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Guide for Registered Organisations Receiving Reports of Disclosable Conduct

Guidance Note



Guide for Registered Organisations Receiving Reports of Disclosable Conduct

This Guide has been created to assist registered organisations, designated officials/managers, and committees of management understand their role in managing complaints of breaches of internal rules or policies or reports of Disclosable Conduct.

The reporting of Disclosable Conduct attracts particular protections under the *Fair Work (Registered Organisations Act 2009)* (the **RO Act**), in particular to protect disclosers and others from reprisals being taken against them.

This Guide explains what Disclosable Conduct is, what protections are available, and who may be responsible within registered organisations for managing complaints and/or reports of Disclosable Conduct.

It should be read in conjunction with the registered organisation's internal rules and policies and with the supporting resources available on the Commission [website](#), including:

- Discloser's Guide to raising concerns within registered organisations;
- Manager's guide to handling matters within registered organisations; and
- Manager's investigation checklist.

This Guide covers eight (8) key issues:

- i. What is Disclosable Conduct?



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- ii. Who can report Disclosable Conduct?
- iii. Who is responsible for receiving reports of Disclosable Conduct?
- iv. What kinds of matters might designated officials/managers be asked to deal with?
- v. Protection from reprisals
- vi. Confidentiality and anonymity
- vii. What actions can be taken after investigating the matter?
- viii. What happens when the registered organisation cannot investigate the matter internally?



Part 1: What is Disclosable Conduct?

Disclosable Conduct is defined in section 6 of the RO Act:

Disclosable conduct means an act or omission that:

1. contravenes, or may contravene, a provision of this Act, the *Fair Work Act* (FW Act) or the *Competition and Consumer Act 2010* (C&C Act); or
2. constitutes, or may constitute, an offence against a law of the Commonwealth.

Some examples include, but are not limited to:

- false or misleading statement in an application (Division 136, Criminal Code)
- refusing membership of a registered organisation when eligible (section 166, RO Act)
- using a registered organisation's resources to favour one candidate over another in a registered organisation's elections (section 190, RO Act)
- breach of duties as an officer or employee in relation to financial matters (Sections 285 to 288, RO Act)
- coercion used to exercise or not exercise a workplace right (section 343, FW Act)
- adverse action due to membership /non-membership (section 346, FW Act)
- breach of right of entry notice requirements (section 487, FW Act)
- hindering or obstructing an entry permit holder (section 502, FW Act)
- secondary boycotts (section 45D, C&C Act)
- cartel conduct (Part 4, Division 1, C&C Act)
- dishonest or fraudulent conduct, including bribery and/or corruption.

Part 2: Who can report Disclosable Conduct?

The following people can report Disclosable Conduct in relation to a registered organisation:

- an officer or former officer of the registered organisation, or one of its branches;
- an employee or former employee of the registered organisation, or one of its branches;
- a member or former member of the registered organisation, or one of its branches; or



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- a person who is (or was) a supplier to, or had a transaction with, the registered organisation, or one of its branches, officers or employees;
- an employee (or former employee) of a person who was a supplier to or had a transaction with a registered organisation, or one of its branches, officers or employees; or
- a lawyer on behalf of a discloser in one of the above categories.

Typically, the person who raises a report of Disclosable Conduct is referred to as a discloser.

Part 3: Who is responsible for receiving reports of Disclosable Conduct?

Receiving reports of Disclosable Conduct within the registered organisation

a. Officers, employees and members

A discloser can raise the matter through normal channels within the registered organisation. Depending on the organisation, normal channels may include:

- a designated official or manager;
- a person from the relevant committee or from the human resources team;
- a senior official or the National Office;
- the organisation's Whistleblower Investigation Officer;
- in the case of a member, a local representative who is employed by the registered organisation (such as an organiser or industrial officer).

b. Suppliers/persons who have had a transaction

Suppliers and persons who have had transactions with registered organisations may consider reporting matters through their account manager in the registered organisation. If for some reason it is not appropriate to report the matter through the account manager, they may also consider reporting the matter through the alternative options available to officers and employees above, or directly to the General Manager other appropriate external agency (as outlined below).



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c. Disclosures to the Fair Work Commission and other external agencies

Where a matter is about Disclosable Conduct, the discloser (whether internal or external to the organisation) is entitled to raise their concerns directly with the General Manager or another agency designated to receive disclosures.

If the disclosure qualifies as a protected disclosure, the discloser will be afforded protection in the terms outlined in the RO Act. As such, reprisal action taken against a person, because of a disclosure or possible disclosure, is prohibited.

In circumstances where the discloser has raised their concern directly with the General Manager or another agency, and it meets the definition of a protected disclosure under the RO Act, the disclosure will be allocated to an authorised official in the Fair Work Commission or another prescribed agency who will be responsible for investigating it.

The Fair Work Commission will seek the discloser's consent to relation to investigating the matter.

For the purpose of the investigation, the authorised official may request further information from the organisation or from other parties. A designated official/manager from the organisation may need to respond to the Fair Work Commission or another agency's request for further information.

When the investigation is finalised (and where it is appropriate to do so), the organisation will be notified of the outcome of the investigation, particularly where further action (including the taking of remedial steps) by the organisation may be necessary.

