



ASIC
Australian Securities &
Investments Commission

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**To: CEOs of public companies, large proprietary
companies, and corporate trustees of registrable
superannuation entities (entities)**

13 October 2021

Dear CEOs

Whistleblower policies

We are writing to:

- › remind you of your entity's obligation under the *Corporations Act 2001* (Corporations Act) to have a whistleblower policy that reflects the strengthened whistleblower protection regime that started on 1 July 2019
- › encourage you to check whether your entity's whistleblower policy complies with the Corporations Act's requirements.

Whistleblowers are a key part of an organisation's ability to detect misconduct and identify, escalate and address issues. Potential whistleblowers who are concerned about the personal impact of whistleblowing may be reluctant to speak up. An organisation's whistleblower policy can play an important role in encouraging disclosures by informing potential whistleblowers of the support available and their rights.

During 2020, we reviewed a sample of whistleblower policies to understand how entities are responding to the Corporations Act's whistleblower policy requirements.

Although we observed that some policies addressed the requirements, the majority of the policies we reviewed appeared not to include all the information required by the Corporations Act, including information about the legally enforceable protections available to whistleblowers.

We are concerned that such policies will not encourage potential whistleblowers to come forward. As a result, entities may miss opportunities to identify and address potential misconduct.

What the Corporations Act requires

The Corporations Act requires entities to include information about the following matters in their whistleblower policies:

- › the protections available to whistleblowers
- › how to make a qualifying disclosure, including to whom

- › your entity's measures to support and protect whistleblowers
- › how your entity will investigate whistleblower disclosures and ensure fair treatment of employees named in disclosures or to whom such disclosures relate
- › how the policy will be made available to officers and employees.

What we observed in our review

The most prevalent and concerning issues we observed in the policies we reviewed involved **unclear, incomplete or inaccurate information** about how potential whistleblowers can make a qualifying disclosure and about the protections available under the Corporations Act – see examples below.

Examples of unclear, incomplete or inaccurate information

We saw policies that:

- › **did not list all the categories of people to whom a whistleblower can report misconduct** and qualify for protection under the Corporations Act. Instead, some policies limited the information to the entities' preferred reporting channels
- › **inaccurately referred to obsolete requirements for whistleblowers** to identify themselves or make disclosures in good faith or without malice in order to qualify for protection
- › **omitted or inaccurately described one or more of the protections available to whistleblowers** under the Corporations Act.

For more details about our observations, see the attached summary of our review.

Implications of the issues we observed

The issues we observed may result in potential whistleblowers not understanding how to make a disclosure that qualifies for the whistleblower protections under the Corporations Act. This may discourage them from speaking up.

The issues may also indicate that entities are not handling whistleblower disclosures in line with the Corporations Act obligations.

How entities can address the issues we observed

To address the most common issues, entities should do the following:

- › Clearly articulate how a person can make a disclosure that qualifies for the legal protections for whistleblowers, including to whom
- › Carefully update their whistleblower policy to reflect the whistleblower protection regime that started on 1 July 2019
- › Accurately describe the legal rights and remedies whistleblowers can rely on if they make a qualifying disclosure, which are identity protection (confidentiality), protection from detriment, compensation and other remedies, and civil, criminal and administrative liability protection.

The attached summary of issues is informed by our review. It highlights what entities must include in their policies as well as the better practices we observed.

Our expectations

You, other officers and senior managers in your entity play a critical role to ensure that your entity complies with the whistleblower protection regime in the Corporations Act. In response to this letter, we expect you to do the following:

Discuss this letter within your entity and review your entity's whistleblower policy to consider whether any of the issues we have observed are relevant to your entity's policy. If they are, we expect you to address them.

Review [Regulatory Guide 270 Whistleblower policies \(RG 270\)](#). This guide contains guidance and good practice tips on establishing and implementing a whistleblower policy and program. It also includes measures related to oversight and governance of the program.

Review other parts of your whistleblowing systems and processes to see if your entity's arrangements to handle disclosures and protect whistleblowers reflect the strengthened whistleblower protection regime described in your policy.

We will continue to monitor compliance with the whistleblower policy requirements and entities' handling of whistleblower disclosures. We also plan to conduct a further review of whistleblower policies in the future. Where we identify non-compliance, we will consider the full range of regulatory tools available, including enforcement action.

