

An Introduction to Workplace Investigations

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It is perhaps an inevitable fact of corporate life that employers will, sooner or later, need to carry out an investigation—formal or informal—into some aspect of behaviour at their workplace. Commonly, this will be a result of a complaint or allegations about an employee's conduct, but the need for an investigation goes much further than issues of misconduct, indeed wider than employee conduct generally, be it performance, conduct or capacity. Thus, for example, an accident at the workplace, or work health or safety concern, may also call for an investigation. Investigations may also be used to address systemic issues, such as absenteeism, and to unearth cultural issues in the workplace.

In this article, we look at a few basic pointers about when and how to conduct a workplace investigation, with a quick look at some of the legal risks associated with investigations.

What is an investigation?

To "investigate" is to examine, inquire into or study carefully, "a search for the truth in the interests of justice and in accordance with the specifications of the law". In a workplace setting, it has been defined as "a systematic examination of acts, omissions or events to determine, assess and report on matters pertaining to workplace inability or disciplinary matters".

An investigation thus carries with it the notion of discovering the truth, and doing so in an appropriate way. It is a fact-finding exercise. It is important to realise that despite the employer having to make a decision about how to act, once the fact-finding has concluded, a workplace investigation is not a trial, nor is it a court case where the employer acts as the plaintiff. Rather the investigator is required to be an impartial fact-gatherer, and is required to observe the rules of natural justice (discussed below). This means that many of the rules that apply to a criminal trial or to litigation generally will not apply to an investigation (although, as we set out below, in some instances it is advisable to at least keep in mind some of those rules, for example, rules regarding the admissibility of evidence).

Before the complaint—making the inevitable easier to manage

Long before a complaint is made or an incident occurs, there are some steps an employer can take that will make it easier to conduct an investigation when the need inevitably arises.

Firstly, the employer can ensure that there are proper policies in place. For example, as a large number of complaints and resultant investigations are about allegations of bullying, harassment or sex discrimination (including sexual harassment) a proper policy that makes it clear what is, and is not, misconduct and the potential consequences of that misconduct, will do much to assist the investigator, because it will clarify the lines of inquiry. A proper work health and safety policy will make clear the relevant obligations and the need to investigate any incidents.

Where policies and procedures make it clear that, for example, an investigation may be carried out, that employees have a duty to cooperate with the investigator, and that an employees employment can be suspended (with pay) during an investigation,



the assistance of the policy in facilitating the investigation is further enhanced.

Employers should also ensure they have a policy that covers email and computer usage, and surveillance of computers and the workplace generally. Not only is the use of computers a key source of the need to investigate itself (for example, allegations of distribution of offensive emails, accessing online pornography or theft of intellectual property by copying confidential material) but as computers are such a common business tool for storing and sharing company documents, it is almost certain that an investigation will require access to some material stored electronically. Reinforcing the need for such a policy, a number of States have legislation dealing with workplace surveillance, with a requirement that employees be put on notice about workplace surveillance. A policy that complies with such legislation is essential.

While not essential, employers could also have a policy that sets out rights and obligations when complaints are made and investigations begin. A key here is not to be too prescriptive—a promise in a policy that a complaint will be investigated and action taken within 14 days, for example, is likely to be unrealistic timing for a proper investigation, and thus the policy itself could be grounds for a breach of contract claim, or at least the subject of further complaints. Nevertheless, a well drafted policy may make it clear to employees that the employer is serious about proper behaviour, and assure employees that complaints will be taken seriously, and that victimisation and retaliation will not be tolerated.

Secondly, an employer can assist future investigations not only by having proper policies, but by ensuring that relevant documents are readily available. This can save considerable time. It is surprising the number of employers who cannot quickly locate up-to-date contracts of employment, personnel records, or company policies when needed. Further, all relevant industrial instruments should be available—Modern Awards, enterprise agreements, even informal agreements with staff or their unions. If your industry is one that is subject to special legislation, you should also at least keep a record of the name of the legislation. Ideally, a record of amendments of the Act at various stages should also be kept.

