

POLICY

Portfolio	People and Culture	Ref. No.	POL-5536
Department	People and Culture		
Title	Whistleblower (Protected Disclosures) - Australia		

1. INTRODUCTION

Whistleblower policies are essential for responsible risk management and corporate governance, helping to uncover misconduct that may not be otherwise detected. Often misconduct may only come to our attention because of individuals who are prepared to disclose it, sometimes at significant personal and financial risk.

As an accredited non-government organisation with the Department of Foreign Affairs and Trade (DFAT), Royal Australasian College of Surgeons (RACS) is also obliged to operate in accordance with the Australian Council for International Development (ACFID) Code of Conduct (Code) and Quality Assurance Framework (Framework), which also prescribe processes to guarantee certain protections for those who make good faith disclosures of wrongdoing.

2. PURPOSE

RACS recognises the important role Whistleblowers play in protecting our organisation, our mission, the community and in upholding the law. All individuals who are aware of possible wrongdoing have a responsibility to disclose that information.

RACS guarantees that all who, in good faith, disclose perceived wrongdoing will be protected from adverse employment consequences. To effect that guarantee, RACS has established a safe and secure means for reporting Disclosable Matters and a fair and impartial reporting and investigative process that aims to protect the Discloser throughout the process.

The purpose of this policy is to:

- (a) ensure that RACS takes good faith disclosures seriously;
- (b) ensure those who make good faith disclosures about perceived wrongdoing will be protected from adverse employment consequences;
- (c) set out protections available in respect of Eligible disclosures;
- (d) assist staff in understanding what is a Disclosable Matter and those which are not;
- (e) support disclosure of wrongdoing/breaches of the law and deter wrongdoing/breaches of the law within RACS' organisation;
- (f) seek to ensure that any disclosures made under, and in accordance with, this policy are dealt with effectively and efficiently;
- (g) seek to fulfil RACS' legal obligations with respect to the matters dealt with in this policy; and
- (h) promote an ethical culture within RACS' organisation.

This policy is to be read in conjunction with the RACS Complaint Handling Policy. New Zealand staff should refer to the Whistleblower (Protected Disclosures) policy Aotearoa New Zealand.

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3. SCOPE

This policy applies to and is binding on all Eligible Disclosures in Australia.

4. DEFINITIONS

For the purposes of this policy, the following definitions apply:

- (a) **“ASIC”** means the Australian Securities and Investments Commission.
- (b) **“Associate”** has the meaning given in the Corporations Act.
- (c) **“Corporations Act”** means the *Corporations Act 2001* (Cth).
- (d) **“Disclosable Matter”** means information which a Discloser has reasonable grounds to suspect:
 - (i) misconduct or an improper state of affairs or circumstances in relation to RACS or a Related Body Corporate;
 - (ii) that RACS, a Related Body Corporate or an officer or employee of RACS or a Related Body Corporate has engaged in conduct that constitutes an offence against or contravention of a provision of any of the following:
 - the *Corporations Act 2001*;
 - the *Australian Securities and Investments Commission Act 2001* (Cth);
 - the *Banking Act 1959* (Cth);
 - the *Financial Sector (Collection of Data) Act 2001* (Cth);
 - the *Insurance Act 1973* (Cth);
 - the *Life Insurance Act 1995* (Cth);
 - the *National Consumer Credit Protection Act 2009* (Cth); or
 - the *Superannuation Industry (Supervision) Act 1993* (Cth)
 - (iii) constitutes a breach of the Australian Charities and Not-for-profits Commissions’ External Conduct Standards (which can be accessed at <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards>);
 - (iv) constitutes an offence against any other Commonwealth law that is punishable by imprisonment for a period of 12 months or more;
 - (v) represents a danger to the public or the financial system; or
 - (vi) is conduct prescribed under the Regulations.
- (e) **“Discloser”** means an individual who makes a disclosure of information.
- (f) **“Eligible Whistleblower”** means any individual who is (or was formerly) of RACS:

