



ROCpod episode 30 – Whistleblower investigations: what you can expect

The ROCpod was a monthly podcast focussed on the regulation of registered organisations. It shared information, tips and tools for improving compliance with legislative requirements.

The podcast was key part of the Registered Organisations Commission's (ROC) education strategy. The ROC was abolished on 6 March. The Fair Work Commission (the Commission) is now the regulator for registered organisations.

Although processes may change under the Commission, much of the podcast content is still useful.

Email any questions about anything in an episode to regorgs@fwc.gov.au.

Speaker Key

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00:42:00

KM Hello and welcome to the first episode of *ROCpod* for 2022. My name is Kristina Menzies and I'm a Senior Adviser in the Education and Reporting Team at the ROC. Today's episode is about whistleblowing, and specifically, what you can expect if you make a protected disclosure under the *Fair Work (Registered Organisations) Act* (we call this the RO Act for short).



The RO Act has provisions for whistleblowers to make disclosures about a registered organisation. A complaint under the RO Act can be made to the ROC, or to the Fair Work Commission, the Fair Work Ombudsman or the Australian Building and Construction Commission.

Making a protected disclosure will trigger a whistleblower process. But what can you expect if you make a disclosure? Will there be an investigation? And how are matters handled and finalised?

To help me discuss what you may encounter as a whistleblower, I am joined today by Bill Steenson. He leads the ROC's Compliance and Protected Disclosures Team.

Welcome, Bill.



01:45:00

BS Hi Kristina, thanks for having me on.

KM Okay, let's start at the beginning – before the complaint is lodged either directly with the registered organisation, the ROC, or another regulator under the scheme.

Before you raise a complaint with anyone, you might question... should I speak up?

BS That's right Kristina. So I'll start with your point that you mentioned about making the complaint directly with the organisation. We know that, in practice, *most* issues get resolved this way. So if you've got a complaint or query about your membership of an organisation, the reality is that you're likely to follow it up directly with the organisation in the first place. Sometimes it's as simple as asking them: why am I not on the list of members at my workplace? Other times its going be more complex and potentially serious if not addressed.

A 'speak up' culture can help organisations to deal with matters themselves as they arise, and *before* they become big problems. Encouraging people to speak up can protect the organisation against misconduct, effectively nipping it in the bud.

KM Yeah, we've previously discussed how to develop a 'speak up' culture in *ROCpod* episode 20 – that's one of our most popular episodes. So you can go back and have a listen.

So having a 'speak up' culture is best practice, but we also have the whistleblower scheme under the RO Act. And it provides protection in circumstances where matters are reported to an external Commonwealth regulator.

Bill, what advice do you have for anybody who is thinking about making a complaint to a regulator like the ROC?



03:15:00



BS Well there are a few things actually Kristina.

First, it's a really good idea to get a basic understanding of the whistleblower scheme, including who can make a complaint and what kind of conduct it covers. Some things, like being dissatisfied with the level of representation the organisation gives you – so essentially a level of service / member satisfaction issue – won't, on its own, be something the ROC can do something about.

Second, if it's an eligible disclosure, the protections are available even if you choose to make that complaint directly to the organisation first – and that's because the protections are worded in such a way that they extend to eligible disclosures where they could be made to the ROC or another regulator, but happen to be made to the organisation first.

There is a common misconception that the ROC must investigate all complaints that are lodged with us, regardless of what they're about. And that's not just the case.

KM That's a good point, Bill. Some of the complaints made with the ROC can't be taken further because they're about issues that aren't covered by the legislation. And we'll talk more about the jurisdiction shortly.



04:22:00

BS And it also comes back to the importance of knowing what disclosable conduct actually is (what makes it an eligible disclosure) and of speaking up against misconduct or suspected misconduct. There's no question in my mind that it can be a real challenge and it takes courage to be a whistleblower and contribute to cultural change in an organisation.

So I also want to make the point that it is okay if a complaint is later found to be mistaken, or is ultimately not supported by the evidence, as long as it's genuinely made and not malicious.

It's also common that a whistleblower may have incomplete information. But you should raise your concerns even if you don't have *all* of the information on hand. It's ideal to have evidence there to support your allegations, and we certainly encourage people to provide that but an investigation itself will aim to draw out the relevant facts from the parties involved.

KM Okay before we talk more about what an investigation might look like, let's cover off the basics.