Of course, employers should not just assemble this material into the electronic equivalent of a large shoe box, but take the opportunity to review the material and ensure that it is both appropriate (for example, ensure that contracts of employment have appropriate terms) and understood (for example, check what the enterprise agreement or the governing legislation says about an employee's right to have a support person present at any interview).

When is an investigation required?

It is important to assess quickly, when confronted with a complaint or an incident, whether an investigation (particularly more formal investigation) will be required. Not every complaint or incident requires that form of investigation.

For example, the majority of concerns raised by workplace complainants are able to be resolved at an informal level by supervisors or managers, or through a process such as a grievance handling process, without the need for any investigation. Carrying out an investigation where it is not warranted not only wastes valuable resources—investigations are expensive and can tie up considerable management time—but can also damage morale and turn a petty squabble into a major workplace problem.

Some factors to bear in mind when assessing whether to instigate an investigation include:

- *Is the issue really an interpersonal dispute?* A grievance procedure or mediation may be more appropriate than an investigation.
- *Is the issue really about workplace rules or practices?* Implementing a change in practice, or enforcing an old one, may be a better alternative.
- *Is the issue one that relates to the workplace?* Conduct out-of-hours is not always a matter for the employer. Ensure there is a proper connection to the workplace before becoming involved in allegations about conduct in an employee's own time and away from the workplace.
- *Is the complaint frivolous—trivial, far-fetched or otherwise not worthy of serious attention?* An employer is not obliged to investigate frivolous matters.
- *Is the complaint vexatious—without merit and solely designed to inconvenience or annoy another person or the employer?* While not easy to discern, there is no obligation to investigate in these circumstances. Note that it will sometimes not be apparent that a complaint is vexatious until investigated, and some complaints that may initially appear vexatious will have some merit (and thus not be vexatious).
- *How old is the matter?* If significant time has passed and the matter is relatively minor, no investigation may be warranted. Witnesses and evidence may no longer be available. So a complaint that an employee made a single sexist remark 10 years earlier may not warrant an investigation, but a complaint of sexual assault at work may, despite the time that has elapsed.
- *Is there a risk of widespread or repeated conduct if not stopped?* For example, pilfering of less than \$1 worth of goods may not seem important, but the issue of stock losses by staff theft may still require an investigation, even though the amount in question may be small.
- *Is there is a risk to reputation?* Conduct which risks the

reputation of the company may require investigation to demonstrate that it is of serious concern to the company. For example, poor driving of company-marked vehicles may be investigated, even if no charges were laid by Police.

- *Is there a wider public interest?* Theft of small amounts of chemicals that could be used to manufacture prohibited drugs or explosives, for example, or leaving children unattended, may justify an investigation because there is a public interest in ensuring these things do not occur. Usually, it will be in the best interest of the company to investigate such matters in any event—for example, no employer wants to be associated with potential illegal conduct.
- *Is it one of a series of complaints about the same person or the same type of conduct?* This could indicate a pattern of behaviour or a widespread problem, justifying a wider investigation.

However, be aware that there are risks in incorrectly deciding to not investigate (or in not investigating because no decision was made at all). A claim of sexual harassment, for example, that is not investigated, may eventually lead to litigation where one issue will be the company's failure to take all reasonable steps to prevent the activity of one of its employees. Worse still, failure to investigate may itself be portrayed as sex or race discrimination—for example, ignoring a complaint by a female employee could lead to allegations that the complaint was not investigated because the complainant was female.

Further, an un-investigated complaint will leave the complainant unhappy, and if the complaint was justified, may simply see the person at fault emboldened and continue the conduct at more significant levels, putting the company at increased risk. It is for that reason good practice to not only take care when exercising a discretion to investigate or not, but to also discuss the reasons with the complainant in case there are additional factors to consider.

Does the matter need to be reported?

