblower policy requirements. The review must be conducted as soon as practicable after the end of 5 years after 1 July 2019, and the report tabled in Parliament. In addition, the final report of the Government's review of the Australian Charities and Not-for-profits Commission legislation was tabled on 22 August 2018. The report recommends increases to the financial reporting thresholds for entities registered with the ACNC, which would likely have an impact on the thresholds adopted by the relief.

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Jane Hume



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

6 February 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600

Via email: Senator.Hume@aph.gov.au
CC: Shelby.Brinkly@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]

Thank you for your response of 19 December 2019 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 5 February 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

While the committee has concluded its examination of the instrument, the committee reiterates that exemptions from primary legislation by delegated legislation should not generally continue in force for such time as to operate as a de facto amendment to the principal Act. Accordingly, the committee requests that this matter be considered in the future review of the operation of the corporate sector whistleblower protection regime under the *Corporations Act 2001*.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the Delegated Legislation Monitor.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation