Bartier Perry LAWYERS
EMPOWERING INSIGHT

Council CONNECT

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Inside this issue

Hello

Welcome to this edition of Council Connect. I'm delighted to be writing this introduction for three reasons. First, Council Connect represents our commitment to supporting the important work you do for NSW communities. Without you, so much of what we take for granted would cease to function. It's our privilege to partner with you.

Second, it represents a level of knowledge and expertise within Bartier Perry that I'm exceptionally proud of. Council Connect offers insights based on years of experience and understanding of our clients from some of the best in our profession. There is true value in these pages.

Finally, having only joined Bartier Perry as CEO in late 2017, I am yet to meet all our clients and friends, so this introduction also serves as a personal "hello" from me.

After 15 years in senior strategic and operational leadership roles in Australia and internationally, I was drawn to Bartier Perry by what I saw as an outstanding client-centric culture, made possible by a focus on best outcomes versus rigid operating structures. The intervening months have only reinforced that perception, and I'm committed that we build on it further.

If you have questions or comments, please don't hesitate to get in touch. We love feedback and we love contributing to the work you do.

Riana Steyn
Chief Executive Officer
Bartier Perry

Building, Construction and Procurement – Cautionary Tales

MARK GLYNN

Tale No. 1

The Bartier Perry Building and Construction team was recently engaged by a New South Wales local council regarding a possible claim against a consultant providing design services for the construction of a public access facility.

Facts

Council invited tender submissions for design services including for the construction of a new public facility.

The design scope required the consultant to provide an options analysis with more than one design option to be submitted.

The contract stated that the design must minimise the health and safety risk to construction, operation, maintenance and service workers and all other users of the facility. This clearly included members of the public.

The contract also stated that the consultant must identify, assess and, where practicable, eliminate all reasonably foreseeable hazards and risks to the health and safety of all those who may use, maintain or repair the facility.

Issue
Designs were submitted by the successful consultant and a preferred design agreed on. The consultant prepared 'For Construction' drawings which were then issued by Council to the successful construction contractor.

Some months into construction, work was suspended when it became apparent that the design created a step hazard which presented a safety risk for anyone using, maintaining or servicing the facility.

Following an on-site inspection, review of the consultant's design and a reconciliation of the design scope against the design, Council determined that:

- the consultant's design failed to address safe management, maintenance, use and operation of the completed facility
- the consultant had failed to produce a design that minimised the risk to the health and welfare of construction, operation, maintenance and service workers and all other users of the facility
- the consultant had failed to exercise due skill and care in the preparation of the design.

> It is vital that the contract clearly and precisely defines not only the design scope stated or inferred from the project requirements, but also any responsibilities, obligations or warranties in relation to the design services which Council wishes the consultant to assume.

Council further determined that the step hazard was a reasonably foreseeable risk to the health and safety of users of the facility.

Action taken
Working closely with Council's project manager, Bartier Perry prepared a detailed letter of demand which:

- clearly set out the basis of Council's claim, relying on the terms of the contract and the common law
- referred to the numerous 'For Construction' drawings prepared by the consultant
- set out the loss suffered by Council, which included additional costs incurred in the redesign of the asset, delay costs paid to the construction contractor, modification of materials already delivered to site and additional costs in retrospectively overcoming the step hazard.

Council demanded payment of loss and damage suffered, which included redesign of the facility, additional design costs to overcome the trip hazard, construction contractor's delay, and modification of materials already ordered and delivered to site.

Result
Council received a settlement of 74% of its claimed amount without the need for formal legal proceedings.

Why does council need to know this?
When entering into an agreement for design or any other services, Council relies on the expertise of the consultant.

It is vital that the contract clearly and precisely defines not only the design scope stated or inferred from the project requirements, but also any responsibilities, obligations or warranties in relation to the design services which Council wishes the consultant to assume.

These may include that the consultant provide a design which is not only fit for purpose but that meets other requirements such as:

- health and safety requirements contained in WHS legislation
- all other legislative requirements
- Council's policies (if so they should be annexed to the contract)
- all environmental requirements.

Furthermore, the consultant must carry out the design so that the related construction work will also comply with these requirements. The importance of this cannot be overstated.

Time spent ensuring the contract reflects Council's appetite for risk and narrows the scope for dispute often, as in this case, provides a smoother and easier path to resolution.

Tale No. 2

The Bartier Perry Building and Construction team was recently engaged by a subcontractor to help recover outstanding rental fees for equipment supplied to a construction contractor.

Facts

An equipment hire contractor entered into a contract with a construction contractor in which the hire contractor undertook to supply specialised hydraulic lifting equipment for a high-rise commercial construction project.

Issue

Partway through the contract, the builder alleged that the equipment was defective and stopped making the monthly hire payments. Yet the builder appeared to continue using the equipment.