Sometimes, the conduct or incident which is, or is proposed to be, the subject of an investigation, can be significant not only for the particular employer, but because it raises issues of wider public importance or interest. For example, the employee's conduct may not just be misconduct affecting the employer, but also a serious criminal offence. The investigation may uncover wider public corruption. In these circumstances, employers should consider whether the matter ought to be reported to one of the public authorities, typically but not exclusively, the relevant Police, either State or Federal.

In some jurisdictions, there are obligations to report certain matters. These include:

- An employer which is a public sector employer may have an obligation to report conduct which is potentially corrupt conduct, or conduct which demonstrates poor public administration. Such complaints may need to be given to a body such as the Ombudsman, or to an anti-corruption body such as the New South Wales Independent Commission Against Corruption.
- An employer may have obligations to report certain conduct by employees that could affect vulnerable members of the community, for example, children or young persons. These obligations are typically much more stringent for employers whose business it is to provide services to these special

groups, such as children or the aged, though sometimes they will apply to all employers. Assaults against, or even in the presence of, children, or any other activity that puts a child at risk of harm are typically the types of matters that need to be reported. Similarly, under the Commonwealth *Aged Care Act*, employers who work in aged care need to report assault against the elderly under their care.

- In some States, there is an obligation to report certain activities to the Police, if those activities could involve a serious criminal offence. In New South Wales, for example, it is itself an offence not to report conduct that constitutes a serious indictable offence. Many of the serious matters which an employee may need to investigate—*theft, assault, sexual misconduct*—potentially fall into that category.

Even if there is no *obligation* to report a matter to the Police, nevertheless it is good practice to at least consider whether a matter ought to be referred. The Police have expertise and investigative powers beyond that of the usual employer, and can represent a wider public interest in preventing criminal activity generally, not just against the particular employer. Thus, for example, theft of materials is a matter an employer can well investigate, but it may also be part of a wider Police investigation, where the theft is not the first time the particular employee has been involved, or where the theft is one of a series of thefts across an industry. At least discussing the issue with the Police will give an employer a sense of whether there is any wider concern.

Of course, reporting a matter to the Police or another authority does not relieve the employer from investigating the workplace issue. The Police investigation, for example, may necessarily take some time to conclude, and the situation at the workplace needs to be resolved. This would be the case, for example, where there are allegations of sexual misconduct by an employee, in the context of a breach of the Sex Discrimination legislation. It is not going to be acceptable for the employer to take no steps to resolve the matter—for example, leaving the complainant still working closely with the alleged harasser—just because the matter has been reported to Police. In those circumstances, any investigation by the employer will need to proceed carefully so that it does not interfere with the Police task, for example, by contaminating evidence or alerting people to potential Police interest.

Who should investigate?

When a decision has been made that an incident or a complaint requires an investigation, then the next question is, who should carry out the investigation.

In rare cases, the employer may have no say. Some public sector organisations will be governed by laws or directions that specifically direct who is to carry out an investigation. Normally, however, an employer has an initial choice—an internal investigation, carried out by someone from within the employer’s organisation; or an external investigation, carried out by someone not connected to the employer.

Benefits of an internal investigator include:

- Often, it can be cheaper than an external investigation.
- There will be knowledge of how the company operates and its processes and its culture.

External investigators may have advantages in some cases:

- They can be viewed as more neutral by staff.



- They can be chosen for their expertise in investigations and writing reports.
- It can be easier to convince a court or tribunal about the validity of an arms-length investigation.

Whether internal or external, there are some basic requirements that any investigator should meet. The investigator must not have any interest in the outcome of the investigation—a supervisor, for example, should not be the investigator if the conduct of that supervisor is likely to be an issue in the investigation. The investigator must not be a potential witness. The investigator must be free from any bias, or perception of bias—for example, the investigator should not be a friend of either the complainant or the alleged wrongdoer, or when investigating an accident, should not have a financial interest in the company that manufactures the equipment involved in the accident.