Yours faithfully,

Greg Yanco
Executive Director
Markets

Kim Demarte
Acting Senior Executive Leader
Governance

Summary of ASIC's review

The sample we reviewed

We reviewed a select sample of 102 whistleblower policies from entities that are subject to the Corporations Act requirement to have a whistleblower policy – public companies, large proprietary companies and corporate trustees of registrable superannuation entities.

The sample included entities of different sizes, different industries and operations, and from different ASX market segments for listed public companies.

What our review looked at

Our review looked at how whistleblower policies addressed the requirement in s1317AI(5) to include information about:

- › the protections available to whistleblowers
- › how to make a qualifying disclosure, including to whom
- › the entity's measures to support and protect whistleblowers
- › how the entity will investigate whistleblower disclosures and ensure fair treatment of employees named in disclosures or to whom such disclosures relate
- › how the policy will be made available to officers and employees.

Our review did not consider the operational practices underlying the whistleblower policies we reviewed. In making our observations, we acknowledge that the presence or clarity of information in a whistleblower policy does not guarantee that an entity supports and protects whistleblowers or handles whistleblower disclosures in line with the whistleblower protection regime in the Corporations Act.

Our observations of how policies addressed the s1317AI(5) requirement

The tables below describe our observations about how policies addressed each of the five areas described above. In each table:

- › the left column refers to the legal requirements and definitions relevant for information required under s1317AI(5). It also refers to corresponding sections of [RG 270](#), which contains guidance for companies on establishing and implementing a whistleblower policy
- › the right column describes issues with how policies addressed those legal requirements, as well as better practices we observed in some policies we reviewed. Where these better practices align with our guidance, we have included references to relevant information in [RG 270](#).

The protections available to whistleblowers: s1317A(5)(a)

Required content	Observations
<p>Information about the protections for qualifying disclosures, which are:</p> <ul style="list-style-type: none">› identity protection (confidentiality)› protection from detriment› compensation and other remedies› civil, criminal and administrative liability protection. <p>s1317AAE, 1317AB, 1317AC, 1317AD and 1317AE; RG 270.87–RG 270.105</p>	<p>A small number of policies:</p> <ul style="list-style-type: none">› did not include information about any of the protections, or› incorrectly described the protections. <p>Some policies:</p> <ul style="list-style-type: none">› did not describe <i>all</i> the protections available under the Corporations Act, or› did not state that the protections are legal protections. <p>This may result in whistleblowers not understanding that the Corporations Act makes the protections available, and that they can seek legal recourse if those protections are not provided or the obligations breached.</p> <p>Better practice: Some policies highlighted that protections such as confidentiality and protection from detriment are available under the law and that it is an offence to breach confidentiality or cause detriment.</p>

How to make a qualifying disclosure, including to whom: s1317A(5)(b)

Required content	Observations
<p>Information about what a reporter needs to do to qualify for protection under the Corporations Act</p> <p>s1317AA</p>	<p>A number of policies did not summarise the threshold criteria for whistleblowers to qualify for protection under the Corporations Act. This may make it difficult for potential whistleblowers to understand how to make a disclosure that triggers the Corporations Act protections, including who they should make the disclosure to.</p> <p>Better practice: Some policies used diagrams to explain the threshold criteria for whistleblowers to qualify for protections under the Corporations Act (for more information, see RG 270.33). This assists potential whistleblowers to understand how to make a disclosure that qualifies for protection.</p>
<p>Information about who is eligible to be a whistleblower</p> <p>s1317AA and 1317AAA; RG 270.41–RG 270.46</p>	<p>Some policies omitted some of the categories of individuals who are eligible to make disclosures qualifying for whistleblower protections (i.e. individuals who can meet the legal definition of 'eligible whistleblower').</p>

