McGrathNicol

Getting to the facts in a whistleblower investigation





Whistleblower disclosures can expose misconduct, control failures and risks that an organisation may not otherwise see.

When a concern is raised, boards and executives need to ensure it is examined fairly, independently and on the evidence to understand what occurred and act appropriately. The adequacy of that response may itself come under scrutiny, particularly where questions arise about independence, scope, evidence handling or the protection of the whistleblower.

Boards and executives need to make early decisions about who will oversee the matter, whether the investigation can be conducted independently, what evidence must be preserved and examined, and how the whistleblower and others involved will be protected and treated fairly.

These decisions are often made under considerable stakeholder and time pressures, and with incomplete information. How these decisions are made can determine whether the investigation properly uncovers the relevant facts or reinforces assumptions.

The early decisions matter

A disclosure may initially appear to be a financial irregularity, employment grievance, isolated policy breach or a conflict between individuals. The underlying facts, however, may point to broader misconduct, control weaknesses, or governance failures.

An experienced independent investigator brings an objective perspective at this critical stage. This includes testing how the matter has been characterised, identifying potential conflicts, assessing the available evidence, and helping determine a scope that is proportionate but capable of following the evidence.

"A credible investigation must follow the evidence, test competing accounts, and remain open to findings that may be unexpected or difficult. Its purpose is to establish what occurred and identify matters requiring action."

Graham Newton, Partner

Five early decisions that shape an investigation

- Who should commission and oversee the investigation?
- Is sufficient independence available internally, or is an external investigator required?
- What evidence needs to be preserved immediately?
- Can the initial scope follow the evidence if broader issues emerge?
- How will the whistleblower and others involved be protected and kept appropriately informed?

Protecting the whistleblower and the integrity of the process

Protecting the whistleblower is fundamental to the integrity of the investigation and the organisation's ability to establish the facts.

Protection arrangements should be established at the outset and reviewed as the investigation progresses. This includes controlling access to the whistleblower's identity and disclosure, limiting information to those who need it, providing a clear reporting channel and actively monitoring for actual or threatened detriment. A whistleblower policy alone is not evidence that these protections are working in practice.

The person who raised the concern should understand, to the extent appropriate, how the matter will be handled, who their point of contact is, what protections apply and how they can raise concerns about retaliation or the integrity of the process. Clear and appropriately timed communication can help maintain confidence and support continued cooperation, while recognising that confidentiality, procedural fairness, and legal constraints may limit what can be shared.

People named in the disclosure must also be treated fairly. Communications and access to information should be managed carefully to preserve procedural fairness without compromising evidence, breaching confidentiality, or prejudging the outcome.

"Protecting a whistleblower is not separate from the investigation. It is fundamental to maintaining the integrity of the process and giving people confidence to continue to provide relevant information."

Matt Fehon, Partner

Key corporate whistleblower obligations

Part 9.4AAA of the Corporations Act 2001 protects eligible whistleblowers who make qualifying disclosures to eligible recipients. ASIC guidance sets expectations for how organisations should handle and investigate those disclosures. Together, the Act and guidance address:

- protecting the whistleblower's identity and information likely to identify them, subject to limited exceptions;
- not causing or threatening detriment because a person has made, may make or is suspected of making a protected disclosure;
- handling disclosures in a way that preserves confidentiality and supports the whistleblower; and
- ensuring the investigation process is consistent with the protections applying to the disclosure.

Public companies, large proprietary companies, and corporate trustees of registrable superannuation entities must also have a compliant whistleblower policy. The policy must explain, among other matters, how protected disclosures will be investigated, how whistleblowers will be supported and protected from detriment, and how people mentioned in a disclosure will be treated fairly.

Separate protections may apply to disclosures about tax affairs and in regulated sectors. Organisations should obtain legal advice on the regimes relevant to their circumstances.

These statutory protections establish important minimum requirements. ASIC's recent benchmarking indicates that an effective whistleblower program also depends on how disclosures are investigated, how outcomes are governed, how whistleblowers are supported, and whether organisations use what they learn to address underlying harm.

