



# Making a protected disclosure

## What is a protected disclosure?

A protected disclosure is a report or complaint about disclosable conduct.

A person who makes a protected disclosure is referred to as the 'discloser'. Often, the discloser may also be referred to as a 'whistleblower'.

Reports or complaints about disclosable conduct can be raised with the registered organisation, which in most cases will be capable of addressing the matter and taking appropriate action. Otherwise, disclosable conduct can also be reported to one of the relevant external agencies outlined below.

Eligible disclosers are encouraged to 'speak up' and voice their concerns as they relate to breaches of rules, policies and disclosable conduct. Eligible disclosers should be able to raise their concerns without fear of reprisal.

Importantly, the RO Act protects eligible disclosers who make a report of disclosable conduct by the organisation, its officers or employees. This protection is also afforded to those who report the matter to the registered organisation that employs them or of which they are a member.



**A PERSON**

A member or former member of a registered organisation

An officer or former officer of a registered organisation

A person who had/has contract for supply of goods or services or had/has any other transaction with the organisation or branch, or its employees or officers, or of a branch of an organization who is or was acting on behalf of the organisation or branch

An officer, former officer, employee or former employee of the person in the above point.



**MAKES A DISCLOSURE**

About disclosable conduction which includes an act of omission that:

- Contravenes, or may contravene, a provision of the *RO Act*, *Fair Work Act 2009*, or the *Competition and Consumer Act 2010*, or
- Constitutes, or may constitute, an offence against a law of the Commonwealth.



**ABOUT AN ORGANISATION**

The discloser must have reasonable grounds to suspect that the information disclosed relates to conduct by a registered organisation, its branch or its officers or employees.



**TO THE RIGHT PERSON**

The Registered Organisations Commissioner (ROC) or their staff

The General Manager or the staff of the Fair Work Commission (FWC)

An FWC tribunal member

The Australian Building and Construction Commissioner (ABCC), their Deputy or an inspector of the ABCC

The staff of the Fair Work Ombudsman (FWO)

## Who can make a protected disclosure and be a whistleblower?

The whistleblower regime protects a number of different types of people if they choose to make a disclosure. A person is able to make a disclosure if they are:

- A member or former member of a registered organisation
- An officer or former officer of a registered organisation
- An employee or former employee of a registered organisation
- A person who has or has had a contract for supply of goods or services or has or has had any other transaction with the organisation or branch, or its officers or employees
- A person who has or had a contract for supply of goods or services or has had any other transaction with an officer or employee of organisation or of a branch of an organisation who is or was acting on behalf of the organisation or branch;
- An officer, former officer, employee or former employee of the person who has the contract or transaction

This is a very wide list of people who are able to contact an agency to make a disclosure. However to be protected the disclosure must be made to the right person and be about 'disclosable conduct'.

## **What is 'disclosable conduct'? What can a whistleblower disclose?**

While any information can be voluntarily given to an agency, only certain disclosures are protected under the RO Act. These include disclosures that the person:

- suspects on reasonable grounds, and
- which indicate that an organisation, a branch, or its officers or employees may have contravened a provision of the RO Act, the Fair Work Act, the Competition and Consumer Act 2010 or constitutes an offence against a law of the Commonwealth.

If all these things are present, the disclosure could be protected under the RO Act if it is made to the right person.

## **Who does the whistleblower need to disclose to?**

If you would like to make a complaint about disclosable conduct, you can report your disclosure to the registered organisation to which you belong or make the disclosure to one of the following external agencies:

- The Commissioner or the staff of the ROC
- The General Manager or the staff of the FWC
- An FWC tribunal member
- The ABCC Commissioner, their Deputy or an inspector of the ABCC
- The staff of the FWO

Any of these people are able to receive a disclosure from a whistleblower and it will trigger the whistleblower process.

A whistleblower is also able to give the information to their lawyer and have their lawyer contact one of the people in the above list with the information.

A person does not need to use the word 'whistleblower' to be protected, however it may help the agency receiving the information to recognise the importance of the disclosure. The person also has no obligation to give the agency their name or contact details, however this can have implications as to how or whether a disclosure is investigated.

## **What happens next?**

Whistleblower disclosures must be investigated unless an 'authorised official' determines that it fits one of the exceptions in the regulations.

In circumstances where a disclosure is made to a registered organisation, the organisation will assess the matter according to the internal rules and policies to determine the best way forward. If the discloser is not satisfied with the action taken by the organisation, the discloser can always raise the matter with the relevant external agency.