Required content	Observations
<p>Indication that reporters can be anonymous or identifiable</p> <p>s1317AA – Note; RG 270.83–RG 270.86</p>	<p>Some policies:</p> <ul style="list-style-type: none"> › continued to require whistleblowers to identify themselves to qualify for protection, suggesting that not all entities appreciate that reforms to the regime now extend to anonymous disclosures, or › did not state that anonymous whistleblowers were protected under the Corporations Act. <p>Better practice: Some policies acknowledged that whistleblowers could disclose anonymously and qualify for protections. Given this is a change from the previous whistleblower protection regime, policies benefit from these positive, express statements that anonymous disclosures are protected under the Corporations Act.</p> <p>We also observed that some policies did not provide details of an internal reporting mechanism to facilitate anonymous disclosures and, for example, asked whistleblowers to report to eligible recipients by telephone or in person.</p> <p>Better practice: Many policies indicated that whistleblowers could report to eligible recipients by email, which would facilitate anonymous disclosures. Some policies encouraged anonymous whistleblowers to maintain ongoing communication using their preferred reporting channel, which allows the entity to ask follow-up questions and better understand and investigate their concerns. For more information, see RG 270.84.</p>
<p>Information about who is eligible to receive disclosures qualifying for protection</p> <p>s1317AA(1)–(3), 1317AAC and 1317AAD; RG 270.64–RG 270.82</p>	<p>Close to half of the policies did not fully or accurately identify the channels available under the law that whistleblowers may use to make disclosures qualifying for protection. For example, a number only listed the preferred or internal channels available.</p> <p>Better practice: Some policies listed all the legally available channels for whistleblowers to disclose reportable matters, highlighting the entity's preferred internal reporting mechanism(s) and clarifying that whistleblowers could qualify for protection regardless of which of the listed channels they choose to report through. For more information, see RG 270 <i>Good practice tip 5</i>.</p> <p>Some policies encouraged whistleblowers to first talk to their managers about their concerns. The Corporations Act does not require a whistleblower to first report their concerns to a manager who is not an 'eligible recipient'. In certain circumstances, doing so may place whistleblowers at greater risk of detriment and loss of confidentiality.</p> <p>Better practices: Instead of encouraging whistleblowers to discuss concerns with their managers, some policies encouraged people to speak up by:</p> <ul style="list-style-type: none"> › clearly identifying how and to whom a whistleblower can disclose their concerns to become eligible for the whistleblower protections, while encouraging people to speak up

Required content	Observations
<p>Information about who is eligible to receive disclosures qualifying for protection (continued)</p> <p>s1317AA(1)–(3), 1317AAC and 1317AAD; RG 270.64–RG 270.82</p>	<ul style="list-style-type: none"> › referring whistleblowers to a person within the entity from whom they could confidentially seek further information before making a disclosure, or indicating that independent legal practitioners could also provide them with advice (see also RG 270.66) › encouraging whistleblowers to use one of the legally available reporting channels listed in the whistleblower policy to report matters if they are unsure whether the matter would be considered a reportable matter. While it may result in an increase in the number of matters an entity has to assess and investigate, this preserves a person's ability to rely on the protections if the issue disclosed is a reportable matter, or › assuring whistleblowers that the entity would treat all disclosures made under its whistleblower policy in the same way, regardless of whether the matter qualifies for protection under Australia's whistleblower laws. This suggests the entity is willing to support and encourage a culture of speaking up.
<p>Information about the types of reportable matters that qualify for protection</p> <p>s1317AA(4)–(5) and 1317AADA; RG 270.47–RG 270.63</p>	<p>Some policies' descriptions of the types of reportable matters that qualify for whistleblower protections did not align with those listed in the Corporations Act and were incomplete or inaccurate.</p> <p>Close to half of policies did not explain when disclosures about matters such as personal work-related grievances may be protected under the Corporations Act.</p> <p>Better practices: Some policies provided additional guidance to whistleblowers about reportable matters by:</p> <ul style="list-style-type: none"> › using simple and less legalistic language to describe the types of reportable matters that are protected under the Corporations Act, as well as the types of matters that are excluded from the protections › describing how to speak up about matters that are not covered by the Corporations Act protections. For more information, see RG 270 <i>Good practice tip 3</i>.
<p>Information about the grounds for suspicion reporters must have to qualify for protection</p> <p>s1317AA(4)–(5); RG 270.53</p>	<p>A third of policies incorrectly stated that whistleblowers must make disclosures in 'good faith' or without 'malice' in order to qualify for protections. This suggests that entities did not appreciate that the Government's reforms to the regime mean that a whistleblower's motive for disclosing is not relevant. Instead, whistleblowers will be eligible for the protections if they have reasonable grounds to suspect the concerns they disclose.</p> <p>Better practice: Policies that were more aligned to the requirements explained the concept of 'reasonable grounds to suspect' when describing what types of reportable matters qualify for protection. This helps whistleblowers understand:</p> <ul style="list-style-type: none"> › the objective basis they must have to be eligible for the protections › that their motive is not relevant to them qualifying for protection. <p>For more information, see RG 270.53.</p>

