

CONDUCTING WORKPLACE INVESTIGATIONS FOR INHOUSE LEGAL TEAMS

PRESENTED BY

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Acknowledgement of Country

HWL Ebsworth would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

OVERVIEW

- Increasing pressure on organisations to conduct internal investigations
- Today's session will cover:
 - The role of inhouse legal teams in workplace investigations
 - When and what we investigate
 - Structuring and managing communications in investigations
 - Maintaining confidentiality and what to do with whistleblower / protected disclosures
 - Legal professional privilege
 - Avoiding common pitfalls in investigations – recent case review

THE INVESTIGATION PROCESS

- 1 Engagement/pre-investigation process + scope
- 2 Consider preliminary issues and ensure set up is appropriate
- 3 Deal with Complainant(s)
- 4 Deal with Witnesses (if any)
- 5 Deal with Respondent(s)
- 6 Review evidence and draft report
- 7 Finalise the investigation

WHEN TO INVESTIGATE

- Positive obligations to investigate complaints
 - Positive duty to take reasonable steps to eliminate sexual harassment and sex-based harassment, including the investigation of complaints under the *Sex Discrimination Act 1984 (Cth)*
 - Duty to investigate safety hazards, including those relating to psychosocial safety under the various *Work Health and Safety Laws*
- Follow internal policies that dictate when you must investigate
 - *Goldman Sachs v Nikolich [2007] FCAFC 120*
- Complaints must always be responded to, but it does not follow that this must always be by way of an investigation
 - *East Coast Pipeline Pty Ltd [2016] QIRC 101*
- A complaint does not need to predate an investigation
 - *Luke Colwell v Sydney International Container Terminals Pty Ltd [2018] FWC 174*

WHEN TO INVESTIGATE CONT'D

- Avoid the temptation to dismiss informal complaints as frivolous or as insufficient to investigate
- Where there is no formal complaint, but a matter has been observed or raised, the obligation to investigate may still be triggered
- Consider use of a consensus approach if appropriate:
 - Reach agreement about how the parties will act in the future
 - No findings of fact or assignment of blame
 - Provide training to the parties as required
 - Set expectations about future conduct
- Collaborative dispute resolution is not always appropriate
 - When may this approach be appropriate and when may it not suit certain circumstances?

BULLYING, HARASSMENT AND SEXUAL HARASSMENT

- Bullying is persistent or ongoing behaviours directed towards an individual or group that a reasonable person would find offensive, intimidating, humiliating or threatening and that potentially or actually affect health and wellbeing
- Unlawful harassment means any form of behaviour that takes place in circumstances in which a reasonable person should have anticipated the possibility that the person, or group of people, who is subject to the harassment would be offended, humiliated or intimidated
- Sexual harassment is any unwanted, unwelcome or uninvited behaviour of a sexual nature that makes a person feel humiliated, intimidated or offended

WHEN SHOULD IN-HOUSE COUNSEL BECOME INVOLVED IN WORKPLACE INVESTIGATIONS?

- Complaints by or against members of the Executive Leadership Team or members of the Board
- Complaints involving senior members of the HR / P&C team
- Complaints that could result in reputational or governance risk
- Perception that investigation is biased or contrived
- Complaints that process has not been followed
- The complaint would be best dealt with under privilege
- The complaint is confidential or submitted as a whistleblower (or public interest) disclosure

INTERNAL v EXTERNAL INVESTIGATION

The employer needs to decide whether the investigation will be done *internally* or referred to an *external* investigator

| INTERNAL INVESTIGATION | EXTERNAL INVESTIGATION |
|--|---|
| Utilises existing internal resources but can be a drain on those resources | Frees up internal resources or useful when no internal expertise |
| Less serious or less complex complaints | Complex or serious subject matter, risk of legal proceedings |
| Greater scope to resolve the complaint internally during the process | May be more credible, particularly if complaint relates to Executive Leadership Team, HR or Legal |
| Generally cheaper and faster | Can be more expensive and take longer |
| Less control by the employer | Independence from the employer |

