



Protected disclosure (‘whistleblower’) scheme

Part 4A, Fair Work (Registered Organisations) Act 2009

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Overview

- Making disclosures
- What makes it protected
- What is 'disclosable conduct'
- What happens when a disclosure is received
- Investigation (and referral to other agencies)
- Protections for disclosers
- What can you and your organisation do?

Highlights

- Commenced in May 2017, as part of the amendments to the *Fair Work (Registered Organisations) Act 2009*
- **More categories of people can disclose** and be protected
- **More agencies** that can receive disclosures
- About a broader range of conduct
- Mandatory **investigation** if certain criteria are met
- **Legislated timeframes** for allocation (14 days) and investigation (90 days)
- **Civil and criminal sanctions** if reprisals taken against whistleblowers

Key concepts

- Discloser
- Organisation
- Recipient
- Disclosable conduct
- Authorised official

Who can make a protected disclosure?

They could be from (or associated with) an organisation or branch as:

- an **officer** or **former officer**
- an **employee** or **former employee**
- a **member** or **former member**
- a **contractor** or **former contractor** supplying services or goods
- an **officer, employee** or **former employee** of such a **contractor**
- or any person who has or **has had a transaction** with an organisation or branch

And a **lawyer** on behalf of a discloser in one of the above categories

(Section 337A, RO Act)

What is an 'organisation'?

An organisation registered under *Fair Work (Registered Organisations) Act 2009*

(Section 6)

A disclosure can also involve:

- a branch of an organisation; and
- officers and employees of an organisation or branch

(Section 337A)

Who can receive a disclosure?

Nine categories of person can receive:

- the RO Commissioner
- a member of the staff assisting the RO Commissioner
- the General Manager of the FWC
- an FWC (Tribunal) Member
- a member of the staff of the FWC
- the Commissioner of the ABCC
- a Deputy Commissioner of the ABCC
- an ABCC Inspector
- a member of the staff of the Office of the Fair Work Ombudsman

(Section 337A)

Which disclosures qualify for protection?

To qualify for protection under the Act, the **discloser** must have **reasonable grounds to suspect** that the information indicates one or more instances of **disclosable conduct by**:

- the **organisation** or a **branch** of the organisation, or
- an **officer** or **employee** of the organisation or of a branch of the organisation

(Section 337A)

What is 'disclosable conduct'?

An act or omission that:

- (a) **contravenes, or may contravene**, a provision of the **RO Act**, the ***Fair Work Act 2009*** (FW Act) or the ***Competition and Consumer Act 2010*** (C&C Act); or
- (b) constitutes, or may constitute, an **offence** against a law of the Commonwealth

(Section 6)

Examples of contraventions

The following are just some examples of disclosable conduct if engaged in by an organisation or its officials:

- False or misleading statement in application (Div.136, Criminal Code)
- Refusing membership of an organisation when eligible (s.166, RO Act)
- Using organisation's resources to favour one candidate over another in an organisation's elections (s.190, RO Act)

Examples of contraventions (continued)

- Breach of duties as an officer or employee in relation to financial matters (ss.285 to 288, RO Act)
- Coercion to exercise or not exercise a workplace right (s.343, FW Act)
- Adverse action due to membership / non-membership (s.346, FW Act)
- Breach of right of entry notice requirements (s.487, FW Act)
- Hindering or obstructing an entry permit holder (s.502, FW Act)
- Secondary boycotts (s.45D, C&C Act)

**Which of the following are
'instances' of disclosable conduct
(and why)?**

Is it Disclosable conduct?

1. “Our organiser didn’t declare his assault convictions on his entry permit application”.

QUESTION TIME:

Is it Disclosable conduct?

2. “Some of the Committee of Management members in our Association are ‘on the take’”.

QUESTION TIME:

Is it Disclosable conduct?

3. “Payments from employer X to the union are not being declared in the financial statements”.

QUESTION TIME:

Is it Disclosable conduct?

4. “My employer [not a registered organisation] is breaching the EBA”.

QUESTION TIME:

Is it Disclosable conduct?

5. “Our accounts weren’t actually audited by a registered auditor”.

QUESTION TIME:

Is it Disclosable conduct?

6. “The union is not supporting me in my dispute and is now not returning my calls”.

How may a disclosure be made?

A disclosure may be made:

- verbally or
- in writing

Is there any need to mention the relevant Act?

Allocating a disclosure

IF the disclosure meets the requirements to be a protected disclosure, i.e.:

1. Made by an **eligible discloser** (e.g. member, etc.); and
2. Concerning the **registered organisation / its official(s) / employee(s)** and
3. Concerning **disclosable conduct**

THEN the recipient must **allocate the handling of the disclosure to one or more authorised officials.**

(Section 337C)

Who is an 'authorised official'?

- An ***authorised official*** means
 - the RO Commissioner (and can include his Delegate)
 - the General Manager of the FWC
 - an FWC (Tribunal) Member; or
 - the Fair Work Ombudsman

(Section 6)

- A matter can be allocated to one or more authorised officials

What about allegations of criminal conduct?