At the end of the project the equipment was demobilised and returned to the hire contractor, as required by the contract. However, payment of the outstanding rental invoices were not made.

Action taken

Even though the hire contractor had issued monthly invoices to the builder for the hire fee, it had not issued a progress claim under the *Building and Construction Industry Security of Payment* (SOP) legislation.

After the return of the equipment, the hire contractor issued a progress claim under the SOP Act on the next 'reference date'.

The SOP progress claim, which included the previously issued invoices, was served on the builder by fax, a permitted method under the construction contract.

The hire contractor expected to receive a payment schedule from the builder rejecting the progress claim and had determined to make an application for adjudication of the dispute under the SOP Act.

However, after 10 business days had passed the builder had not provided a payment schedule.

The SOP Act (section 15) provides that by not providing a payment schedule replying to the progress claim, the builder became liable to pay the amount claimed by the hire contractor in its progress claim.

The SOP Act also provides that if the builder did not pay the claimed amount by the due date (which it did not), the hire contractor could recover the amount in the appropriate court as a debt. Under section 15(4) of the SOP Act, the builder would be unable to bring any cross claim against the hire contractor or raise any defence based on matters arising under the construction contract.

In fact, the only basis available to resist the court application would be if the hire contractor had not strictly complied with the SOP Act (which it had).
The hire contractor drafted a statement of claim to recover the claimed amount from the builder in court.

However, before filing it, the hire contractor sent the builder a copy of the draft advising of its intention to file, and stating that as the builder had not provided a payment schedule, it was prohibited by the SOP Act from bringing a cross claim or raising a defence in the proceedings.

Given that, the hire contractor invited the builder to pay the claimed amount immediately and avoid not only its own legal costs of any proceedings, but also those of the hire contractor's in the likely event that the contractor was successful and costs were awarded against the builder.

Result
Under sufferance and over significant objection, the builder realised its error in not providing the payment schedule and paid the hire contractor the claimed amount.

Why does council need to know?
This successful result for the hire contractor clearly illustrates the consequences to a principal or head contractor of not responding to a progress claim by providing a payment schedule.

Councils enter into many contracts under which contractors undertake to carry out construction work or supply related goods and services to Council in its capacity as principal.

These construction contracts are subject to the provisions of the SOP Act.

Council must ensure it has processes and procedures to respond to all contractor progress claims issued under the SOP Act by providing a payment schedule.

The payment schedule:

- must be provided within 10 business days (or sooner if required by the construction contract)
- must indicate the amount of the payment that Council proposes to make
- if the amount is less than claimed by the contractor, the payment schedule must indicate all the reasons why.

Failure to issue a payment schedule within the required time frame has dire consequences, as experienced by the builder in this cautionary tale.

A progress claim made under the SOP Act used to be easily identifiable, as it carried the warning that it was *"a progress claim made under the Building and Construction Industry Security of Payment Act 1999".*

However, SOP progress claims are no longer required to carry this warning. This raises the question: how will Council know it has been served a progress claim under the SOP Act?

Our advice is that Council should now regard *any* claim made by a contractor under a construction contract as a claim made under the SOP Act.

Council must also be aware that the period for providing a payment schedule cannot be extended by the court or by agreement between Council and its contractor, and the 10 business day period must be strictly complied with. Failure to do so may see the contractor entitled to recover payment through the Court under the SOP Act, with Council having no opportunity to raise a defence or cross claim.

Tale No. 3

A member of the Bartier Perry Building and Construction team assisted an asphalt contractor who had entered into a contract with a NSW council.

Facts

An asphalt contractor successfully tendered for and entered into a contract with a council for the supply and laying of asphalt. The contract contained an option clause which stated the agreement was '*for the period: 1 August 2011 to 31 July 2013 with a further 12 month option available'.*

In 2012 the contractor carried out asphalt works, which showed signs of failure. The council alleged that the contractor had not complied with the specifications contained in the contract; specifically, that it had not carried out testing for in situ voids, which the council asserted was required under the specifications.

Issue

On 11 March 2013, Council advised the contractor that it would not exercise the option to extend the contract and that a new tender would be advertised.

On 4 April 2013 the contractor gave notice of its exercise of the option to extend the contract for a further 12 months.

The council responded by asserting that the option could only be exercised by the council or by mutual agreement.

The council invited tenders for the period after 31 July 2013, identifying different specifications to be included in the new contract.

The contractor did not participate in the second tender.

Action taken

The contractor instead brought proceedings against the council in the NSW Supreme Court, seeking damages for breach of the contract.

The Supreme Court found that the contractor was, on the proper construction of the contract, able to exercise the option unilaterally and that the council had breached the contract. The contractor was awarded damages for lost profits for the option period and the loss of opportunity to successfully tender for two further contracts with the council.

