Fair Work Commission

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RO POD episode 55 – Common protected disclosure issues

Speaker Key

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AN: Welcome to RO pod: Talking about governance of registered organisations with the Registered Organisation Services branch at the Fair Work Commission, the official podcast about the regulation of unions and employer associations. In this podcast we'll share essential information, uncover handy hints and tips and reveal our best tools for proactive compliance with the complex legislative requirements.

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SG: Hello and welcome to RO pod. I'm Sam Gallichio and I'm a Senior Adviser in the Education and Advice team of the Fair Work Commission's Registered Organisations Services Branch. In today's episode we will be talking about whistleblowing, that is, protected disclosures under the *Fair Work (Registered*

Organisations) Act 2009, or as we commonly refer to it as, the 'RO Act'. We'll look at recurring issues we're seeing in this space and provide practical tips to assist you to assess whether your concerns are something that fall within the Commission's protected disclosures jurisdiction.

Here with me today is MaryAnne Guina, who is the Assistant Director of the Governance and Protected Disclosures Team. Welcome MaryAnne.

MG: Hello Sam, thanks for having me here today.

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SG: You're welcome, it's great to have you join us. Our listeners may not be well-versed about the role of protected disclosures in the regulatory work of the Commission. Can you give us a brief overview of the regime that's in place?

MG: Sure Sam, I'd be happy to. In essence, the Commission investigates registered organisations and individuals who may have acted or possibly failed to act, in a way that contravenes the RO Act, the *Fair Work Act 2009*, or the *Competition and Consumer Act 2010*, or may amount to an offence under a Commonwealth law. This conduct, which is called 'disclosable conduct,' can be a valuable source of information for us to identify and investigate potential breaches of the RO Act. The Commission receives information about alleged disclosable conduct from eligible persons, which the RO Act calls disclosers, and it's also known as whistleblowing.

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SG: And who is an eligible person under the RO Act?

MG: Well, to be an eligible person, that person must fall into the category of a current or former member, employee, or officer of an organisation, or be someone who has interacted with the organisation through a contract or through the provision of a service. If they don't fall into one of these categories, we are unable to deal with their disclosure as a protected disclosure.

SG: Does the eligible person have to make the disclosure to a particular person for it to be protected?

MG: Yes they do. They can disclose to the General Manager, or a staff member or a tribunal member at the Commission, or to a Fair Work Ombudsman staff member. They can also disclose to a lawyer who can then relay the information to the Commission.

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SG: You also mentioned that disclosable conduct includes any conduct that may have breached the RO Act, the Fair Work Act, the Competition and Consumer Act, or an offence provision under Commonwealth law. That's quite broad. Could you give us a more specific example of something that could constitute disclosable conduct?

MG: I certainly can, Sam. A common subject matter of disclosures we receive are about people claiming entitlements that the discloser alleges aren't appropriately authorised or the authorisations aren't recorded in the Committee of Management meeting minutes. For instance, a member may report concerns about an officer claiming purchases at a department store as a work-related expenditure. That could certainly appear to be personal spending on the face of it. And when we investigate, we'll ask questions about the expenditure and who authorised it.

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Officers have duties to exercise their powers for a proper purpose pursuant to section 286 of the RO Act and they must not use their position to gain an advantage for themselves or someone else pursuant to section 287. Contraventions of these duties may attract civil penalties. That also means taking steps not to 'self-authorise' expenditure. And we do see that happen. The officer's act of being the authorising person for these claims could constitute a breach of the RO Act – which is why it is important to have more than one person approve expenditure.

Another example would be authorising a donation to a business owned by a family member of the officer. Under section 285 of the RO Act, an officer must not have a material personal interest in the subject matter when exercising their judgement in respect of a matter relevant to an organisation's operations. This is central to their obligation to discharge their duties with care and diligence. And failure to do so may also be 'disclosable conduct' and attract civil penalties.

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SG: Right. Those examples sound quite serious on the face of it. Does that mean that the officers in those scenarios could face civil penalties?

MG: They could – but that would only happen after we have thoroughly investigated the matter and formed the view that they did in fact contravene the legislation.

To go back to the first example, it may be that after further investigation, we find out that the officer's spending at the department store was for a long-serving employee's farewell gift that was appropriately authorised and recorded.

In the second example, it could be that the meeting minutes show that the officer disclosed they had a material personal interest and excused themselves during any discussions and decision-making related to the donation.