Factors to consider when choosing an investigator include the person’s:

- impartiality and objectivity;
- experience in conducting workplace investigations;
- personality and ability to work with people;
- understanding and familiarity with the company or the industry (or the ability to gain that knowledge quickly);
- professionalism;
- availability;
- cost;
- ability to make wise decisions based on evidence; and
- ability to communicate in writing (the report) and orally (for example, to explain the report if challenged in court).

It is sometimes tempting to call in an “expert” to carry out an investigation—for example, a forensic computer expert to deal with allegations of computer misuse. Care should be taken before appointing an expert in that way. It may well be appropriate when the only issue is a technical one—for example, there is no dispute as to the facts in general, but only whether the material in questions was copied from one computer to another. In many cases, however, the technical aspect will be but one factor in the investigation. The fact that a person has expertise in computer science does not mean that she or he will also be skilled at investigations generally. In those cases, it may be better to have a proper investigator carry out the investigation, with the expert appointed to assist the investigator on issues of fact.

Employers also can consider using lawyers to conduct an

investigation. Many of the qualities of a good lawyer are also positives in carrying out investigations. They are usually skilled in asking questions, understand what evidence is going to be admissible, have experience in conducting investigations, and experience in fact-finding and writing. However, it may not always be in the best interests of the employer to use the company's normal lawyers (that is, the lawyers who provide employment and industrial relations advice). Firstly, it runs the risk of those lawyers inadvertently losing legal privilege over the advice previously given, as the lawyers take on an active role in the investigation. Secondly, there is a risk that the investigation may involve the solicitors in a conflict of interest, with the result that they would then be prevented from acting for the employer in any subsequent proceedings. This issue was argued, for example, in the Federal Court of Australia in 2007, when the Court observed "It would no doubt have come as a surprise to the applicant that the solicitors who interviewed him and assessed credibility of his allegations should then have acted for [the employer] in opposing his claims for compensation and reinstatement. In my view [the employer's] decision to engage [the solicitors] in both roles —was not particularly sensitive to the position in which the applicant found himself".

While the Court went on to find there was no impediment to the solicitor continuing to act for the employer in that case because no demonstrable injustice had been shown, it did comment that the applicant could raise the matter on appeal if he lost the reinstatement applications including then being able to argue on appeal that the employer obtained an inappropriate forensic advantage by having the same solicitors who conducted the investigation.

For this reason, it is advisable to discuss the issue with your lawyers at the earliest opportunity. It may be possible, for example, by proper use of information barriers, to ensure any conflict is quarantined in another part of the legal office. Or the risk to privilege or the investigation itself may justify the expense of engaging a second set out lawyers just to carry out the investigation.

How to conduct the investigation?

No two investigations will ever be the same, and it is beyond the scope of this article to provide a detailed analysis of what to do in every form of investigation. Nevertheless, the following are some key pointers that should be considered.

Plan carefully—an investigation plan should be drawn up. Key witnesses should be identified, and persons potentially affected by the investigation should be listed. Practical details, such as location and order of witnesses, should be set out. An outline of the questions to be asked should be drawn up. The objective of the investigation should be noted.

Act quickly—while an investigation should not be rushed, neither should it be delayed. If an issue requires investigation, it is clearly affecting the company. Witnesses' memories fade, computers change, documents can be changed or removed—all these point to the need to act quickly.

Observe proper process and the rules of natural justice—procedural fairness and natural justice are essential, not just for the validity of the investigation itself, but to provide comfort to staff that the matter is being handled fairly. Thus it will be important to ensure people have proper input into decisions. The investigator must obtain all relevant

information and from the best sources; must consider all possible explanations for the information gained, and must specifically consider the information that may be favourable and unfavourable to each affected person. This requires that allegations are put to people quickly, and they be allowed to respond. People should be allowed to have a support person present (though not an advocate).

Interview witnesses—unless physically impossible, all witnesses should be interviewed and records kept of the interviews. It is generally advisable to start with the complainant (in the case of a complaint). Depending on the nature of the investigation, other witnesses would then follow, and then the person complained about (this order allows full allegations to be put to the person the subject of the complaint. Often, the interviews will identify other evidence to be obtained. If the person the subject of the complaint raises counter allegations about the complainer, these in fairness need to be put to that person.