The council was ordered to pay the contractor's costs of the proceedings.

Result

The council appealed to the NSW Court of Appeal, arguing that the primary judge's findings as to construction of the contract were incorrect and that the award of damages was incorrect.

The Court dismissed the appeal and held that the primary judge was correct in his construction of the contract, agreeing with his finding that the option clause conferred a unilateral right on the contractor to exercise the option.

Payne JA explained that:

- the language *'12 month option available'* indicated that the extension was offered by the council to the successful tenderer
- the option clause did not qualify the right to exercise the option, whereas several other clauses in the contract did contain qualifications.

Why does council need to know this?

The decision highlights the need for Council to exercise great care and precision in the drafting of contractual terms. In relation to options to extend the term of the contract, the drafting should be clear and unambiguous as to how and by which party the option is to be exercised, the preconditions to exercise of the option, and the price to apply during the extended option period.

As the council learned in this case, the simple wording *"option to extend"* did not protect its interests and ultimately cost it financially when damages were awarded against it.

Council should ensure that option clauses regularly found in contracts, such as for waste collection, should be drafted with precision and clarity and expressly state by which party and in what circumstances the option can be exercised.

Data Breach Notification – Is this the last nail in the coffin of trust in online living or open government?

NORMAN DONATO

Is online still driven by trust?
What drives the internet and life online: technology or trust? Would you make a transaction or interact online without trusting that your credit card details, personal information (such as family and social information) or sensitive information (health, race, etc) would not be misused or treated insecurely? If you answered yes, perhaps the internet is now so ingrained in your daily l ife that it is too difficult to extricate yourself from it?

It's easier to build trust when you do not have to report breaches of data. Until the introduction on 22 February, 2018 of the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth) **(NDB Act)**, Australia's mandatory data breach notification laws were limited.

Australian government tops the charts in reporting voluntary data breaches
Despite this, the Office of the Australia Information Commissioner **(OAIC)** still received 107 breach notifications in 2015-2016, with the Australian Government leading the way. This is surprising; surely government is one sector we would expect to take the utmost steps to store personal information safely and securely.

Or perhaps the Government was simply acting as a good citizen, reporting breaches that others might have swept under the carpet. If so, the Notifiable Data Breaches Act now puts pressure on those others to also do the right thing.

The new Act amends the *Privacy Act 1988* (Cth) **(Privacy Act)** to introduce Part IIIC – the Notifiable Data Breaches Scheme. The Scheme, which applies to agencies and organisations covered by the Privacy Act, requires them to notify an individual likely to be at risk of serious harm due to a data breach.

What about the NSW Public Sector's Data Breach obligations?

Generally, NSW public sector agencies are not regulated by the Privacy Act. However, given the expectation on such agencies to act as model citizens, they should take note of the Notifiable Data Breaches Scheme.

> Until the introduction on 22 February, 2018 of the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth) **(NDB Act)**, Australia's mandatory data breach notification laws were limited.

What's more, public sector agencies (including local government agencies) must notify data breaches pursuant to:

- the ***Privacy (Tax File Number) Rule 2015*** issued pursuant to section 17 of the Privacy Act
- the ***Data Sharing (Government Sector) Act 2015,*** which imposes an obligation on an agency that receives personal or health information to inform a data provider and the NSW Privacy Commission as soon as practicable of a breach (that is, when the agency becomes aware that a breach of privacy legislation has occurred or is likely to have occurred)
- the ***General Data Protection Regulation,*** which comes into force on 25 May 2018 and will apply to any organisation offering goods or services to, or monitoring the behaviour of, individuals living in the European Union.

So what are the requirements under the Notifiable Data Breaches Scheme?

A breach occurs when data, such as a TFN, is lost, or where there has been unauthorised access to or disclosure of such data. A breach becomes notifiable if it is likely to result in serious harm to an individual.

The Privacy Act does not define what "serious harm" is. According to the Australian Privacy Commissioner, it may include serious financial, physical, psychological, emotional or reputational harm.

The Scheme recommends four steps when responding to a data breach. They are:

1. contain the breach
2. evaluate and mitigate the risks
3. notify and communicate
4. prevent future breaches.

In future articles we will examine the requirements of the Scheme in more detail.

Trust and Open Government

"Good government, sound policy and just decision-making demand that information is collected, stored, managed, used and disclosed wisely and appropriately. Every decision and every activity of government uses information. Each year the amount of information held by government grows and at a faster pace."
'Towards an Australia Government Information Policy" November 2010 Issues Paper 1 Office of the Australian Information Commissioner.

As data breach disclosure culture (whether through mandatory or voluntary disclosure) sets in, the NSW public sector response will be closely monitored and may set the scene for open government.