LEGAL PROFESSIONAL PRIVILEGE

- Protects an investigation report prepared for the purpose of the employer receiving legal advice or in anticipation of litigation
- Does not apply if the Investigation report is prepared for the purpose of assessing the employee's conduct
- Will not protect documents that are part of the investigation process, unless commissioned for the purpose of obtaining legal advice
- Can be inadvertently lost by the employer doing something '*inconsistent with maintaining the secrecy of the communication*' and then be required to be produced in future legal proceedings
- Can be voluntarily waived

LEGAL PROFESSIONAL PRIVILEGE - CASES

- Allowing the opportunity to respond to allegations the subject of the investigation does not automatically waive LPP:

Kirkman v DP World Melbourne Limited [2016] FCW 605 (29 January 2016)

- LPP can still apply if investigative material obtained for the purpose of legal advice is used for another purpose:

Peter Tainsh and Markus Wellner v Co-Operative Bulk Handling Ltd [2021] FWC 3381 (15 July 2021)

ANONYMOUS AND CONFIDENTIAL COMPLAINTS

- Dealing with confidential and anonymous complaints
 - Multiple complainants and / or multiple respondents
 - Single complainants with single respondents
- Complaints made as whistleblower disclosures under the *Corporations Act 2001 (Cth)* or public interest disclosures under state *Public Interest Disclosure Acts*
 - Anonymous disclosures
 - Disclosures where the discloser requests confidentiality
- Procedural fairness and complying with other duties

PLANNING – THE FIRST AND MOST IMPORTANT STAGE

- Try to resist pressure to rush into an investigation
- It is important to plan before commencing the investigation
- Once an investigation commences, it can be easily side tracked, so planning can assist in maintaining the integrity of the process
- Things to consider:
 - ✓ Who is conducting the investigation (consider legal professional privilege)?
 - ✓ Is the investigation confidential or subject to legally protected anonymity?
 - ✓ What are the complaints or concerns?
 - ✓ Who are you meeting with and when?
 - ✓ When are you putting the allegations to the respondent(s) and how will you manage them?
 - ✓ How will the investigation be finalised?
 - ✓ Indicative timing?
 - ✓ Are there any assumptions?

WHAT TO INVESTIGATE

- Set out the matters of complaint/allegations for investigation
- Communicate the matters of complaint to the respondent(s)
- Organise a time and conduct interviews with witnesses
- Update the allegations (if necessary) throughout the investigation
- Prepare and issue stand down letter in certain circumstances to respondent(s) setting out detailed matters of complaint / allegation
- Meet with the respondent(s)

MANAGING PARTICIPANTS AND STAKEHOLDERS

Issues that may arise

| | | | | | |
|----------------------|----------------------------------|---------------------|-------------------------|---------------------------|-------------------------|
| Failure to cooperate | Provision of medical certificate | Counter-allegations | Pressure for an outcome | Disruptive support person | Dispute process engaged |
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CONDUCTING WORKPLACE INVESTIGATION INTERVIEWS



Building rapport



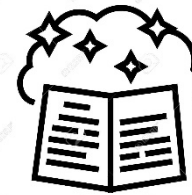
Polite neutrality



Effective listening



Mindful of trauma



Encourage narrative

DOCUMENTS AND NOTES

- Record:
 - date, time and location of the interview; and
 - names of everyone present
- Take contemporaneous notes during the interview or record the interview
- Organise notes chronologically
- Does not need to be a verbatim record but if likely to use particular quotes, record them verbatim for later use
- Document non-verbal cues or behaviours observed
- Obtain consent to record
- Summarise key points back to interviewee

THE ROLE OF THE SUPPORT PERSON IN WORKPLACE INVESTIGATIONS

- Does the person being interviewed (either the respondent employee or another witness) have a right to have a support person?
- The support person may include:
 - A union representative
 - A legal representative
 - A work colleague
 - A family member
- This person should be independent of the investigation and not be (potentially) required to be a witness themselves
- Need to be clear about the role of a support person