Firstly, how does a person, like an officer, an employee or member of a registered organisation, make a complaint to the ROC about a registered organisation? So these aren't the only people who can be an eligible discloser but they're the ones we see most often.

BS Sure, so whistleblower complaints are usually lodged with us either by phone or



email.

Someone can raise a complaint anonymously, however this can make an investigation of the matter difficult. When we can't ask the discloser further questions about the allegations of misconduct, it might mean that we have to close the investigation.

But we do appreciate that these issues can be really sensitive. A whistleblower therefore can provide their details to the ROC and ask that they not be disclosed to other parties (like the organisation). There are plenty of instances where we have agreed not to disclose the whistleblower's identity.

KM Is that always practical though, Bill? I imagine there are cases where it's necessary to disclose the identity of the whistleblower to an organisation to do a thorough investigation.



04:22:00

BS Yeah that's right, each case is different and we'll explain the options available with the whistleblower once we've determined what the disclosure's about. On some occasions, withholding the identity of the whistleblower might actually hinder an investigation.

A very simple example of that: if you contact me to complain that an organisation won't allow you to re-join, even though you're eligible – and that's a potential breach of section 166. For the ROC to follow up this issue with the organisation on your behalf, we'd have to identify to the organisation *who* it is that has been denied membership. It's not effective to approach the organisation and say: *"we think you may be in breach of the legislation by denying someone membership, but we're not going to tell you who they are"*.

KM Okay thanks for explaining that Bill. Okay let's go back to what you said a moment ago that information from a discloser can help us understand the alleged conduct.

What should a whistleblower include in their complaint?

BS Well, this will depend on the circumstances like the nature of the complaint, and the information that the discloser's got.

But it's always worth jotting down what you know. Such as – what have you witnessed (information such as the time, place and circumstances of events or conduct). And those specifics are really important. There's a big difference between claiming that "The President is 'on the take'" and providing specific information, for example "The President writes himself a cash cheque for \$500 on a certain day every month".



You should also let us know if you're aware of any documents, or other people who can corroborate your complaint. And that might include minutes, financial documents or policies.

All those sources of information will help us understand whether the ROC has the jurisdiction to act on the matter, and it may also help to guide an investigation if one takes place. It can help explain what is or isn't permitted under the rules and policies of the organisation.



08:18:00

KM Okay, Bill, so let's now presume that I'm an employee of a registered organisation, and I've discovered that officers have spent money belonging to the organisation for personal expenses. Let's say that I raised the issue directly with the organisation, but my concerns were ignored.

So I lodge a complaint with the ROC by email and I explain what I know and I leave my contact details with you.

What can I expect to happen next?

BS Well, the ROC will firstly need to determine whether the disclosure is eligible for protection under the RO Act. The person who has lodged the complaint must be one of the protected categories of people covered under the Act. Your example is an employee of an organisation, and employees (and former employees) are protected under the whistleblower scheme.

Now the complaint must also got to be about what the RO Act considers anything called 'disclosable conduct' by a registered organisation, a branch, an officer or an employee..

KM What is 'disclosable conduct'? Can you explain what you mean by this, and give us an example of a common complaint that is protected under the RO Act?

BS Sure, Kristina. 'Disclosable conduct' is something that the discloser reasonably suspects is a breach (or possible breach) of the *RO Act*, the *Fair Work Act* or the *Competition and Consumer Act*. It can also be something an act or omission that maybe an offence against another Commonwealth law.

That's the technical definition, but I'll give you an example ...

In fact, let's use *your* example because personal spending using the credit cards of the organisation is unfortunately a recurring issue that we see.

The fact that the complaint is about possible breaches of financial management obligations – will give a whistleblower protection against reprisals. Because the rules of registered organisations deal with how the organisations' funds must be managed and most organisations will have policies which prohibit using corporate credit cards



for personal use.



10:11:00

KM We've also seen this kind of behaviour, misuse of organisation's funds, amount to breaches of the statutory duties of officers. haven't we?

BS Yes, that's right, Kristina. In the *Thomson* matter the misuse of the organisation's money was found by the Court to be a breach of the duty to act in good faith and for a proper purpose, as well as the duty to act with care and diligence. So, an allegation about financial misconduct is a clear illustration of 'disclosable conduct'.