Part 4: What kinds of matters could a designated official/manager be asked to deal with?

As a designated official/manager within the organisation, you may be approached to deal with a range of matters such as complaints about service, a breach of internal rules or policies, or a concern relating to Disclosable Conduct. It is important that you are aware of, and can distinguish between the types of matters that may be raised with you, so you can take the appropriate action.

Some examples of matters that you may be required to deal with are:

a. Complaints



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A person believes that the Organisation:

- supplied them with a level of service that they believe to be unreasonable;
- supports a policy that they do not agree with; or
- needs to take action in relation to some other matter that they are dissatisfied with.

While Complaints may be seen as trivial to some, they may be of significance (particularly to the complainant) and there may be good reason they have been raised. In dealing with them, it may be the case that a simple adjustment or improvement in communication is necessary.

Even in cases where there is no formal remedy, it is important that Complaints are handled appropriately as they may be an indicator of larger issues, or mishandling can result in further, more serious Complaints.

b. Alleged breaches of internal rules or policies

Internal rules or policies refer to the powers and duties that are set out in the Organisation's rule book. The RO Act specifies what the rules of Organisations are required to include, and provides for the powers and duties of committees and the officers (section 141(1)(b)(i)). It also provides external mechanisms for the performance and enforcement of rules (sections 164 and 164A).

Examples include:

- disciplinary procedures not being followed;
- members not being able to participate in the affairs of the organisation;
- the Organisation, its officers, employees and members, otherwise not abiding by the Organisation's own rules;
- other grievances by a member, employee or officer of an organisation or a branch of the organisation that may not amount to a contravention of the law. Typically these can fall under the Human Resources area of responsibility; or
- any other breach of an internal policy of the organisation by a member, employee or officer of an organisation or a branch of the organisation.

Potential breaches of internal rules and policies should be taken seriously, and time made to assess and deal with them in accordance with the processes set out in the organisation's rules. It is in the



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Organisation's best interests to deal with these matters appropriately from the outset in order to ensure that it is meeting its obligations and complying with its own rules.

c. Reports of Disclosable Conduct

Disclosable Conduct is conduct, as defined in the RO Act, that may be reported to the General Manager or other responsible external agencies, which amounts to a suspected contravention of a Commonwealth law.

Disclosable Conduct is defined in section 6 of the RO Act as follows:

Disclosable conduct means an act or omission that:

- a) contravenes, or may contravene, a provision of this Act, the *Fair Work Act* or the *Competition and Consumer Act 2010*; or
- b) constitutes, or may constitute, an offence against a law of the Commonwealth.

Some examples include:

- false or misleading statements in application (Division 136, Criminal Code);
- refusing membership of an organisation when eligible (section 166, RO Act);
- using organisation's resources to favour one candidate over another in an organisation's elections (section 190, RO Act);
- breach of duties as an officer or employee in relation to financial matters (sections 285 to 288, RO Act);
- coercion to exercise or not exercise a workplace right (section 343, FW Act);
- adverse action due to membership/non-membership (section 346, FW Act);
- breach of right of entry notice requirements (section 487, FW Act);
- hindering or obstructing an entry permit holder (section 502, FW Act);
- secondary boycotts (section 45D, C&C Act);
- cartel conduct (Part 4, C&C Act);



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- dishonest or fraudulent conduct (including bribery and/or corruption) by an employee or officer of an organisation or branch.

Although Disclosable Conduct can be reported to external agencies, such as the Fair Work Commission, in some cases the organisation may be capable of dealing with the matter to reach an appropriate resolution.

As a designated official/manager, you may be asked to assess or investigate reports of Disclosable Conduct. The Fair Work Commission's [Designated Official and Managers Guide to Handling Matters within Organisations](#) – available on the Fair Work Commission's website – provides comprehensive information on investigating complaints and/or breaches of internal rules/policies.

Part 5: Protection from reprisals

It is important to ensure that people who raise Protected Disclosures are not the subject of reprisals or threatened reprisals. For example, if the organisation has a Whistleblower Policy, consider the measures that need to be applied internally to ensure that reprisals and threatened reprisals are not taken against the discloser or others.

Protection under the RO Act

The RO Act provides protection from reprisal to a person who makes (or is believed or suspected to have made) a 'protected disclosure'. A protected disclosure is defined in the RO Act. To qualify as a protected disclosure, the disclosure must:

- be made by an eligible discloser (as listed in section 337A of the RO Act); and
- be about suspected Disclosable Conduct (as defined in section 6 of the RO Act, i.e. a suspected contravention of a relevant Commonwealth law); and
- be capable of being reported to an authorised recipient in a relevant government agency.

Importantly, the RO Act protects an eligible disclosure from reprisal even if it is reported internally to the registered organisation. This is because section 337BA of the RO Act provides that a disclosure is protected from reprisal under the RO Act if the person made, or could have made, the disclosure to the Fair Work Commission or other authorised recipient.