PROCEDURAL FAIRNESS CAN REQUIRE DIFFERENT THINGS IN EACH INVESTIGATION

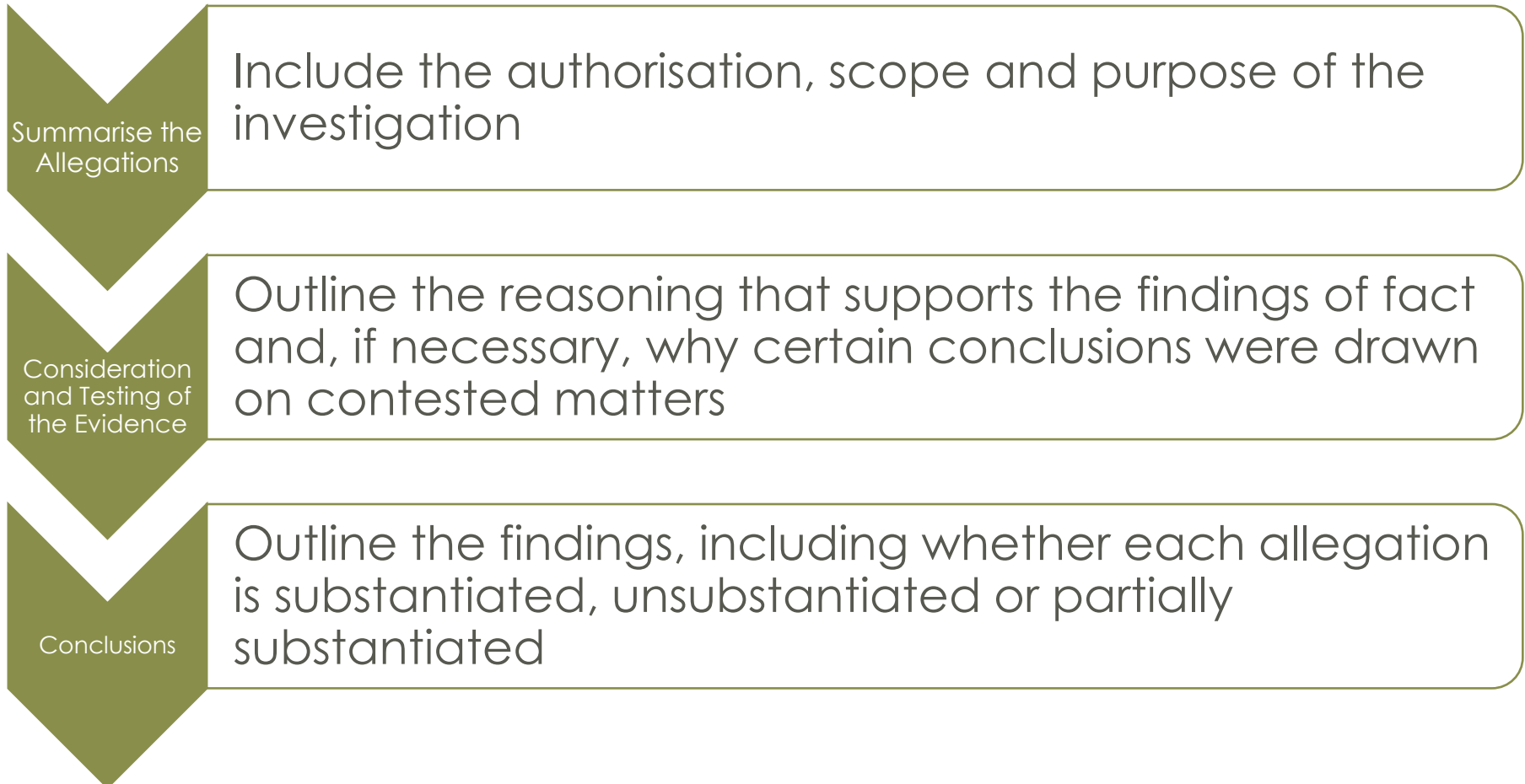
- What is “fair” may be different depending on the circumstances
- Avoid following a rigid, prescriptive or one-size-fits-all approach to investigations
- Procedural fairness can be compromised when we do not properly plan and then adjust the process as circumstances change
- The timing and content of allegations is critical to running a procedurally fair process