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- (i) an officer or employee;
 - (ii) an individual who supplies services or goods (whether paid or unpaid);
 - (iii) an employee of a person who supplies services or goods (whether paid or unpaid);
 - (iv) an Associate; and
 - (v) a relative, a dependant or a dependant of a spouse of an individual referred to in any of sections 4(f)(i) to (iv) of this policy.
- (g) **“Eligible Disclosure”** means a disclosure by an Eligible Whistleblower that is in respect of a Disclosable Matter and made:
- (i) directly to an Eligible Recipient, ASIC, or any body prescribed by the Regulations; or
 - (ii) as a public interest disclosure or emergency disclosure (as described in section 6 of this policy) in accordance with the Corporations Act; or
 - (iii) to a legal practitioner for the purpose of obtaining legal advice or representation in respect of Part 9.4AAA – Protection for Whistleblowers in the Corporations Act.
- (i) **“Eligible Recipient”** means any individual who is:
- (i) a director, company secretary, company officer or senior manager of RACS or a Related Body Corporate;
 - (ii) an auditor, or a member of an audit team conducting an audit of RACS or a Related Body Corporate of RACS;
 - (iii) an actuary of RACS or a Related Body Corporate of RACS;
 - (iv) a person authorised by RACS to receive disclosures that may qualify for protection (including the Whistleblower Protection Officer and other individuals specified in section 10 of this policy);
 - (v) ASIC of the Australian Prudential Regulation Authority (APRA) or;
 - (vi) the Eligible whistleblower’s nominated lawyer, if disclosing to obtain legal advice or representation under the whistleblower provisions of the Corporations Act.
- (j) **“Misconduct”** as defined in section 9 of the Corporations Act as;
- (i) fraud;
 - (ii) negligence;
 - (iii) default;
 - (iv) breach of trust and breach of duty; or

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- (v) an improper state of affairs or circumstances, which is not defined and left intentionally broad

An improper state of affairs or circumstances may not involve unlawful conduct but may indicate a systemic issue.

It may relate to business behaviour and practices that may cause widespread harm.

- (k) “**RACS**” means Royal Australasian College of Surgeons.
- (l) “**Reasonable grounds**” means that a reasonable person in the Eligible Whistleblowers position would also suspect the information indicates misconduct or a breach of the law.
- (m) “**Regulated Entity**” has the meaning given in section 1317AAB of the Corporations Act.
- (n) “**Regulations**” means the *Corporations Regulations 2001* (Cth).
- (o) “**Related Body Corporate**” has the meaning given in the Corporations Act.
- (p) “**Victimisation Provisions**” means the provisions contained in section 1317AC of the Corporations Act.
- (q) “**Whistleblower Protection Officer**” means the individual specified in section 10 of this policy.

5. INELIGIBILITY FOR PROTECTION

- (a) Personal work-related grievances

A disclosure is not protected under this policy, to the extent that the information disclosed concerns a “personal work-related grievance” of the Discloser.

Information disclosed concerns a “personal work-related grievance” of the Discloser if the information concerns a grievance about any matter in relation to the Discloser's employment, or former employment, having (or tending to have) implications for the Discloser personally. Examples of personal work-related grievance include:

- (i) an interpersonal conflict between the Discloser and another employee;
- (ii) a decision that does not involve a breach of workplace laws;
- (iii) a decision about the engagement, transfer or promotion of the Discloser;
- (iv) a decision about the terms and conditions of engagement of the Discloser;
- (v) a decision to suspend or terminate the engagement of the Discloser or otherwise discipline the Discloser and;
- (vi) does not concern conduct, or alleged conduct, referred to in section 4(e) of this policy.

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RACS has a range of policies and procedures that deal with personal work grievances. You should carefully review RACS' policies to ensure that personal work grievances are raised in accordance with the relevant policy/ies and not under this policy.

To avoid doubt, this policy is not intended to limit the protections which apply to any individual in relation to RACS pursuant to the Corporations Act.