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Section 337BA provides protection where:

- i. A person (the first person) takes a reprisal against another person (the second person) if
 - a. The first person causes (by act or omission) any detriment to the second person; and
 - b. When the act or omission occurs, the first person:
 - i. believes or suspects that the second person or any other person made, may have made, proposes to make **or could make a disclosure that qualifies for protection under this Part;**
or
 - ii. should have known that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part.

This confirms that under the RO Act, if Disclosable Conduct is raised within the Organisation by an eligible person, they will be afforded the same protection from reprisal as if they had reported the eligible disclosure to the Fair Work Commission or another authorised recipient in an external agency.

The [Fact Sheet Protection for Whistleblowers \(FS003\)](#) – available on the Fair Work Commission’s website – provides comprehensive information on the protections available.

Reprisals

A discloser is protected from reprisal being taken against them, to their detriment (whether by act or omission), as a result of making that protected disclosure. The range of conduct that may be a ‘detriment’ is broad.

Detriment is defined in section 337BA of the RO Act as follows:

Detriment includes (without limitation) any of the following:

- a. Dismissal of an employee;
- b. Injury of an employee in his or her employment;
- c. Alteration of an employee’s position to his or her detriment;
- d. Discrimination between an employee and other employees of the same employer;



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- 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.

Other examples might include preventing a person from accessing training and development opportunities available to others, etc.

Reprisals may be the subject of criminal penalties, civil penalties or other civil remedies (such as reinstatement, injunctions, etc.) if the disclosure is the reason (or part of the reason) for the reprisal action being taken.

A person who makes a protected disclosure 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.

However, it is important to understand that if a person makes a protected disclosure, they are not exempt from the consequences of their own misconduct.

Importantly, the RO Act protects an eligible disclosure from reprisal even if it is reported internally to the organisation in the first instance. This is because section 337BA of the RO Act stipulates that a discloser is protected under the RO Act if the person made, or could have made, the disclosure to the Fair Work Commission or other authorised recipient.

Part 6: Confidentiality and Anonymity

Confidentiality

Reports of Disclosable Conduct received by the Fair Work Commission will be dealt with confidentially. A discloser's consent will be sought by the Fair Work Commission before a formal investigation is undertaken, or before other parties are notified of the matter.



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Reports of Disclosable Conduct that are made directly to a registered organisation should also be dealt with sensitively, having regard to the discloser's privacy and their protection from reprisals.

Anonymity

As a person within the organisation responsible for handling matters, you may receive an anonymous report of wrongdoing. Anonymous reports have significant limitations that may inhibit a proper and appropriate inquiry or investigation. These limitations may include the inability to gather additional particulars to assist the inquiry/investigation. Even so, anonymous reports should be taken seriously, with all reasonable steps undertaken and appropriate action taken, including, where warranted, investigation.

The Fair Work Commission's [Designated Official and Managers Guide to Handling Matters within Organisations](#) – available on the Fair Work Commission's website – sets out the steps that you should consider as part of carrying out an investigation.

Part 7: What happens after a designated official/manager has investigated a report of Disclosable Conduct?

Reporting Disclosable Conduct to your registered organisation

The action the registered organisation takes after investigating a matter may depend on the internal rules and policies in place.

An investigation could result in one of the following taking place:

- a satisfactory explanation can be provided in relation to the matter;
- the matter is resolved by speaking to one or more parties;
- the matter is recorded and monitored at that point in time;
- a decision is made to conduct an investigation;
- the matter is referred to another agency, or
- a combination or variation of the above.



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Part 8: What if the designated official/matter cannot internally investigate the matter?

Disclosable Conduct is defined in Part 2 of this Guide. If the organisation has received a report of Disclosable Conduct, made an assessment, and is unable to investigate the matter (or it is inappropriate to do so), the designated official/manager may ask the discloser to report the matter to the Fair Work Commission, or ask for their consent to report the matter to the Fair Work Commission on their behalf.

Once the Fair Work Commission receives a report of Disclosable Conduct, an assessment is made of whether it amounts to an eligible protected disclosure under the RO Act, and whether the Fair Work Commission is responsible for handling the matter, or the Police (in the case of a suspected criminal offence).

If the disclosure meets eligibility requirements, it is allocated to an authorised official within the Fair Work Commission or another responsible prescribed agency, who will be responsible for investigating the disclosure. The authorised official has 90 days to investigate after the disclosure has been allocated to them. This timeframe may be extended by the General Manager of the Fair Work Commission.

For the purpose of the investigation, the authorised official may request further information from the discloser, the organisation and others as part of the investigation.

When the investigation is finished, where appropriate, the organisation will be notified of the outcome of the investigation, particularly where further action (including the taking of remedial steps) by the organisation may be sought.



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Further information	Website/Email	Telephone
Fair Work Commission Mail: GPO Box 1994, Melbourne VIC 3001	www.fwc.gov.au regorgs@fwc.gov.au	1300 341 665
Fair Work Ombudsman	www.fairwork.gov.au	13 13 94
Australian Competition and Consumer Commission	www.accc.gov.au	1300 302 502

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1	March 2019	
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This Guide is not intended to be comprehensive. It is designed to assist in gaining an understanding of the RO Act's whistleblower scheme. The Fair Work Commission does not provide legal advice.