ASSESSING THE EVIDENCE - STANDARD OF PROOF

The Briginshaw Standard

- Applies where the allegations are particularly serious, for example:
 - Assault and sexual assault;
 - Serious theft;
 - Significant fraud;
 - Other serious misconduct
- It is not a third standard of proof but relates to the type of evidence which will be needed to meet the “reasonable satisfaction” required to accept a serious allegation as proven
- The evidence relied upon must be of a high probative value, avoiding reliance on “inexact proofs, indefinite testimony or indirect inferences”

THE INVESTIGATION REPORT - OVERVIEW



TIPS FOR REPORT PREPARATION

1. Use objective language
2. Set out relevant background
3. Explain why evidence is accepted or not accepted
4. Explain why you have reached relevant conclusions
5. Clearly set out conclusions for each alleged fact
6. Where allegations are only partly substantiated, be clear about what is and what is not substantiated
7. If the investigation requires conclusions about contraventions, indicate what the substantiated allegations contravene – remember to consider more than Company policy
8. Make recommendations if within the scope

POST-INVESTIGATION STEPS

- Providing the findings of the investigation and outcomes to the stakeholders
- Is there other information that needs to be considered before determining what needs to occur after the investigation?
- Have you provided the employee with a reasonable opportunity to respond before determining disciplinary action?
- What, if any, disciplinary action should be taken?
- Have you provided the employee with any other relevant information (evidence and/or relevant extracts from the report) upon which you may seek to rely on in your decision (beware LPP)?

WHAT POWERS DO REGULATORS HAVE IN INVESTIGATIONS?

- Duty to preserve incident sites if there is a safety event
- Power of Health and safety Representatives to investigate complaints regarding health and safety
- Regulatory power to investigate contraventions of the Act
- Regulator can compel independent investigations
- Australian Human Rights Commission conduct an inquiry and compel the production of information (ss46PF and 46PI of the *Australian Human Rights Commission Act 1986* (Cth))

PRINCIPLES FROM RECENT CASES

- Separate the investigator from the decision-making process: *Skei Batton v The Environment Centre NT Inc* [2024] FWC 597 (7 March 2024)
- Be wary of taking adverse action against a respondent employee before completion of investigation: *State of New South Wales (NSW Police Force) v Plant* [2024] NSWPICPD 11 (19 February 2024)
- Complete investigations in timely fashion and interview all relevant witnesses: *Jason Kildey and Others v Technical And Further Education Commission* [2024] FWC 383 (13 February 2024)
- Do not rush investigations and ensure that sufficient opportunity is given to employees to respond to allegations: *Roy Sabag v D&T Hydraulics and Engineering Pty Ltd* [2024] FWC 3336 (3 December 2024)

PRINCIPLES FROM RECENT CASES CONT'D

- Ensure investigation and disciplinary processes are in line with relevant policy and procedures and opportunity is given to employees to respond to allegations : *Elisha v Vision Australia Ltd* [2024] HCA 50 (11 December 2024)
- Follow a procedurally fair process: *Scott Matthew Ashburner v St Mary's Rugby League Club Ltd* [2024] FWC 246 (30 January 2024)
- Even if an employee resigns, complete investigations promptly, fairly and fully: *Adela Werner v SkinKandy VIC Pty LTD T/A SkinKandy* [2025] FWC 389 (11 February 2025)
- Ensure that issues are investigated, and findings are made, to establish a valid reason for dismissal: *Nuttall v The Trustee for Bm Supplies Unit Trust* [2024] FWC 953 (12 April 2024)

QUESTIONS?



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The background features a dark green surface with several light-colored, textured geometric shapes. A large, light-colored circle is partially visible behind the text. In the bottom right, there is a sphere with a cratered, moon-like texture. In the top left, there is a rectangular shape with a similar textured surface.

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