



Protection for whistleblowers: what disclosers need to know?

The *Fair Work (Registered Organisations) Act 2009* (also referred to as the RO Act) has protections related to making protected disclosures (also known as whistleblowing).

The Fair Work Commission (the Commission) Fact Sheet [Whistleblower disclosures \(FS 003\)](#), provides information on who is eligible to be a whistleblower and what constitutes a protected disclosure.

The difference with this fact sheet is that it is designed to specifically explain to a discloser what the protections are and when they apply.

What is a person protected from?

A discloser (or a person eligible to make a disclosure) is protected from reprisals taken or threatened against them. In order for the protections from reprisal to apply, all of the essential elements set out below must be present.

A reprisal is an act or omission causing detriment to the discloser or another person **because** it is believed or suspected that a disclosure has been made, may have been made or is able to be made.¹

Detriment can include any of the following: dismissal from employment, alteration of a person's employment to their detriment, harassment, intimidation, discrimination, harm or injury to a person (including psychological harm), or damage to property or reputation.²

¹ Section 337BA, RO Act.




² Section 337BA(2), RO Act.



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Protection from reprisals: essential elements

In order for the protections to apply, **ALL** of the following elements must be present:

	A person who is eligible to make a disclosure; and
	A reprisal taken or threatened against the discloser or another person; and
	The disclosure/potential disclosure was the reason (or part of the reason) for the reprisal or threat.

In other words, there needs to be a link between the reprisal and the disclosure. Any investigation or litigation about alleged reprisals will need evidence demonstrating that link.

Consequences of taking or threatening a reprisal:

If all of the above essential elements are present to qualify a discloser or potential discloser for protection and a person nevertheless takes or threatens a reprisal, the following court actions may be available:



Criminal offence

Taking, or threatening to take a reprisal is a **criminal offence**.³

Therefore a person who takes or threatens a reprisal may be prosecuted for doing so. This must be proved beyond reasonable doubt.



Civil penalty

Taking or threatening a reprisal may also make a person who takes or threatens a reprisal liable for a **civil penalty**.⁴ This must be proved on the balance of probabilities (i.e. more likely than not) by the person making the application.



Civil remedy

An application can also be made for a **civil remedy** against a person taking or threatening a reprisal. It is up to the person alleged to have taken reprisal action to prove (on the balance of probabilities) that a disclosure was not the reason (or part of the reason) for the action.

Criminal offences can only be pursued by Police or the Australian Competition and Consumer Commission (ACCC).

Civil penalty proceedings can only be commenced by regulators such as the Commission.⁵

Civil remedy applications can be made to the Court by a range of applicants including the target of the reprisal or threatened reprisal.

³ Section 337BE.

⁴ Section 337BD.

⁵ In the case of the Commission, see the Commission Compliance Policy



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A civil remedy order may include: compensation, an injunction to prevent, stop or remedy the effects of the reprisal or threat, an order requiring an apology, reinstatement (if the reprisal involved termination of employment), and any other order the Court thinks appropriate.

If you are considering making an application for a civil remedy you should seek legal advice. The Commission is not able to provide individual legal advice.

Further information

Further information is available on the Commission website at www.fwc.gov.au/whistleblowers

If you require further assistance regarding the information in this Fact Sheet, please contact the Commission at regorgs@fwc.gov.au or call us on **1300 341 665**.