KM So that's one example of 'disclosable conduct'. And If you want more information about the types of issues that are covered by the scheme, there's a whistleblower module in the ROC's Digital Classroom on our website. The module includes a handy summary of our jurisdiction, and it's a great place to start.

Okay, let's return to my earlier example to talk through the investigation process.

So I sent the ROC an email and you've determined that the ROC has jurisdiction to look into the matter. Should I now expect to be contacted by the ROC?

BS Yes, very much so and it's likely that we'll contact you soon after we receive your email, to find out some more about your eligibility and the issues you're disclosing about. Because even with the most detailed disclosures, it's likely we'll have some questions to ask. Our initial contact with a whistleblower is really useful for determining what aspects of the complaint the ROC actually has jurisdiction to look at.



11:39:00

KM There are timeframes to look into the matter under the RO Act, aren't there?

BS Yes, there are. If it's an eligible disclosure, the ROC must allocate it to an 'authorised official' within 14 days of receiving the disclosure, and then the RO Act then sets a standard timeframe of 90 days for the investigation .

KM Bill, what you mean there by an 'authorised official'? Who's that?

BS Under the RO Act, the Registered Organisations Commissioner is one of the authorised official, and in practice the Commissioner can sign an instrument of delegation allowing other people like the ROC's Executive Director to be an authorised official

There are authorised officials in other agencies. It might be more appropriate for a matter to be allocated to an 'authorised official' in another regulator. We'll do this to ensure the right person and the right agency – the one that's got the jurisdiction to



deal with it – is the one that takes charge of the investigation.

KM Right, so if someone complained to the ROC about alleged breaches of the *Fair Work Act* (so let's say the complaint involved adverse action by a registered organisation) the ROC may re-allocate the matter for the Fair Work Ombudsman to investigate?

BS Yeh that's correct Kristina and in fact, it's very likely. Likewise, if the Fair Work Ombudsman were to receive a complaint about industrial elections it's likely they/re going to send the matter to us. We want the matter to go to the regulator who actually has the authority to look at it.



13:06:00

KM What does that mean to me, as the person who made the complaint?

BS So you'll be told that it's been allocated, and who it's been allocated to, but really there will probably be a few people working on your matter and you may be dealing with a particular ROC Staff member who is the action officer for this complaint.

KM Okay, so let's get back to the timeframes. The regulator has 14 days to allocate the matter to an authorised official. Let's talk about what happens next.

There are further timeframes that apply to the investigation, aren't there?

BS Yes, once a disclosure is received the time is ticking. An 'authorised official' then has 90 days to conduct an investigation of the complaint.

KM Yeah and 90 days might seem a long time to a discloser, but that's actually pretty quick isn't it?

BS Yes, it is and particularly when you look at something like the investigations that are available to the ROC under section 331 for instance can sometimes take a year or more, so in practice 90 days is a very short timeframe to take an investigation from start to finish.



14:11:00

KM Yeah that's good, but not all matters are investigated, even if the ROC determines that the matter is a protected disclosure. Can you explain, Bill, the circumstances when the ROC will not investigate a protected disclosure?

BS Sure, Kristina. So the *Fair Work (Registered Organisations) Regulations* actually lists of circumstances where an authorised official can exercise a discretion to not conduct an investigation.



One of the reasons is where an investigation is just impractical. For example, because the whistleblower hasn't provided enough information. And while we'll make our best efforts to reach out to get as much information as we can. We don't always receive a response.

Another reason an investigation won't be undertaken is when another regulator (or a court) is already handling it – or has previously done so. And that's usually it's because the expertise of that other regulator or court is more relevant to the particular complaint.

There are more circumstances why an investigation might not be conducted and you can find them set out in Regulation 176G. If the ROC decides not to investigate, then we'll reach out and let you, the discloser know, and we'll explain the particular reason why we're not investigating or further investigating.

KM Thanks for explaining that Bill, let's now talk about what happens during an investigation.

During an investigation of a whistleblower complaint, can the ROC require people to produce documents or answer questions?

BS That's a good question Kristina, and the short answer when it comes to whistleblower investigations is 'no'.

In an investigation of a protected disclosure, the ROC doesn't have the power to require people to produce documents or answer questions. We rely on the co-operation of the people relevant to the complaint.

You can think of a whistleblower investigation as a fact-finding exercise – trying to establish whether there may be a contravention that can be looked into further.



16:07:00

KM So how does the ROC typically run a whistleblower investigation?