- Police agencies are not authorised officials.
- However, the RO Act makes provision for notifying Police of criminal conduct.
(Section 337CD(1))
- Similar provisions for disclosure to the ACCC for offences against the *Competition and Consumer Act*
(Section 337CD(3))
- In some circumstances – criminal conduct carrying a penalty of 2 or more years imprisonment – Police must be informed.
(Section 337CD(2))

Informing the discloser

- The recipient must inform the discloser of the allocation of the matter to an authorised official.
- But not if the discloser is not contactable

(Reg 176H(4))

- Making a protected disclosure is a significant step for an individual, so the ROC will usually try to seek the discloser's consent to contact the organisation.
- Some disclosers will seek to remain anonymous.

Protections for the discloser

Protections from reprisal action:

- civil remedies (including damages and injunctions);
- a civil penalty provision; and
- a criminal offence provision

(Sections 337BB, 337BD and 337BE)

Protections for the discloser

A discloser who falls within the scheme will not be subject to:

- any criminal or civil liability for making the disclosure, or
- the enforcement of any contractual or other right or remedy against them on the basis of their disclosure.

A discloser receives qualified privilege in defamation proceedings where the discloser provided the information without malice.

(Section 337B)

What is a reprisal?

A person ('Bart') ***takes a reprisal*** against another person ('Lisa') if:

Bart causes '**detriment**' to Lisa (either an act or omission) **and** when the act or omission occurs, Bart **believes or suspects** that Lisa or any other person:

- made;
- may have made;
- proposes to make;
- or could make

a disclosure that qualifies for protection

(or should have known that)

(Section 337BA (1))

What is 'detriment'?

Detriment includes (but is not limited to):

- a) dismissal of an employee;
- b) injury of an employee in their employment;
- c) alteration of an employee's position to their detriment;
- d) discrimination between an employee and other employees;
- e) harassment or intimidation of a person;
- f) harm or injury to a person, including psychological harm;
- g) damage to a person's property;
- h) damage to a person's reputation.

BUT, it is not reprisal action to the extent that it is administrative action reasonable to protect the person from detriment.

(Section 337BA)

Consequences of taking reprisal action

An application to the Federal Court may be made for:

- an **order for compensation** for loss, damage or injury;
- an **injunction** to prevent or stop the effects of, or the threat of, the reprisal;
- **reinstatement** of employment.

The Federal Court may also make orders against a person who has aided, abetted, counselled, procured or induced the taking of (or threat of) reprisal against another person.

Consequences of taking reprisal action

An application to the Federal Court may be made by any of the following:

- the person who is the target of the reprisal
- the Registered Organisations Commissioner
- the General Manager of the Fair Work Commission
- the Fair Work Ombudsman

Taking (or threatening) a reprisal against a discloser or another person is also a **criminal offence**.

Investigation of disclosure

If a disclosure qualifies for protection and is allocated, the authorised official must investigate

UNLESS

the regulations give a discretion not to investigate, e.g.:

- if the matter is (or has been) the subject of another investigation;
- if the matter is the subject of other proceedings dealing with it (e.g. Court proceedings).

Investigation of disclosure

The authorised official may obtain information from such persons, and make such enquiries, they think appropriate.

Consistent with the ROC's practice in other matters:

- our aim is to achieve compliance; and
- we will invite cooperation and voluntary compliance.

PLEASE NOTE: Protections for disclosers continue to apply even if there is no investigation.

(Section 337CA)

Protection for witnesses

A person is not subject to any criminal or civil liability because the person gives information, produces a document or answers a question as part of an investigation AND it is relevant to the investigation.

However, the protection does not apply to:

- a person's own liability for committing an offence; or
- their own conduct in relation to the information, document or answer.

Investigations: time limit

- An investigation under Part 4A (protected disclosure provisions) must be completed **within 90 days** after the disclosure has been allocated to an authorised official.
- The Commissioner may extend, or further extend, the 90-day period.
- If extended, the discloser is to be informed of:
 - **the extension and the reasons** for it; and
 - the progress of the investigation.
- Failure to complete the investigation within the time limit does not affect its validity.

(Section 337CB)

Outcome of investigation: informing the discloser

On completing a protected disclosure investigation, the authorised official must, as soon as reasonably practicable inform the discloser:

- that the authorised official has completed the investigation

AND

whether the authorised official will:

- be taking further action;
- be recommending that another agency take action;
- not be taking further action.

(Regulation 176M)

Outcome of investigation: Report

- On completing a protected disclosure investigation, the authorised official must prepare a report of the investigation which sets out:
 - the **matters considered** in the course of the investigation; and
 - the **duration** of the investigation; and
 - the authorised official's **findings (if any)**; and
 - the **action** (if any) that has been, is being, or is recommended to be, taken; and
 - **any claims made about**, and any evidence of, **detrimental action** taken against the discloser, and any response to those claims and that evidence.

(Regulation 176M)

What can you and your organisation do?

- **Step 0: Comply with the legislation** –disclosures must concern alleged breaches of RO Act, FW Act, C&C Act or alleged offences.
- **Step 1: Develop your own** processes (including internal policies for addressing disclosures) in order to for deal with matters
- **Step 2: Investigate complaints** – this can assist in both resolving matters and providing the authorised official with relevant information about the matter (and how it has been dealt with).
- **Step 3: Don't take reprisals** before, during or after a disclosure – the consequences include civil and criminal remedies.
- **Step 4**: Discourage others from taking reprisals.

- **Questions ?**



For More Information or to Contact Us

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<http://roc.gov.au/>

<http://www.roc.gov.au/whistleblowers/whistleblowers-organisations>

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