Changes to the Environmental Planning and Assessment Act – Confusion with a *"simplified"* certification process

STEVEN GRIFFITHS / DENNIS LOETHER

The most significant changes in recent memory to the *Environmental Planning and Assessment Act 1979* (Act) came into force on 1 March 2018.

By now, most are getting to grips with, if not entirely enjoying, the new structure and section references of the amended Act.

One part of the amended Act causing confusion is Part 6, which consolidates updated provisions on the building and subdivision certification process.

It is first worth noting that consolidating certification provisions under one part of the Act is a positive move which improves access to the certification provisions and also makes the certification process easier to understand.

The changes

The main changes to the certification provisions include:

> Greater clarification of the roles of certifiers (section 6.5)
> A more logical ordering of provisions
> Creation of the following new certificates

- ***subdivision works certificate*** (sections 6.4(b) and 6.12-6.14) for physical building works associated with a subdivision that would previously have been subject to a construction certificate;
- ***building information certificate*** (Division 6.7, incorporating sections 6.22 to 6.26), being the new term for building certificates previously governed by sections 149A to149G of the former Act.

> Construction certificates and subdivision work certificates being required for the erection of a building and for subdivision work respectively (sections 6.3, 6.7 and 6.13), rather than the seemingly more stringent requirement that the erection of a building and subdivision work *must not commence* until a construction certificate has been issued (sections 81A(2)(a) and 81A(4)(a))
  - it remains to be seen whether this will be interpreted as permitting some works to be carried out.

> Councils will be required to keep a record of building information certificates they issue and provide public access to them (section 6.26(8)-(10))

> Granting the Land and Environment Court the express power (under section 6.32) to declare a construction, subdivision work, subdivision or compliance certificates invalid where plans and specifications are *not consistent* with the development consent for which it was issued, replaces clause 145(1)(a) of the Regulation which requires that a construction certificate must not be issued unless the plans and specifications are *not inconsistent* with the development consent
  - this replaces clause 145(1)(a) of the Regulation which requires that a construction certificate must not be issued unless the plans and specifications are *not inconsistent* with the development consent
  - the intent of the change is to provide the community with greater confidence in the certification process

and avoid illegitimate changes to plans and specifications after development consent has been granted by a consent authority
- elevation of the requirement into the Act, coupled with the subtle but significant changing of the wording, should alert both council and private certifiers that variations between development consent plans and specifications and certificate plans and specifications may face greater scrutiny
- it opens certificates up to legal challenges from third parties rather than councils carrying the exclusive burden of monitoring and reporting
- the three month time limit, from the date of issue of the certificate, within which proceedings must be brought may preclude many third parties from challenging certificates on account of variations not being discovered in time
- alternatively, it could result in speculative court applications from particularly well resourced and committed objectors to a development
- it seems inevitable that the new wording *(not consistent with the development consent)* will require and be the subject of judicial interpretation
- the Court retains discretion with respect to the making of a declaration of validity.

> ..The intent of the change is to provide greater confidence in the certification process and avoid illegitimate changes to plans and specifications after development consent has been granted.

The confusion

The aspect of the new provisions creating confusion is their date of commencement.

When accessed via the State legislation and other legal portals, the current Act exhibits the new Part 6 provisions. However, the majority of them do not take effect until 1 September 2018.

Their status is clarified by clause 18 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (Savings Regulation).

Clause 18 of the Savings Regulation states that Part 6 of the amended Act does not apply until 1 September 2018 and that until then, the ***former building and subdivision provisions,*** defined as sections 81A (2)–(6), 86 and 121ZP and Part 4A (incorporating sections 109C to 109Q) of the former Act remain in force.

The only exception is Division 6.7 (building information certificates) under Part 6 of the amended Act which commenced on 1 March 2018 in place of former sections 149A to 149G.

That exception aside, councils are to continue to use the ***former building and subdivision provisions*** until 1 September 2018.

A new principal Regulation will also need to be made before then to give effect to the Part 6 provisions. Look out for further updates on the new Regulation from the Environment and Planning group at Bartier Perry.

Conclusion

For now, it is largely business as usual for council certification teams.

As most councils have been proactive in implementing and maintaining a record of building information certificates, this new statutory requirement will have little impact.