There may be instances where members and employees don't have full visibility over the decisions made by officers, and understandably, they may have concerns about the propriety of those decisions and raise that with the Commission.

The question that we always ask is, what is the basis for the entitlement claimed? We need to be able to trace every decision back to its authorisation, which is why it's so important for everything to be recorded in the minutes.

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SG: So, to summarise, good governance requires good record keeping and the ability for officers to answer any questions about decisions made.

MG: That's exactly right. Our role is to check that registered organisations have complied with the governing legislation and their own rules, it's not to make a moral judgment about a decision or action.

For instance, if an organisation decides to donate to a particular cause that a member disagrees with, that is not something we can take further if the decision for that donation has been made with appropriate authorisation and in accordance with the objects of the organisation, and all the

applicable officer's duties have been met (such as there being no conflict of interest or personal benefit).

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SG: I see. I hear that the Commission also gets a significant number of disclosures about use of resources in elections, specifically, reports about an organisation favouring one candidate over another. What might that look like in practice?

MG: That's a good question Sam. As you can imagine, most of these disclosures will relate to resources of the organisation and allegations that incumbent candidates made, or are currently making, use of these resources over challengers. Section 190 of the RO Act makes it an offence for an organisation or branch to use property or resources to help one candidate over another. The key here is identifying what specific property or resource of the organisation is allegedly being used (and evidence of support will be sought by the Commission for this), and how that is said to be assisting a particular candidate or candidates. If all candidates in the election process have the same access – for example each candidate has equal space for a profile in the organisation's newsletter – that would be a very different thing from an incumbent officer using organisation funds and vehicles to print and distribute 'How to vote' flyers in support of their own campaign, which is something we would be quite concerned with.

On the other hand, if a prominent member of an organisation endorses one candidate over another in their personal capacity, (unless of course, they have used organisation resources or property to give this endorsement), it is unlikely to amount to a contravention. The problem is only where the resources of the organisation have been used. What constitutes resources is quite broadly considered and includes where the organisation provides office space, labour (i.e. staff during their work time paid for by the organisation), equipment such as printers, motor vehicles, mobile phones, printing paper or money (either directly or indirectly) to assist a particular candidate or campaign.

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SG: Thanks, MaryAnne. Another one that we see some confusion over is organisations that have dual registration. Can you give our listeners a rundown of what that means, and how it can create issues in the protected disclosures space?

MG: Sure. The RO Act prescribes a number of financial reporting obligations for registered organisations. Usually, each organisation and branch would be considered a separate reporting unit that has to produce its own financial report under the RO Act. Excluding the Territories and the State of Victoria, the States have their own industrial relations legislation, and many federally registered organisations will have state-based branches. Sometimes, the state-based branch will have a 'mirror' association registered under that State's industrial relations legislation with the same members and office holders as the federally registered Branch. I won't delve into all the requirements today but advise our listeners that we cover dual registration in depth on Episode 5 of RO pod if they want to go back and have a listen. For present purposes, it's sufficient to say that the federally registered state-based branch and the state registered association are two separate legal entities even though they may have the same officers, have the same or similar names and share resources like an office.

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Receiving information about dual registered organisations can raise questions about our jurisdiction to deal with the disclosure. Although they may have a national counterpart registered under the RO Act, the reality is that for some of these state-based associations, all of their financial affairs fall under the state body. In such cases, they can apply for the General Manager to issue an exemption certificate under section 269, which will exempt them from preparing a financial report in accordance with the requirements of the RO Act – because the financial affairs are done in the State system.

In these instances, if someone comes to us with a disclosure allegedly related to financial issues, it may be that it's outside our jurisdiction. This is because the Commission cannot deal with disclosures about possible non-compliance with state legislation. And the discloser may need to raise the matter directly with the relevant state authority.

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Sometimes disclosers provide information that tells the Commission that things aren't the way that they have previously been reported to us. In fact, not that long ago we received a protected disclosure telling us about a particular Branch's finances and financial decision-making processes. This was despite the organisation previously telling us that this particular Branch didn't have any financial affairs, and therefore didn't have to lodge a financial report with us. The discloser provided evidence that the Branch had its own budget, its own credit card, and made its own decisions about how that money was spent, without having to refer to anyone else for approval – which looked a lot like they had their own financial affairs. In the end, after our investigation, the Branch was required to prepare and submit a financial report.

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SG: That makes sense. So far, we've covered several types of protected disclosures that the Commission may be able to deal with. Are there any types of concerns or reports that we can't assist with?

