Clubs Australia Submission
Whistleblower policies

Clubs Australia welcomes the opportunity to comment on *Consultation Paper 321: Whistleblower policies* (the Consultation Paper), published by the Australian Securities and Investments Commission (ASIC).

This submission provides that Clubs Australia:

- supports ASIC's proposal to exercise its power to exempt small not-for-profits from the requirement to have a whistleblower policy;

- recommends the exemption should apply to businesses employing fewer than 15 employees, which is the existing size threshold for employment-related laws in the *Fair Work Act 2009* (Cth);[1] and

- recommends that, if a revenue threshold is selected, $1 million is an appropriate amount.

Should you wish to discuss this submission further, please contact Josh Landis, Executive Manager of Public Affairs...

Licensed clubs

Clubs Australia represents the interests of 6,440 licensed clubs in Australia.

Licensed clubs serve as social hubs for 13.2 million club memberships and employ approximately 130,000 people.

Licensed clubs are not-for-profit (NFP), member-based entities which offer their communities a range of hospitality, entertainment and social services.

A significant number of Australian clubs are public companies limited by guarantee, particularly in NSW,[2] subjecting them to the whistleblower regime in the *Corporations Act 2001* (Cth) and the requirement to have a whistleblower policy.

[1] Section 23; Meaning of *small business employer*.
[2] Pursuant to *Registered Clubs Act 1976* (NSW) s 10(1)(b), all NSW clubs registered after 1 December 1986 must be public companies. In practice, many clubs registered before this date have also adopted the public company legal entity structure. As not-for-profits, clubs which are companies are public companies limited by guarantee.

Clubs which are companies are NFPs because they cannot distribute assets to members:

- during the running of the club, due to the Corporations Act prohibiting companies limited by guarantee from issuing shares and paying dividends to members, and jurisdiction-specific legislation which prevents clubs from distributing assets to members;[3] and/or

- upon dissolution, due to the club's constitution or the jurisdiction-specific legislative restrictions noted above.

Many NFP clubs pay federal income tax.

As member-based entities, licensed clubs adhere to a high standard of corporate governance. Clubs tend to have a large and engaged member base, which provides a strong layer of protection against misconduct or corruption.

Moreover, clubs are legally obligated to impose stringent corporate governance and integrity standards. In addition to standards in the Corporations Act, clubs are also governed by jurisdiction-specific legislation. In NSW, which features the greatest presence of clubs which are public companies, strict corporate governance standards are mandated by the *Registered Clubs Act 1976* and regulations; the latter of which contains the Registered Clubs Accountability Code.[4]

Integrity standards for NSW clubs include:

- requiring club members to approve any disposals of the club's core property;[5]

- prohibiting a person from managing a club if the Independent Liquor and Gaming Authority finds they are not a fit and proper person;[6]

- prohibiting clubs from:[7]
    - entering into a contract with a director or top executive that has a pecuniary interest, without board approval;
    - entering into a contract with a close relative of the club's secretary;
    - lending money to a director of the club;

- requiring clubs to disclose the following details to their members:
    - personal and financial interests held by club directors or employees;
    - legal settlements paid to a director or employee.

NSW clubs are also required to circulate a profit-and-loss statement and balance sheet to their members on a quarterly basis.[8] The effect of this requirement is that clubs which are small companies limited by guarantee must circulate these statements to members, despite being exempted from preparing financial reports under s 292(3) of the Corporations Act.

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[3] See *Registered Clubs Act 1976* (NSW) s 30(1)(i); *Liquor Act 1992* (Qld) s 78(1)(b).
[4] *Registered Clubs Regulation 2015* (NSW), Sch 2.
[5] *Registered Clubs Act 1976* (NSW) s 41E.
[6] Ibid. s 33.
[7] The standards in this, and the next, point are contained in *Registered Clubs Regulation 2015* (NSW), Sch 2.
[8] *Registered Clubs Regulation 2015* (NSW), Sch 2, cl 10.

Exemption

At C1Q1, ASIC seeks feedback on whether the whistleblower requirements will impose a disproportionate regulatory impact.

Clubs Australia submits that the requirement to adopt and comply with a whistleblower policy, as well as distribute it to staff, will impose disproportionate compliance costs on small clubs. These compliance costs will outweigh the benefits.

The regulatory impact assessment of the Bill estimates that establishing, implementing and maintaining a whistleblower policy requires average costs associated with:

- a one-off implementation cost corresponding to 28 hours, to develop the policy, seek professional advice and produce informative materials for staff members; [9] and
- an ongoing cost corresponding to four hours per year, for the club to familiarise itself with the policy and undertake training.[10]

These regulatory costs may be higher for small clubs, as they do not have dedicated compliance or human resources functions and incur a higher cost for one-off professional advice or training.

Many small clubs are run by volunteers, and only trade one or two days per week. The regulatory cost for these clubs to adopt a whistleblower policy would be disproportionate.

Threshold

At C1Q2, ASIC seeks feedback on the appropriate exemption threshold.

Clubs Australia submits that an appropriate threshold should be based on number of employees, rather than revenue.

Revenue thresholds are used in the Corporations Act to provide certain reporting relief to smaller companies. However, Clubs Australia considers the whistleblower regime is best conceptualised as an employee matter and, as such, should be aligned to the *small business employer* threshold defined in s 23 of the Fair Work Act as an employer:

- that employs fewer than 15 employees; and
- excludes casual employees not employed on a regular or systematic basic.

[9] Revised Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, [2.209].
[10] Ibid., [2.207] and [2.219].

This threshold is already well-understood by smaller companies. Moreover, ASIC's policy objective in considering a threshold exemption is similar to the objective underlying the relief provided to *small business employers* in the Fair Work Act; namely, to "recognises that small businesses do not have the human resources support that larger businesses enjoy".[11]

This submission proposes a threshold based on number of employees. However, if a threshold based on revenue is selected, Clubs Australia believes the *small company limited by guarantee* threshold of $250,000 is far too low.

It was noted above that many small clubs are run by volunteers and trade one or two days per week. Clubs with these characteristics include those with revenue exceeding $250,000. Noting the regulatory costs identified by the explanatory memorandum, these costs would be disproportionate.

If a revenue threshold is selected, Clubs Australia proposes $1,000,000; which is the threshold under which a company limited by guarantee may have its financial reports reviewed rather than audited.[12]

[11] Second Reading Speech, Fair Work Bill 2008, House of Representatives, 25 November 2008 (Julia Gillard, Acting Prime Minister).
[12] *Corporations Act 2001* (Cth) s 301(3).