The entity's measures to support and protect whistleblowers: s1317A(5)(c)

Required content	Observations
<p>Information about how the entity will support whistleblowers</p> <p>s1317A(5)(c); RG 270.106–RG 270.107</p>	<p>Some policies only stated that the entity would support and protect whistleblowers without describing how they would do this.</p> <p>Better practice: Some policies provided details of how the entity would support whistleblowers, such as through provision of employee support services or making case-by-case changes to an employee's working arrangements.</p>
<p>Information about how the entity will protect whistleblowers from detriment</p> <p>s1317A(5)(c); RG 270.109–RG 270.110</p>	<p>A few policies claimed that support or protection is conditional on whistleblowers making disclosures in good faith. Under the Corporations Act, a whistleblower's motive is not relevant to qualifying for the protections and a whistleblower does not need to satisfy a 'good faith' test.</p> <p>Better practices: Some policies explained:</p> <ul style="list-style-type: none"> › that the entity had designated people to support and protect whistleblowers, and that when appropriate and with whistleblowers' consent, such persons would be appointed to support individual whistleblowers and protect them from detriment (for more information, see RG 270.145(d)) › the entity's processes to assess and control the risk of detriment to whistleblowers (for more information, see RG 270.109 and <i>Good practice tip 9</i>), or › the training provided to personnel who receive or investigate reports (for more information, see RG 270.134).

How the entity will investigate whistleblower disclosures and ensure fair treatment of employees mentioned in qualifying disclosures, or to whom such disclosures relate: s1317A(5)(d)–(e)

Required content	Observations
<p>Information about how the entity will investigate disclosures that qualify for protection</p> <p>s1317A(5)(d); RG 270.117–RG 270.120</p>	<p>A small number of policies did not provide even a high-level statement about how the entity would investigate disclosures that qualify for protection.</p> <p>Better practices: Some policies provided:</p> <ul style="list-style-type: none"> › summaries of the steps the entity would take after it received a report, including by use of a flowchart, table or diagram (for more information, see RG 270.115–RG 270.120), or › information about how and when the results or findings about an investigation might be reported to an entity's board, and the board's oversight over certain types of investigations (for more information, see RG 270.123, RG 270.151–RG 270.154).

Required content	Observations
<p>Information about how the entity will ensure fair treatment of employees mentioned in qualifying disclosures, or to whom such disclosures relate</p> <p>s1317A(5)(e); RG 270.125–RG 270.127</p>	<p>Some policies stated that the entity would conduct fair assessments and investigations and ensure fair treatment but did not include details of how they would ensure fair treatment of employees who are mentioned in disclosures that qualify for protection, or to whom such disclosures relate.</p> <p>Better practices: Some policies included:</p> <ul style="list-style-type: none"> › the steps an entity would take to ensure the independence of those assessing or investigating allegations › transparent disclosure about roles and responsibilities for various aspects of an entity's whistleblower program, awareness of the potential for conflicts of interest to arise and the existence of measures to handle such conflicts (for more information, see RG 270.145–RG 270.146), or › explanations about how an entity would ensure procedural fairness in relation to employees mentioned in qualifying disclosures or to whom such disclosures relate, for example by providing an opportunity to respond to allegations while maintaining confidentiality of the whistleblower's identity (for more information, see RG 270.126–RG 270.127).

How the entity makes its policy available to officers and employees: s1317A(5)(f)

Required content	Observations
<p>Information about how the entity makes its policy available to officers and employees</p> <p>s1317A(5)(f); RG 270.128–RG 270.130</p>	<p>Not all policies explained how the entity would make its whistleblower policy available to its officers and employees.</p> <p>Better practice: Some policies included information about where the policy was located on the entity's intranet site (for more information, see RG 270.130).</p> <p>Separately, we observed that not all entities made their whistleblower policy publicly available on their websites.</p> <p>Better practice: Although not legally required, many entities had made their policies, or a version of their policies, publicly available on their websites. This enables eligible whistleblowers who are not current employees and officers to read the entity's policy and understand the channels available for whistleblower disclosures and how to access the entity's preferred reporting channels. For more information, see RG 270.138–RG 270.139.</p>