MG: Yes, a common issue the Commission frequently receives are reports from members who are dissatisfied by the level of service provided by their organisation. Generally, we do not have the jurisdiction to deal with these reports.

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SG: Why is that? If I'm a paying member of registered organisation, wouldn't I expect a certain level of service or support in return?

MG: Well yes you might indeed! However, the reality is far less simple than that.

It's important to understand that the Commission's power under the RO Act is confined to whether the organisation is meeting its statutory obligations and acting within the scope of its rules. Organisations run their own affairs within that framework. It's a long held legal principle that it's for the organisation to decide how it operates internally, including the services it will provide to its members based on its resources and internal policies.

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It may be frustrating for a member if they perceive that they are receiving a different level of support than another member or insufficient representation with an issue they're having. However, if the organisation's rules and policies permit it to have discretion over the level of service and support rendered to a member, the Commission can't interfere with that unless the organisation otherwise breaches its obligations under the RO Act.

Ultimately, it comes back to the fact that the whistleblower protection scheme covers very specific disclosable conduct for us to investigate – basically, breaches of the RO Act obligations and specified other laws – and is not intended to be a general avenue to make complaints about an organisation's services or whether you disagree with the position they've taken on a particular issue or dispute. In such circumstances we would recommend that you approach the organisation about its internal complaints mechanism to try to address an issue of this type.

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SG: It's great to get some insight into the different kinds of protected disclosures that your team receives, and also what's in and what's out in terms of what the Commission can deal with. I also wanted to discuss something that is probably at the top of mind for our listeners. What protections are there for whistleblowers?

MG: While disclosers have the right to report any concerns, we understand that there are fears of consequences, such as reprisals, associated with whistleblowing. Fortunately, the RO Act has protections for a discloser who makes a protected disclosure – including from reprisals. The discloser cannot be held liable because they have reported the concern. However, they are not exempt from any civil or criminal liability if they have participated in the alleged conduct. Also, a contractual or other requirement not to disclose information, can't override the right to make a whistleblower disclosure.

The protection applies even if they only report the concern within the registered organisation, as long as the discloser and their disclosure meets certain eligibility criteria – including that it relates to

disclosable conduct (in other words, that they reasonably suspect a breach of the law) – and therefore could have been disclosed to the Commission.

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SG: You mentioned that there are eligibility criteria for protections, can you elaborate on them for our listeners?

MG: Of course. In order for these protections to apply, there are three elements that must all be present.

Firstly, the discloser must fall into one of the categories of an 'eligible person' that I mentioned earlier.

Secondly, a reprisal needs to have been taken, or threatened, against the discloser or another person. This can include dismissal, disadvantages in their employment or position, discrimination between them and other employees, harassment or intimidation, harm or injury and damage to property or reputation.

Thirdly, the disclosure or potential disclosure was the reason (or part of the reason) for the reprisal or threat. That is, there needs to be some evidence demonstrating the link between the reprisal and disclosure.

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SG: Thanks MaryAnne. Before we wrap up, did you have any other points you'd like to add?

MG: I think an important message to take away is that registered organisations should promote and embrace a 'speak up' culture. Don't be frightened of it. That is, a culture where members feel that they can ask questions, and their concerns will be addressed. Many disclosures arise because of the limited visibility of the decision-making within an organisation, which is exacerbated by poor record keeping. In our experience, this provides space for rumour and innuendo to arise.

The Commission strongly encourages organisations and their officers to regularly review their internal processes, including record keeping, to ensure they maintain good governance procedures. Other issues to review include ensuring that your financial authorisation procedures are robust and can withstand scrutiny, as can the procedures related to the handling of conflicts/material personal interests, also ensure the absence of affected officers from decision-making and that their absence is

noted in meeting minutes. And finally, and very importantly, the official minutes should be approved and signed.

Good communication with members will greatly assist in preventing the concerns that give rise to the disclosures that we regularly receive. A speak up culture encourages any concerns to be raised and resolved locally at first instance, without necessarily requiring the Commission's intervention.

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SG: I'd also like to add that we have a template available on our website which can be used to make a whistleblower report, and it can be found by selecting 'Whistleblowing' in the drop-down menu of the 'Registered Organisations' tab, and from there you can select 'Report a concern.' Thanks for your time today MaryAnne, and for sharing your knowledge of protected disclosures with us.

MG: It's been my pleasure, Sam and thanks for the opportunity.

SG: No problems at all. Please join us in December for our next episode of RO pod.

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