6 DISCLOSABLE MATTERS

- (a) A disclosure of information by a Discloser qualifies for the protections under this policy and the Corporations Act if it is an Eligible Disclosure.
- (b) Examples of matters which may constitute Disclosable Matters include:
 - (i) fraud, money laundering or misappropriation of funds;
 - (ii) offering or accepting a bribe;
 - (iii) financial irregularities;
 - (iv) breaches or failure to comply with legal or regulatory requirements;
 - (v) systemic improper conduct in relation to RACS' financial affairs.
- (c) The examples in section 6(b) are not exhaustive and other matters may constitute Disclosable Matters.
- (d) Disclosable Matters may include conduct which is not necessarily unlawful but which otherwise concerns misconduct or an improper state of affairs or circumstances in relation to RACS or a Related Body Corporate, for example, a significant risk to public safety, gross mismanagement or waste or systemic record keeping failures.
- (e) Disclosures that are not about Disclosable Matters do not qualify for protection under the Corporations Act. Such disclosures may be protected under other legislation such as the Fair Work Act 2009.
- (f) A Discloser can still qualify for protection even if it is found their disclosure turns out to be incorrect.
- (g) Further, the Eligible Discloser must have reasonable grounds to suspect the information disclosed concerns misconduct or improper affairs or circumstances. We discourage deliberate false reporting (e.g. a report that the Discloser knows to be untrue) as it undermines confidence in this policy and workplace harmony.

6.1 Public interest disclosures and emergency disclosures

- (a) A public interest disclosure is a disclosure of information where:
 - (i) the Discloser has previously made an Eligible Disclosure to ASIC or anybody prescribed by the Regulations (including the ATO);

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- (ii) at least 90 days have passed since the disclosure was made;
 - (iii) the Discloser does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the previous disclosure related;
 - (iv) the Discloser has reasonable grounds to believe that making a further disclosure of the information in accordance with this subsection would be in the public interest;
 - (v) after at least 90 days, the Discloser gave the body to which the previous disclosure was made a written notification that includes sufficient information to identify the previous disclosure states that the Discloser intends to make a public interest disclosure; and
 - (vi) the public interest disclosure is made to a member of the Parliament of the Commonwealth, the Parliament of a State or the legislature of a Territory or a journalist; and
 - (vii) the extent of the information disclosed in the public interest disclosure is no greater than is necessary to inform ASIC, or any body prescribed by the Regulations (as the case may be) of the Disclosable Matters.
- (b) An emergency disclosure is a disclosure of information where:
- (i) the Discloser has previously made an Eligible Disclosure to ASIC, or any body prescribed by the Regulations;
 - (ii) the Discloser has reasonable grounds to believe that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment;
 - (iii) the Discloser gives the body to which the previous disclosure was made a written notification that includes sufficient information to identify the previous disclosure and states that the Discloser intends to make an emergency disclosure; and
 - (iv) the emergency disclosure is made to a member of the Parliament of the Commonwealth, the Parliament of a State or the legislature of a Territory or a journalist; and
 - (v) the extent of the information disclosed in the emergency disclosure is no greater than is necessary to inform ASIC, or any body prescribed by the Regulations (as the case may be) of the substantial and imminent danger.

7 MAKING A DISCLOSURE

7.1 How to make a disclosure

- (a) A disclosure may be made:

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- (i) internally, to the Whistleblower Protection Officer or an Eligible Recipient specified in section 9 of this policy;
 - (ii) to another Eligible Recipient;
 - (iii) externally, to ASIC, or any body prescribed by the Regulations;
 - (iv) externally, in accordance with section 6.1, if the disclosure is a public interest disclosure or emergency disclosure as described in that section; or
 - (v) anonymously.
- (b) Disclosures may be made in person, or by post, email or via telephone.
- (c) Disclosers are encouraged to make a disclosure internally, to the Whistleblower Protection Officer or an eligible recipient specified in section 9 of this policy, in the first instance.
- (d) Discloser's can seek legal advice before making a disclosure.

7.2 Anonymous disclosures

- (a) Disclosures may be made anonymously and will still be Eligible for protection under this policy, in accordance with the Corporations Act.
- (b) A Discloser can choose to remain anonymous throughout any investigation into the disclosure and after the investigation into the disclosure has been finalised.
- (c) A Discloser may refuse to answer questions if they feel it could reveal their identity, including during follow up conversations after the initial disclosure.
- (d) If a Discloser wishes to remain anonymous, it is best if they maintain ongoing dialogue and communication with RACS so that RACS may seek any further information that is required.
- (e) To protect the anonymity of a Discloser, Disclosers may adopt a pseudonym and/or disclosures may be made through an anonymised email address, if the Discloser chooses to do so.