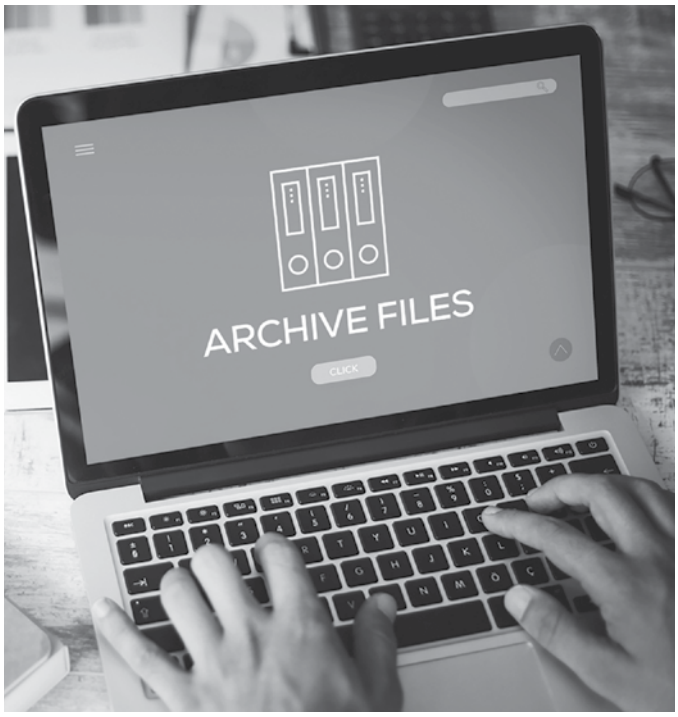
However, more significant changes are on the horizon and, come 1 September, they may impact on the daily operations of council certification teams.

We await a draft Regulation which will provide greater detail with respect to the practical implementation the changes to the Act.

Dangers in asbestos litigation

DAVID GREENHALGH

To many people, asbestos diseases and court cases are mysterious things that are vaguely talked about and poorly understood. However, Councils and their risk managers should be aware of potential problems caused by asbestos and take steps to lessen them.



Asbestos is a naturally occurring product with many wonderful features, such as fire resistance and great insulation properties. However, there is one small problem: it is deadly.

Asbestos fibres can enter the lungs and lie dormant for decades before a process not fully understood by the medical profession manifests itself in either a malignant or a benign asbestos disease.

Mesothelioma is a malignant disease which results in death within two years (often a lot earlier) after diagnosis. While the benign asbestos diseases are less unpleasant, they can still be very disabling for the person affected, and therefore expensive for Council and its insurers.

Asbestos remains widespread; it is still in many homes, especially in areas like the eaves. It is safe while undisturbed, but for instance can trigger serious concerns when major storms or winds rip buildings open.

From a risk management perspective, we expect that most councils would, at the very least:

- have a detailed inventory of asbestos in their infrastructure
- have embarked on proper remediation programs long before now
- include terms in their development applications that draw the problem of asbestos in buildings to the attention of developers.

From a claims handling point of view, the problem with asbestos diseases is their long latency period; usually 20 to 40 years. If a Council receives an asbestos claim today, the plaintiff's exposure to asbestos will usually have occurred decades ago.

Therefore, the plaintiff's supervisor and colleagues are likely to be either retired (and unwilling to become involved in litigation), dead, or simply unable to be located. Obtaining detailed facts of an alleged asbestos exposure is a perennial problem; in many cases there is little practical alternative but to accept the plaintiff's version of events.

Once a claim arrives, Council also needs to locate whoever its insurer was at the time of the exposure, which may not be the current insurer. If the plaintiff was a Council employee, the relevant workers compensation insurer can usually be located through Council or icare records. If the plaintiff was not an employee (such as a contractor, member of the public, or wife of an employee exposed to asbestos through washing her husband's clothes), Council needs to locate its public liability insurer at the time of the exposure. In many cases, this is easier said than done, and even if such a policy can be located, it may not be enough to cover the value of the claim; a typical mesothelioma claim now settles for around $500,000 inclusive of the plaintiff's costs.

The first lesson for a Council is therefore to keep as detailed a record as possible of all insurance policies, as far back as can be located. It should be kept in digital form, in a file which will never be deleted, and its location known to all present and future employees.

Record keeping is also crucial for establishing the liability of any other party, such as a professional asbestos supplier, who may have contributed to an exposure. It is not sufficient for a Council to say in court that it "probably" acquired asbestos from James Hardie (now known as Amaca) or CSR. Unless Council has definite evidence to identify the supplier, those companies are likely to successfully defend any claim against them.

"From a claims handling point of view, the problem with asbestos diseases is their long latency period; usually 20 to 40 years. If a Council receives an asbestos claim today, the plaintiff's exposure to asbestos will usually have occurred decades ago".

A council we act for recently retrieved purchase invoices from their digital archives showing they had acquired asbestos from James Hardie. Accordingly, a substantial contribution was obtained from Amaca towards settling an asbestos exposure claim against the council.

That said, identifying the asbestos supplier by no means absolves Council of its liability, especially if Council was also the plaintiff's employer. The courts have shown a surprisingly varied approach to apportioning liability between an employer and supplier, but the employer can generally expect to carry between 25 and 50 per cent of the total.

The problems posed by asbestos litigation indicate a wider risk management lesson for all Councils; accurate records should be kept of all council activity. Councils with a policy of throwing out hard copies of documents after seven years should reconsider and ensure that all relevant records are stored electronically for the long term.