The RO Act, as demonstrated below, has short timeframes that an agency must adhere to when it receives a disclosure.



Extensions of time can be sought if more time is needed to complete an investigation.

The first step will be for the agency to allocate the disclosure to an authorised official who will be either:

- The Commissioner of the ROC
- The General Manager of the FWC
- An FWC tribunal member
- The Fair Work Ombudsman

It may not be the person in charge of the agency that the whistleblower contacted; agencies are able to allocate the disclosure to another agency.

Once the disclosure is allocated the investigation will begin unless the authorised official believes that it fits one of the prescribed reasons in the Regulations not to investigate. These include:

- the information does not, to any extent, concern serious disclosable conduct;
- the disclosure is frivolous or vexatious;
- the discloser has informed the investigator that the discloser does not wish the investigation to be pursued, and the investigator is reasonably satisfied that there are no matters concerning the disclosure that warrant investigation;
- it is impracticable for the disclosure to be investigated:
  - because the discloser's contact details have not been disclosed;
  - or because the discloser refuses or fails, or is unable, to give, for the purposes of the investigation, such information or assistance as the investigator asks the discloser to give;
  - or because of the age of the information;
- because the information is being, or has been, dealt with adequately in another manner (refer to regulation 176G).

A whistleblower can remain anonymous throughout an investigation. However, while a whistleblower can keep their identity anonymous, it may impact on whether the investigation is continued by the authorised official.

A person who makes a disclosure, and provided their contact details, will be notified of the steps as the process progresses.

## Who is notified about the disclosure and when?

The person who makes a disclosure can seek to remain anonymous, however they will not be contacted by the agency with updates on the investigation. Additionally if the agency requires more information or finds that it is impractical to progress the investigation because they cannot contact the whistleblower this may result in the investigation being discontinued or not started.

If the person who makes a disclosure provides their name and contact information the agency will provide notifications to the person when:

- it is allocated to the authorised officer
- the investigation commences
- the investigation is discontinued
- an extension of time is granted
- the investigation is completed

The organisation may be contacted, if required, as part of the investigation. This may involve sharing details of the disclosure to the organisation to ensure that they are able to properly answer the allegations made against them. In some cases, this may involve identifying the whistleblower to the organisation. There is no guarantee under the RO Act of anonymity, however, there are times when the agencies need to seek the whistleblower's consent to disclose their information.

There are however, protections against reprisals.

## **What are reprisals and what are the penalties for breaching protections of whistleblowers?**

If a person makes a disclosure they are protected against reprisals being taken against them for making that disclosure. The whistleblower is protected against many types of conduct including:

- any civil or criminal liability for making the disclosure (the person may still be liable for their conduct revealed by the disclosure)
- any contractual or other remedy being enforced on the basis of the disclosure
- any form of reprisal, which is detriment being caused by another person because they made the disclosure, including:
  - dismissal
  - injury in their employment
  - discrimination between them and other employees
  - harassment or intimidation
  - harm or injury (including psychological injury)
  - damage to property
  - damage to reputation

The list is not exhaustive and other forms of detriment, caused by action or inaction, may also be protected against.

## **What are the civil and criminal penalties for breaching the protections of whistleblowers?**

The Federal Court or Federal Circuit Court can order significant civil remedies including:

- compensation for loss, damage or injury
- injunctions to prevent, stop or remedy the effect of reprisals or threats
- an order requiring an apology
- reinstatement
- exemplary damages
- any other order the court thinks appropriate

There are also civil penalties of up to 100 penalty units for taking or threatening to take a reprisal against a whistleblower.

There are also criminal offences that attach to the protections. A person commits an offence if they take or threaten a reprisal against a whistleblower and the reason for the reprisal was their belief that the whistleblower made, may have made, proposes to make or could make a protected disclosure. The offence is punishable by imprisonment of up to 2 years, a fine of 120 penalty units or both.

## **Discloser's guide to raising concerns with registered organisations**

This guide has been created to assist people who are considering raising a matter such as a complaint about service, breach of internal rules or policies or disclosable conduct as defined under the RO Act in relation to an officer, employee or member of a registered organisation, or one of its branches.

This guide should be read in conjunction with your organisation's internal rules and policies and with all of the ROC's supporting resources available online.

[Discloser's guide to raising concerns with registered organisations \(DOCX 142.3KB\)](#)

## **Contact us**

To make a protected disclosure to the ROC, you can call 1300 341 665. Alternatively, you can also send an email to: [regorgs@roc.gov.au](mailto:regorgs@roc.gov.au)