Maintain confidentiality—both during the investigation and after it, except as may be necessary. Note, however, that it is not desirable to offer any witness a guarantee that the evidence will remain confidential, as no matter how well-intentioned, there can be no guarantee that the matter will not end in court proceedings.

Be aware of what constitutes evidence—while a law degree is not essential, having an understanding of what constitutes proper evidence is crucial. Investigations that come to conclusions based on inadmissible evidence can easily be the subject of court challenge.

Keep proper records—it is important that you keep good notes of the investigation. However, be aware that in general you will need consent to electronically record interviews or to videotape them. At the very least, detailed minutes of the interviews should be taken. If necessary, the investigator should consider whether having a second person to take detailed notes would be useful.

Preserve evidence—if the investigation involves the examination of physical objects, it may well be important to preserve the evidence—to keep the document intact, to ensure the laptop remains untouched, and to ensure the computer record is not altered.

Preparing the Report

Once all the fact-gathering has been completed, the investigator will need to prepare a report. Most employers will expect this report to be in writing. Preparation of the report can be a difficult task and a failure to give sufficient attention to the task is a common reason for many investigations to fail to achieve their stated aim.

It is important to start with an understanding of what the investigation was meant to do. This should have been identified before the investigation properly began, at the stage of developing the overall plan. The investigator's report then needs to make findings of fact in relation to the overall aim of the investigation.

These findings of fact must be based on the evidence collected in the course of the investigation. That evidence can be from witnesses, or from documents. In considering the evidence, the investigator should consider both the relevance of the evidence, and its reliability. Care should be taken in assessing witnesses, in particular in relation to "impressions" of whether the witness is

an honest person. As one eminent senior counsel recounted “The demeanour of a witness, if carefully studied, is often more likely to lead to error than enlightenment. Some witnesses are nervous. They look very unimpressive. . . . But the witness who appears to have ‘something to hide’ is likely to be a perfectly honest person as nervous of a court as of a dentist’s chair. . . . Some witnesses are confident. . . . They exude respectability, decency and reliability. In fact, they are exact replicas of good confidence tricksters. . . .” Lord Atkin, a famous English judge of old, wrote “An ounce of intrinsic merit or demerit in the evidence, that is to say the value of the comparison of evidence with known facts, is worth pounds of demeanour.”

An investigator must consider the necessary “onus of proof”—that is, the standard to which the investigator must be satisfied. For example, in a criminal trial, the judge or jury must be satisfied “beyond reasonable doubt”. A workplace investigation only needs to have matters proved “on the balance of probabilities” (more likely to have occurred than not). However, in an investigation, the report would also need to bear in mind the long-discussed (and often misunderstood) principle in *Briginshaw v Briginshaw*, a decision of the High Court of Australia in 1938, which at its simplest, merely recognises that the more serious the ramifications of a finding, the more substantial the evidence needed to make an adverse finding. The case does not, however, mean that the criminal onus applies just because serious misconduct is being investigated.

An investigation should not make a finding that a person has committed a criminal offence—if the investigator thinks that is the case, he or she should rather indicate that there is enough evidence to support the matter being referred to the Police. Because of the different levels of proof, an investigator may find evidence of misconduct, but that does not necessarily mean a person would be convicted of a criminal offence on the same evidence.



An investigator may in some circumstances be left in a position where there is simply no evidence, or insufficient evidence, to make a finding. The investigator should take great care in making such a finding, and should at least consider whether the evidence points to a need for changes to the employer’s policies or procedures.

Finally, it is important that in preparing a report, the investigator does not start with a presumption of a position (for example, that the complainant is lying, or that there is evidence of misconduct) and seek to identify evidence that supports that proposition. Such an approach will see the investigation go seriously astray. Rather, the investigator should start with the evidence, analyse that evidence, and come to conclusions based on that evidence.

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