



## Fact sheet

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### Penalties for taking a reprisal against a whistleblower

Part 4A of Chapter 11 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act) contains protections for whistleblowers who make a protected disclosure. In our fact sheet [Protections for whistleblowers \(FS 003\)](#), we provide information on who is a whistleblower and what constitutes a protected disclosure. In this fact sheet we explain the penalties which may be imposed on a person who takes a reprisal against a whistleblower.

Under Part 4A of the RO Act, taking, or threatening to take a reprisal is a criminal offence.<sup>1</sup> Civil penalties may also apply.<sup>2</sup> Further, the Federal Court and Federal Circuit Court of Australia may make a range of orders against a person who took, or threatened to take a reprisal, or any other persons who assisted in the taking, or threatening of the reprisal.<sup>3</sup>

#### What is a reprisal? (s. 337BA)

A person (Person A) takes a reprisal if:

- Person A causes (by act or omission) **detriment** to another person (Person B) and:
  - Person A believes or suspects that Person B or any other person made or proposes to make a protected disclosure, or
  - Person A should have known that Person B or any other person made or proposes to make a protected disclosure.

However, Person A does not take a reprisal against Person B if they take administrative action that is reasonable to protect Person B from **detriment**.<sup>4</sup>

#### What is detriment (s. 337BA(2))?

Detriment includes (but it is not limited to) the following:

- dismissal of an employee
- injury of an employee in his or her employment
- alteration of an employee's position to his or her detriment
- discrimination between an employee and other employees of the same employer
- harassment or intimidation of a person
- harm or injury to a person, including psychological harm
- damage to a person's property
- damage to a person's reputation.

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<sup>1</sup> s. 337BE

<sup>2</sup> s. 337BD

<sup>3</sup> s. 337BB.

<sup>4</sup> s. 337BA(3).

## **Taking or threatening to take a reprisal is a criminal offence (s. 337BE)**

Taking or threatening to take a reprisal against a person is a criminal offence which is punishable by a maximum period of imprisonment of up to 2 years, a fine of up to 120 penalty units, or both.

### **Taking a reprisal (s. 337BE(1))**

Person A commits a criminal offence if the reason, or one of the reasons, they took a reprisal against Person B is because they believed or suspected that Person B (or another person) made or proposes to make a protected disclosure.

Person A may be prosecuted for taking a reprisal regardless of whether it is proven that Person B (or another person) has made or proposes to make a protected disclosure.<sup>5</sup>

### **Threatening to take a reprisal (s. 337BE(3))**

Person A commits an offence if they threaten Person B that they will take a reprisal against Person B (or another person) and:

- Person A intends Person B to fear that the threat will be carried out, or Person A is reckless as to Person B fearing that the threat will be carried out; and
- the reason, or one of the reasons, Person A made the threat was because they believed or suspected that Person B (or another person) made or proposes to make a protected disclosure.<sup>6</sup>

A threat to take a reprisal may be express, implied, conditional or unconditional.<sup>7</sup>

Person A may be prosecuted for threatening to take a reprisal regardless of whether Person B actually feared that the threat would be carried out.<sup>8</sup>

### **Civil remedies are available (s. 337BB)**

A number of persons, outlined below, may apply to the Federal Court or Federal Circuit Court for a civil remedy against the person taking, or threatening to take the reprisal (**the respondent**). The Court may grant an application for a civil remedy if they are satisfied:

- the respondent took or threatened to take, is taking or threatening to take, a reprisal against a person (**the target**)
- the respondent took or threatened to take a reprisal against the target because they believed or suspected that the target or any other person made a protected disclosure.

However, if the respondent satisfies the Court that their belief or suspicion was not the reason, or one of the reasons, they took or threatened to take the reprisal, the Court may not order a civil remedy except in the very limited circumstances set out in s. 337BB(3).

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<sup>5</sup> s. 337BE(2).

<sup>6</sup> s. 337BE(3).

<sup>7</sup> s. 337BD(4).

<sup>8</sup> s. 337BD(5).

### **What civil remedies are available (s. 337BB(1))?**

The Court may make any one or more of the following orders:

- a compensation order for loss, damage or injury as a result of the reprisal or threat
- an injunction to prevent, stop or remedy the effects of the reprisal or threat
- an order requiring the respondent to apologise to the target for taking or threatening to take the reprisal
- if the reprisal involved termination of the target's employment, reinstatement of the target's employment in their former position or at a comparable level
- if the Court thinks it is appropriate, an order requiring the respondent to pay exemplary damages to the target
- any other order the Court thinks appropriate.

### **Who may apply for a civil remedy (s. 337BB(4))?**

The following may apply to the Federal Court or Federal Circuit Court for a civil remedy:

- the target of the reprisal
- the Commissioner
- the General Manager of the Fair Work Commission
- the Fair Work Ombudsman.

### **Third parties may be liable (s. 337BB(6))**

If the Court has the power to make an order against the respondent for taking or threatening to take a reprisal, the Court may also make any other orders it thinks appropriate against a person who:

- aided, abetted, counselled or procured the conduct constituting the reprisal
- induced the conduct, whether through threats or promises or otherwise
- failed to fulfil a duty to prevent, refrain from, or take reasonable steps to ensure other persons' under their control prevented or refrained from, the conduct
- was in any way (directly or indirectly) knowingly concerned in or a party to the conduct, or
- conspired with others to take the reprisal.

### **Civil penalties may apply (s. 337BD)**

A civil penalty of up to 100 penalty units may also be imposed on a person who takes, or threatens to take a reprisal.

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