The question is simple: if a claim emerges in 30 years' time from an asbestos exposure from Council property today, is your record-keeping sufficient to properly assist your successors, and their insurers and lawyers, in the 2040s?

When families disagree over a loved one's burial

Unfortunately, there will sometimes be disputes between family members regarding the burial of a loved one. Different members will have strongly held views about the type of memorial service and proper disposal of the body. The deceased may never have expressed their wishes and the opposing views of the family members may be equally valid.

Background

In *Darcy v Duckett* (2016), the Supreme Court of NSW considered who had the right to bury Mr Darcy's body. Mr Darcy died intestate, leaving four children from one relationship, and another four with his de facto partner, Ms Duckett, with whom he was still in a relationship at the time of his death.

Mr Darcy was born in Gulargambone in north-west New South Wales and was part of the Aboriginal Weilwan tribe. However, he had lived on and off with Ms Duckett since 2000 at Bowraville on the New South Wales north coast. Ms Duckett and their four children were of the Gumbaynggirr tribe, and it was argued that Mr Darcy had been "adopted" as a member of this tribe.

Mr Darcy's sister, Ms Darcy, argued that his body should be buried with his tribe on Weilwan country and Ms Duckett argued that the body should be buried in Bowraville. The Court had to consider a mix of secular and traditional law.

> Apart from appointing an executor, a person may not dictate what will happen to his or her body.

Legal position

The common law principles regarding the right to dispose of a body have previously been summarised by the Court:

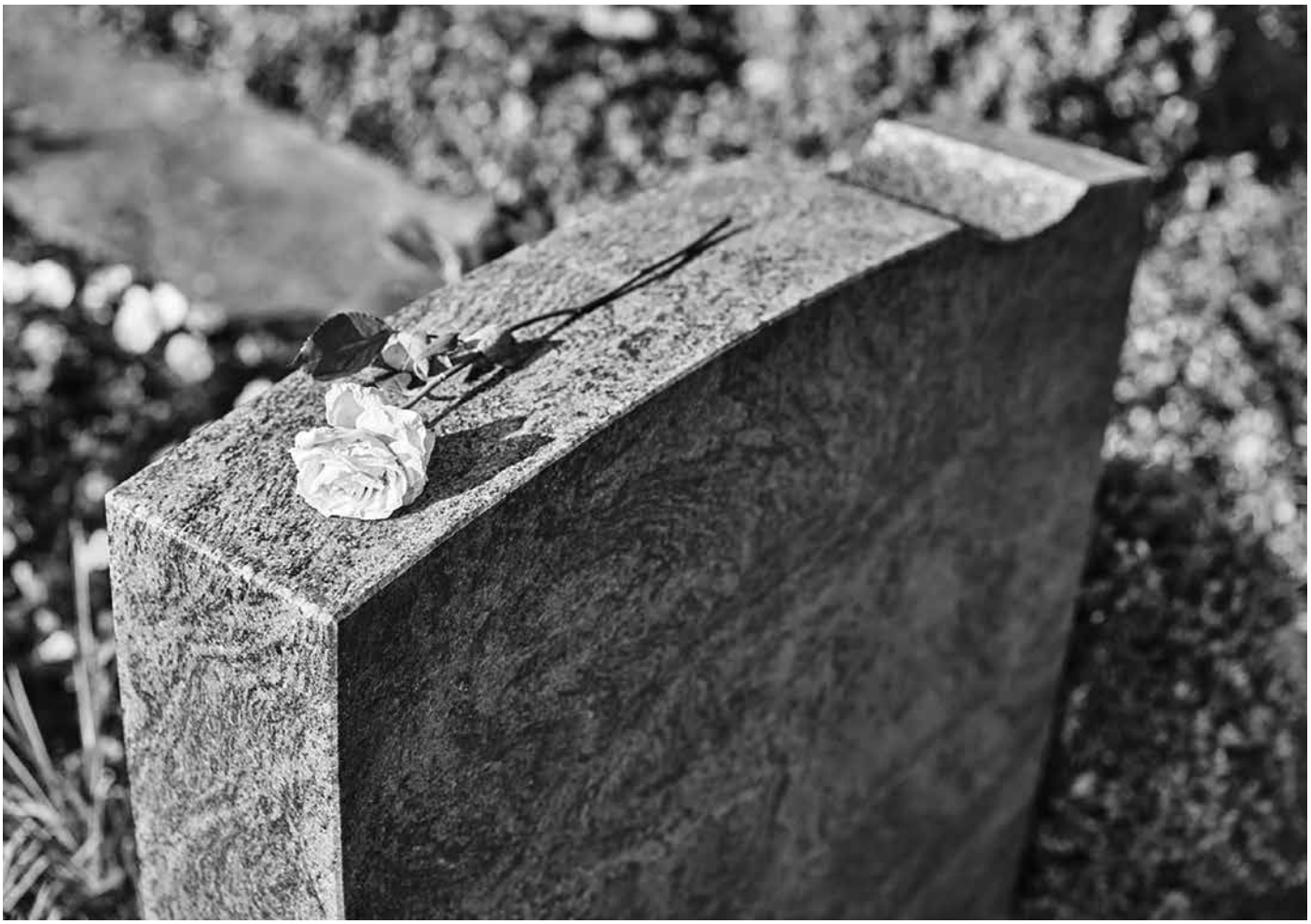
1. A person named as an executor in the deceased's will has the right to arrange for the burial of the deceased's body.
2. Apart from appointing an executor, a person may not dictate what will happen to his or her body.
3. The person responsible for the burial of the body is expected to consult with other stakeholders, but is not legally bound to do so.
4. If no executor is named, the person with the highest right to apply for a grant of administration will have the same right regarding disposal of the body as a named executor.
5. The right of the surviving spouse or de facto spouse will be preferred to the right of the deceased's children.
6. Where more than one person has an equal right to disposal, the practicalities of burial without unreasonable delay will prevail.