BS Well we try to get as much verifiable information as we can. So we'll talk to the whistleblower to draw out information, and this could be by phone, email or interviewing them. We'll also reach out to anybody else we think is relevant to the complaint. For example, we might contact officers on the committee of management if the complaint is about financial management of the organisation.

And we'll also provide the registered organisation with the opportunity to answer questions. Where possible we try to keep the whistleblower's identity private, especially where they request it.

At the end of the day, we're trying to find out is any substance to the complaint and to assess whether the legislation is being complied with or not. So, we consider things like: Is there enough evidence that points to breaches of the RO Act? Because our



approach to enforcement is to follow wherever the evidence takes us.

KM Earlier you mentioned that the RO Act says the regulator has 90 days to complete the investigation. It might take longer, though, right. What happens if it does take longer than 90 days?

BS Yes, investigations often involve complex issues or speaking to lots of people and that may require more time.

In your earlier example of disclosable conduct involving misuse of the organisation's money, we might need to engage with the organisation's accountant, the auditor, office holders on the committee and others. We might also need to assess hundreds of pages of policies and financial documents.

And so the ROC can request the Commissioner to grant an extension of time to ensure the investigation is as thorough as it needs to be

KM Okay so in my example, the person is waiting to hear back within 90 days, but we've arranged an extension, what happens now?

BS Well we're required to contact the discloser to explain that we have an extension and let them know how the investigation is going. Sometimes, that's not always possible in an anonymous complaint.



18:03:00

KM Okay, let's jump ahead to the end of an investigation. How can a whistleblower expect to find out about the outcome?

BS Well, The RO Act requires an authorised official to report on the outcome of an investigation. In practice this takes the form of an outcome letter to the discloser. The letter explains the issues considered in the investigation, the information obtained, whether that amounts to evidence of possible contraventions, and any other actions that will follow from that.

Outcome letters are also an opportunity for us to share governance tips with an organisation. We've got a really strong focus on voluntary compliance, and sometimes we've sometimes found that whistleblower complaints can originate from deficiencies in the organisation's governance and their practices. And if we identify that improvements can be made – such as where current policies or practices may leave an organisation vulnerable to breaches or leave them open to further complaints of the same kind, then we'll share strategies to prevent a similar issue from repeating in the future. We'll also encourage remedial action by the organisation – then we follow up to see what steps they've actually taken to remediate.

KM Yeah, I think the message there is that investigations take their own course and I know there can be different outcomes.



To finish off today's episode can you tell us about the common outcomes of a whistleblower investigation?



19:21:00

BS Sure, Kristina. So sometimes the investigation reveals a misunderstanding, or the organisation might need to make some governance changes within itself. In these cases, the ROC doesn't usually need to take further compliance action, but we'll offer assistance, education, guidance, those sorts of things. In my experience, this is how a great many investigations in fact are resolved.

In some instances, the ROC has referred matters to other agencies, including the Australian Federal Police. For example, where the investigation has revealed possible fraud.

If the investigation points to likely breaches of the Registered Organisations laws, we can escalate the matter to a formal investigation under section 331, where people can be compelled to provide information. And if that kind of investigation reveals serious breaches of the RO Act, it may very well lead to civil penalty litigation.

KM At the beginning of today's episode I mentioned that people may be hesitant to make a protected disclosure. Do you have a final message to our listeners who may be contemplating raising a concern, either with their organisation or with a regulator?

BS Yes, I think it's really important to remember the role that registered organisations play in representing their members. And after all, they're entrusted with members' money, to use it properly, and to act in members best interests.

We encourage whistleblowers to 'speak up' – even if it's just to seek an explanation of what's going on – and they can do that either directly to the organisation or with a regulator. It can be the step of asking a question, of speaking up, that makes a difference and can bring about change. Our earlier podcast with Professor A J Brown (which is episode 6 of *ROCpod*) contains some great examples of the importance of whistleblowers speaking up, what they've done and how that can make a difference, and I'd really encourage people to go back and have a listen to that particular podcast.



21:18:00

KM Thank you for your time, Bill. 'Speaking up' against misconduct is not always an easy thing to do, but it certainly helps to know what you can expect from the process (and that there are protections) when you do speak up.

BS That's absolutely right, Kristina, and I really appreciate the time to explain some of that.



KM Tune in next month for another episode of *ROCpod*. We'll be talking about financial decision-making in registered organisations.

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