7.3 Process of receiving a disclosure

Where a disclosure is made, there are a number of steps that will generally be taken by RACS in relation to the disclosure.

- (a) RACS will assess the disclosure to determine whether:
 - (i) it is an Eligible Disclosure;
 - (ii) a formal investigation is required; and
 - (iii) any other steps are required.
- (b) RACS will seek to ensure that individuals mentioned in an Eligible Disclosure are treated fairly, including by ensuring, where possible and appropriate, that:

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- (i) all disclosures are handled confidentially;
- (ii) where an investigation is undertaken, the process is fair, impartial and independent; and
- (iii) individuals mentioned in a disclosure are notified at the appropriate time of the investigation (if any), and prior to any adverse findings being made against them.

7.4 Investigation

- (a) If RACS considers that an investigation is required, an investigation plan may be developed by RACS to ensure all relevant questions are addressed, the scale of the investigation is in proportion to the seriousness of the disclosure to ensure sufficient resources are allocated to the investigation. Due to this the process may vary depending on the nature of the disclosure
- (b) RACS may appoint an internal or external investigator to conduct the investigation. The appointed investigator will be responsible for ensuring that as far as reasonably practicable:
 - (i) actions taken to investigate the disclosure are appropriate to the circumstances;
 - (ii) the confidentiality of the disclosure;
 - (iii) proper records and documentation are kept in respect of the steps;
 - (iv) retaliatory action will not be taken against the Discloser;
 - (v) any technical, financial or legal advice that is required in the investigation is obtained;
 - (vi) the investigation is dealt with in a timely and efficient manner; and
 - (vii) further support is provided to the Discloser if necessary.
- (c) RACS may seek further information from the Discloser to assist any investigation it conducts. This may include details of the conduct that is the subject of the disclosure, including the:
 - (i) nature of the conduct;
 - (ii) person or persons involved;
 - (iii) facts on which the Discloser believes the conduct occurred; and
 - (iv) nature and whereabouts of any further evidence, if known.
- (d) RACS will endeavour to ensure that the investigation process is undertaken efficiently and without delay, where possible. However, the timeline is likely to vary, depending on the nature of the disclosure.
- (e) RACS will endeavour to ensure that the Discloser is provided with regular updates throughout the investigation process, if they are able to be contacted, including

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through anonymous channels of communication. The frequency of these updates will vary, depending on the disclosure.

- (f) The investigation that RACS is able to undertake into the disclosure may be limited, where the disclosure is made anonymously and where the Discloser has not provided a means by which they may be contacted.
- (g) RACS will consider any appropriate steps based on the findings of the investigation.
- (h) A decision not to investigate alleged serious wrongdoing must be recorded in writing and does not prevent RACS from taking further action in relation to matters raised in the protected disclosure, as appropriate. However, the original Discloser will be informed about any further action that may be taken, should it require further disclosure to any other person.

8 PROTECTIONS

8.1 Identity protection (confidentiality)

- (a) Subject to the exceptions explained in this section, the identity of a Discloser is to remain confidential. A person cannot disclose the identity of a Discloser or information that is likely to lead to the identification of the Discloser. It is illegal to do so.
- (b) A person can disclose the identity of a Discloser or information that is likely to lead to the identification of the Discloser if it is made:
 - (i) to ASIC;
 - (ii) to a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979* (Cth));
 - (iii) to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to Part 9.4AAA – Protection for Whistleblowers in the Corporations Act;
 - (iv) to a person or body prescribed by the Regulations; or
 - (v) with the consent of the Discloser.
- (c) A person may also disclose the information contained in an Eligible disclosure if:
 - (i) the information does not include the identity of the Discloser;
 - (ii) the person has taken all reasonable steps to reduce the risk that the Discloser will be able to be identified; and
 - (iii) it is reasonably necessary to investigate issues that have been raised in the disclosure made by the Discloser.
- (d) RACS will endeavour to protect the confidentiality of the Discloser’s identity wherever possible, by ensuring that, among other things:
 - (i) in the disclosure:

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- all personal information or reference to the Discloser will be redacted;
and
 - the Discloser will be referred to in a gender neutral context;
- (ii) all documents and materials relating to the disclosure will be stored securely;
and
- (iii) access to information relating to the disclosure will be limited to those directly involved in the management of the disclosure.