Notwithstanding these principles, the Court stated that it needed to have a flexible approach, especially when "the undisputed evidence before me is that, in particular, the place of burial is a matter of cultural, spiritual and religious importance to Aboriginal Australians."

Part 4.4 of the *Succession Act 2006* (NSW) permits "a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged" to "apply to the Court for an order for distribution of the intestate estate under this Part". Although the issue here was not entitlement to the intestate's estate, there is an implied willingness by the Legislature that the Court should consider the different family arrangements that can arise among Aboriginal people.

Conflicting traditional positions

Ms Darcy put forward evidence that it was:
"'story and tradition' that she has received from the elders of her people that her ancestors must be buried on Weilwan country. The Weilwan people believe that if a Weilwan person is not buried on Weilwan country, his



or her soul will not rest properly…" and "when our people are not buried on the country with their ancestors their spirit gets lost and would always be travelling and unable to rest."

Ms Duckett's evidence was that:
"during their time together living at Bowraville, Mr Darcy became involved in Gumbaynggirr community activities, including with the Gumbaynggirr elders. The Gumbaynggirr language remains strong and Mr Darcy learned to speak some words. He encouraged their children to become fluent in the Gumbaynggirr language and knowledgeable about their culture… Mr Darcy would introduce himself as having been born out west in Gulargambone, but that he was from Bowraville in Gumbaynggirr country."

Decision

In finding that Ms Duckett had the superior claim for administration of Mr Darcy's estate, the Court also found that Ms Duckett had the superior right to determine the burial of the body. This was because the evidence showed that "a Weilwan man has chosen to make his life and home with a Gumbaynggirr woman on Gumbaynggirr country and he has been accepted as part of that community by the Gumbaynggirr people." In acknowledging the disappointment that Ms Darcy and her family would feel, the Court quoted an earlier decision regarding burial: "There is no solution or compromise available to me that will satisfy each side. I can only make a decision and indicate my regret that it will cause pain to the unsuccessful party."

Conclusion

The right to burial of a deceased person is determined by legal, ethical and practical considerations:

> The person with the greatest entitlement to apply for a grant of representation in an estate will generally have the superior right to the disposal of the body.

> The Court will try to balance common law principles with practical and traditional considerations.

> The person with the right of burial should consider the wishes of interested parties and inform them of the arrangements.

Crown land and public roads

PETER BARAKATE

The long-awaited commencement of the new Crown land legislation is expected to take place shortly. It is therefore timely to consider three areas where councils will experience the greatest change; namely, the vesting of Crown land in councils, the management of Crown land by councils and the closure of public roads by councils.

Before we do that, here is a brief summary of the relevant legislation.

The new *Crown Land Management Act 2016* received royal assent on 14 November 2016 and will eventually repeal the *Crown Lands Act 1989.* The enactment of the new Act will have an impact on other Acts, such as the *Roads Act 1993* and the *Local Government Act 1993.*

The *Crown Land Legislation Amendment Act 2017* will make consequential amendments to those other Acts. This Act received royal assent on 17 May 2017 and will commence when the Crown Land Management Act repeals the *Crown Lands Act 1989.*

Crown land management by councils

The Crown Land Management Act will bring the management of Crown land by councils under the Local Government Act, providing a largely single framework for the management of Crown and community land. This will simplify how councils manage Crown land.

These provisions are expected to commence in the near future.

The Crown Land Management Act enables the Minister to appoint a council to be a Crown land manager for specified dedicated or reserved Crown land. Following the appointment, the council (known as a *council manager*) is authorised to classify and manage the Crown land as if it were public land within the meaning of the Local Government Act, but it must do so in accordance with the Crown Land Management Act.