Following the evidence

Whistleblower matters are rarely resolved through interviews alone. Relevant evidence may be dispersed across email, messaging platforms, mobile devices, financial records, access logs, transaction data, and organisational systems. Some evidence may be time-sensitive, capable of alteration, or stored in locations that are not immediately obvious. Delays in identifying and preserving this data can limit the investigation before substantive fact-finding has even begun.

Independent investigators and forensic specialists bring together different sources of information, reconstruct events and test witness accounts against objective records. Digital and financial evidence may confirm what witnesses recall, identify inconsistencies, or reveal conduct and connections that were not apparent from the original disclosure.

This evidence-led approach is particularly important where allegations involve senior executives, disputed accounts, complex transactions, or potential systemic workplace conduct.

"Evidence does more than corroborate an account. It can change the direction of an investigation and reveal issues that were not apparent from the original disclosure."

Michael Shanahan, Partner

Independence must be real and demonstrable

Not every disclosure will require an external investigation. The organisation's response should reflect the seriousness, complexity, and potential consequences of the allegations at hand.

External independence may be important where the matter involves senior executives or directors, presents actual or perceived conflicts, has significant regulatory implications, or tests the adequacy of the board's earlier response. Those responsible for commissioning and overseeing an investigation should have sufficient authority to act on the findings and be independent of both the conduct and individuals under examination.

Scope is equally important. A clear scope creates discipline and accountability, but it should not prevent the investigator from pursuing relevant evidence or escalating issues when they emerge. Material limitations, unavailable data, and matters excluded from scope should be documented and understood by those overseeing the investigation.

"Independence must allow the evidence to be examined objectively and for difficult questions to be pursued, even at risk of uncovering uncomfortable answers."

Sara Deady, Partner

Consider appointing an external investigator where:

- the allegations involve directors, senior executives or others whose position or influence may compromise an internal investigation;
- actual or perceived conflicts may affect confidence in the investigation;
- specialist forensic, financial, or digital capabilities are required;
- the matter may attract regulatory or other external scrutiny; and
- the organisation's handling of the disclosure, or an earlier investigation, forms part of the concern.

Bringing legal and forensic expertise together

Significant whistleblower matters often require legal, investigative, forensic, and technical expertise. Working together, legal advisers and independent investigators give boards and executives a more complete picture of both what occurred and the implications that may follow.

Independent investigators establish and test the relevant facts, while lawyers advise on the obligations, risks and consequences that may follow. These disciplines perform distinct but complementary roles within a clearly governed investigation.

Legal advisers	Independent investigators and forensic specialists
▪ Advise on applicable legal and regulatory obligations, including whistleblower protections and confidentiality requirements.	▪ Develop and execute an investigation plan directed to establishing and testing the relevant facts.
▪ Advise on procedural fairness requirements and the legal risks arising from proposed investigative steps.	▪ Conduct the investigation in a manner that affords procedural fairness and preserves the integrity of the fact-finding process.
▪ Advise on governance arrangements, reporting obligations, privilege and the legal parameters relevant to scope.	▪ Identify, preserve, and analyse documentary, digital, financial and other evidence.
▪ Advise on the legal and regulatory implications of the facts and findings established through the investigation.	▪ Conduct interviews, assess competing accounts and test those accounts against objective records and data.
▪ Provide legal advice to the organisation on its response, including regulatory, employment, disciplinary or other consequential action.	▪ Make independent findings of fact and identify broader misconduct, control weaknesses, governance issues and further investigative leads.