8.2 Protection from detrimental acts or omissions

- (a) A person must not engage in conduct that causes detriment to another person where 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 Policy; and
 - (ii) engaged in the detrimental conduct because of that belief or suspicion.
- (b) A person must also not make a threat to cause any detriment to the second person or to a third person where the first person:
- (i) intends the second person to fear that the threat will be carried out; or
 - (ii) is reckless as to causing the second person to fear that the threat will be carried out; and
 - (iii) makes the threat because the second person or third person makes or may make a disclosure in accordance with this Policy.
- (c) Examples of detrimental conduct may include:
- (i) dismissing an employee;
 - (ii) harassment or intimidation of a person;
 - (iii) victimisation.
- (d) There are a range of examples of conduct that would not constitute detrimental conduct (for example, managing a person's unsatisfactory work performance (in line with our policies) and may include reasonable administrative action to protect a Discloser, such as moving them from their work area to a different office to protect them from any detrimental conduct.
- (e) RACS will endeavour to ensure that a Discloser is protected from detrimental acts or omissions wherever possible (this may include providing the Discloser with protection even in circumstances where the matter genuinely reported is not a disclosable matter).
- (f) Allegations of detrimental acts or omissions in breach of this policy will be treated seriously by RACS. In respect of employees, RACS may take disciplinary action, up to and including termination, against any person found to have engaged in detrimental acts or

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omissions in breach of this policy. In respect of other persons to whom this policy applies, RACS may take action, up to and including termination of contracts, against any person found to have engaged in detrimental acts or omissions in breach of this policy.

8.3 Compensation and other remedies

- (a) In the event that a Discloser has:
- (i) suffered loss, damage or injury because of a disclosure; and
 - (ii) RACS failed to take reasonable precautions and exercise due diligence to prevent the detrimental conduct;
- the Discloser can seek compensation and other remedies from the Courts.
- (b) It is recommended that Disclosers seek legal advice in this regard, prior to seeking this avenue of compensation/remedies.

8.4 Civil, criminal and administrative liability protection

- (a) If a Discloser makes an Eligible disclosure, they will not be subject to any:
- (i) civil liability (e.g. legal action for breach of employment contract);
 - (ii) criminal liability (e.g. prosecution for unlawfully releasing information, other than proceedings in respect of the falsity of the information); or
 - (iii) administrative liability (e.g. disciplinary action) for making the Eligible disclosure.
- (b) However, there is no immunity for the Discloser in respect of any misconduct that they have engaged in that is revealed in their disclosure.

9 GENERAL PRINCIPLES REGARDING RACS' WORKPLACE POLICIES

Note to employees and contractors of RACS: policies and procedures are not binding on RACS and are not a term of or incorporated into an employee's contract of employment or any contract between RACS and any person to whom this policy applies.

RACS expressly reserves the right to vary this policy from time to time. RACS will endeavour to take reasonable steps to notify employees of any significant changes to this policy, prior to the changes coming into operation.

This policy will be made available to the public via the RACS website and also to employees through training, the intranet and the employee handbook.

This policy is to be read in conjunction with other RACS policies.

10 ASSOCIATED DOCUMENTS

Whistleblower (Protected Disclosures) Policy Aotearoa New Zealand

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The Corporations Act 2001

11 FURTHER INFORMATION AND SPECIFIED ELIGIBLE RECIPIENTS

- (a) Questions about this policy can be directed to the Whistleblower Protection Officer or any other Eligible recipient specified in this section.
- (b) The following individuals are specified Eligible recipients for the purpose of this policy:
 - (i) Whistleblower Protection Officer:
 - Chief People and Culture Officer.
 - (ii) Other specified Eligible recipients.
 - (iii) Other members of the RACS Executive Leadership Team, namely;
 - Chief Executive Officer
 - Chief Financial & Risk Officer
 - Chief Operations and Partnerships Officer
 - Officer Executive General Manager Education Pathways
 - Executive General Manager Fellowship Experience
- (c) Further information can also be obtained from the following external agencies:
ASIC | 1300 300 630 | www.asic.gov.au
- (d) Support can be sought from:
Employee Assistance Program | Converge International 1300 687 327
Lifeline | 13 13 14