What happens after the investigation

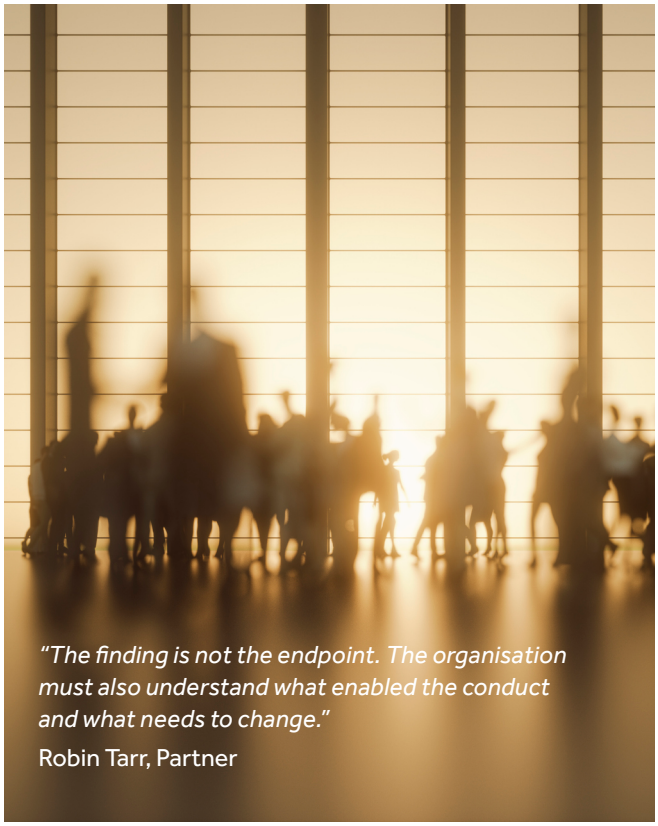
Determining whether an allegation is substantiated is not always the end of the investigation's value.

A well-conducted investigation may identify systemic weaknesses in controls, escalation pathways, supervision, record keeping, or workplace culture issues. It may show that similar conduct could have occurred elsewhere or that earlier warning signs may have been missed.

Independent investigators can help boards and executives distinguish between an isolated act and a broader organisational issue. This allows remediation to address the causes and enabling conditions of the conduct, rather than only the individuals or events immediately identified.

The organisation should consider:

- what enabled the conduct to occur;
- whether similar risks may exist elsewhere;
- whether earlier indicators were overlooked;
- what controls, behaviours or governance processes need to change; and
- how remediation will be monitored and reported.



"The finding is not the endpoint. The organisation must also understand what enabled the conduct and what needs to change."

Robin Tarr, Partner

What boards and executives should test now

The strength of an investigation framework is best tested before a serious disclosure is received. Boards and executives should consider whether their organisation can answer yes to each of the following questions:

- ☐ **Recognition and escalation channels:** Can the organisation recognise a protected disclosure and escalate serious, sensitive or conflicted matters promptly?
- ☐ **Governance:** Is it clear who will commission, oversee and make decisions about an investigation, particularly where allegations involve senior executives or directors?
- ☐ **Independence and capability:** Can the organisation appoint an investigator with the necessary independence, authority, expertise and access to specialist forensic capability?
- ☐ **Evidence preservation:** Can relevant email, mobile-device, messaging, financial and system data be identified and preserved quickly and defensibly?
- ☐ **Scope:** Can the organisation establish a clear and proportionate scope while allowing the investigator to follow relevant evidence as new issues emerge?
- ☐ **Whistleblower protection:** Are there practical arrangements to protect the whistleblower's identity, provide appropriate support and monitor potential detriment?
- ☐ **Procedural fairness:** Can people named in the disclosure be treated fairly without compromising confidentiality, evidence or the integrity of the investigation?
- ☐ **Oversight and documentation:** Will changes to scope, investigative limitations and important governance decisions be documented and approved by an appropriately independent decision maker?
- ☐ **Legal and specialist input:** Is there a process for determining when investigative, forensic, legal and technical capabilities should be brought together? and
- ☐ **Response and remediation:** Can the organisation act on findings and address broader control, conduct or governance weaknesses identified?

Getting to the facts and acting on them

Whistleblower investigations test whether an organisation is prepared to confront concerns openly and establish the facts, even when the issues are difficult.

A credible response starts with independence, appropriate governance, and a willingness to follow the evidence. It protects the whistleblower, treats those involved fairly and enables boards and executives to take appropriate action based on the findings of an independent investigation.

Independent investigators have a particular role in that process: to establish what occurred without being constrained by early assumptions, test accounts against the available evidence, and identify what the organisation needs to address.

When that work is undertaken rigorously, boards and executives have a reliable basis for action, and the organisation is better placed to maintain trust and demonstrate a credible response to regulators and other stakeholders.

Contact us

Forensic experts to help you investigate and make informed decisions on complex matters.

Businesses, courts, regulators and government agencies rely on McGrathNicol for rigorous forensic services that help resolve complex issues. We deliver evidence that stands up to legal and regulatory scrutiny. We work with you to trace assets, investigate fraud, uncover critical information, and provide expert opinions.

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