This means that the council manager may manage its Crown land as if it were community or operational land.

As a rule, the council manager must manage its Crown land as if it were community land. For that purpose, it has the same functions as under the Local Government Act in relation to community land, including the leasing and licensing of the land. The council manager must assign the Crown land to one or more of the categories of community land listed in section 36 of the Local Government Act and must prepare and adopt a plan of management for the land in accordance with the Local Government Act.

The preparation and adoption of the plan of management must take place within 3 years after the commencement of the Crown Land Management Act. Councils can do this by amending an existing plan of management so that it applies to the Crown land or by adopting a new plan of management for the Crown land.

If the Crown land is a public reserve, the council manager must manage it as such under the Local Government Act.

A council manager can only classify Crown land as operational with the written consent of the Minister. In such cases, the council has the same functions as under the Local Government Act in relation to operational land. However, this does not allow the council manager to sell or dispose of the land without the Minister's written consent.

Vesting of Crown land in councils

The most significant change to vesting provisions effected by the Crown Land Management Act is that if Crown land is subject to a claim under the *Aboriginal Land Rights Act 1983,* the Minister may not vest that land in councils without the written consent of the Local and NSW Aboriginal Land Councils.

The provisions regarding the vesting of Crown land in councils commenced when the Crown Land Management Act received royal assent on 14 November 2016.

The Crown Land Management Act enables the Minister, by a *council vesting notice* published in the Gazette, to vest specified *transferable Crown land* in a council. *Transferable Crown land* means dedicated, reserved or any other Crown land, but does not include:

- land dedicated, reserved or declared to be a wildlife refuge under the *National Parks and Wildlife Act 1974* or
- land that is required by another Act to be used for a particular purpose.

The Minister may only vest Crown land in a council if the following 4 conditions are met:

- the land is wholly located within the local government area of the council
- the council has agreed to the vesting
- the vesting has received the written consent of the Local and NSW Aboriginal Land Councils if the land is subject to a claim under the *Aboriginal Land Rights Act 1983*
- the Minister is satisfied that the land is suitable for local use.

> The Crown Land Management Act will bring the management of Crown land by councils under the Local Government Act, providing a largely single framework for the management of Crown and community land.

Vesting the land in a council means the council obtains the fee simply for the land. This, in turn, means it ceases to be Crown land. Council takes the land, subject to any native title rights and interests existing immediately before the vesting and any reservations and exceptions contained in the council vesting notice.

The land vested in the council is taken to have been acquired as community land under the Local Government Act from the date of its vesting. However, the Minister may specify in the council vesting notice that the land is to be acquired as operational land, as long as:

> the land does not fall within any of the categories for community land under the Local Government Act or

> the land could not continue to be used and dealt with as it currently is if it were classified as community land.

Closing public roads

The purpose of the proposed amendments of the Crown Land Legislation Amendment Act to the *Roads Act 1993* is to provide a means for councils to close council-owned public roads without the approval of the Minister.

If a road is not reasonably required as a road for public use, or is not required to provide continuity for an existing road network and another public road provides lawful and practical vehicular access to land, then council may propose closure of that road.

Council must give public notice of the proposed road closure in a local newspaper as well as to all owners of land adjoining the road and to all *notifiable authorities.*

The notice must allow at least 28 days for submissions to be made.

Notifiable authorities include Ausgrid, Jemena, Transport for NSW and RMS, among others.

If a notifiable authority formally objects to the road closure, the road may not be closed until the objection is withdrawn by the authority or set aside by the Land and Environment Court. The council may appeal to the Court against a formal objection and, on such an appeal, the Court may either affirm the objection or set it aside.

After considering submissions, the council may close the road by publishing a notice in the Gazette. It will then cease to be a public road and previous rights of passage and access will be extinguished.

Owners of land adjoining the road may also appeal to the Land and Environment Court against the closure, and the Court may either affirm the closure or set it aside. Unlike the provisions relating to appeals by notifiable authorities, the new provisions do not prevent the council from closing the road until the objection is withdrawn or set aside by the Court.

When the Crown Land Legislation Amendmen Act commences, the closure of public roads by councils should become a less costly and time-consuming exercise.

Workplace investigations – a critique

JAMES MATTSON AND MARK PAUL

Complaints, disputes and incidents needing employer attention are inevitable in today's workplace. When they happen, employers need to respond quickly, not only to restore workplace relations but also to simply get on with business.

Making decisions in such cases can be complex and challenging. As a result, we have seen employers increasingly turn to workplace investigations in response to employee claims and complaints.

Therein lies a potential problem. The routine use of investigations not only discourages alternative approaches but may also reduce opportunities for good business decisions and outcomes.

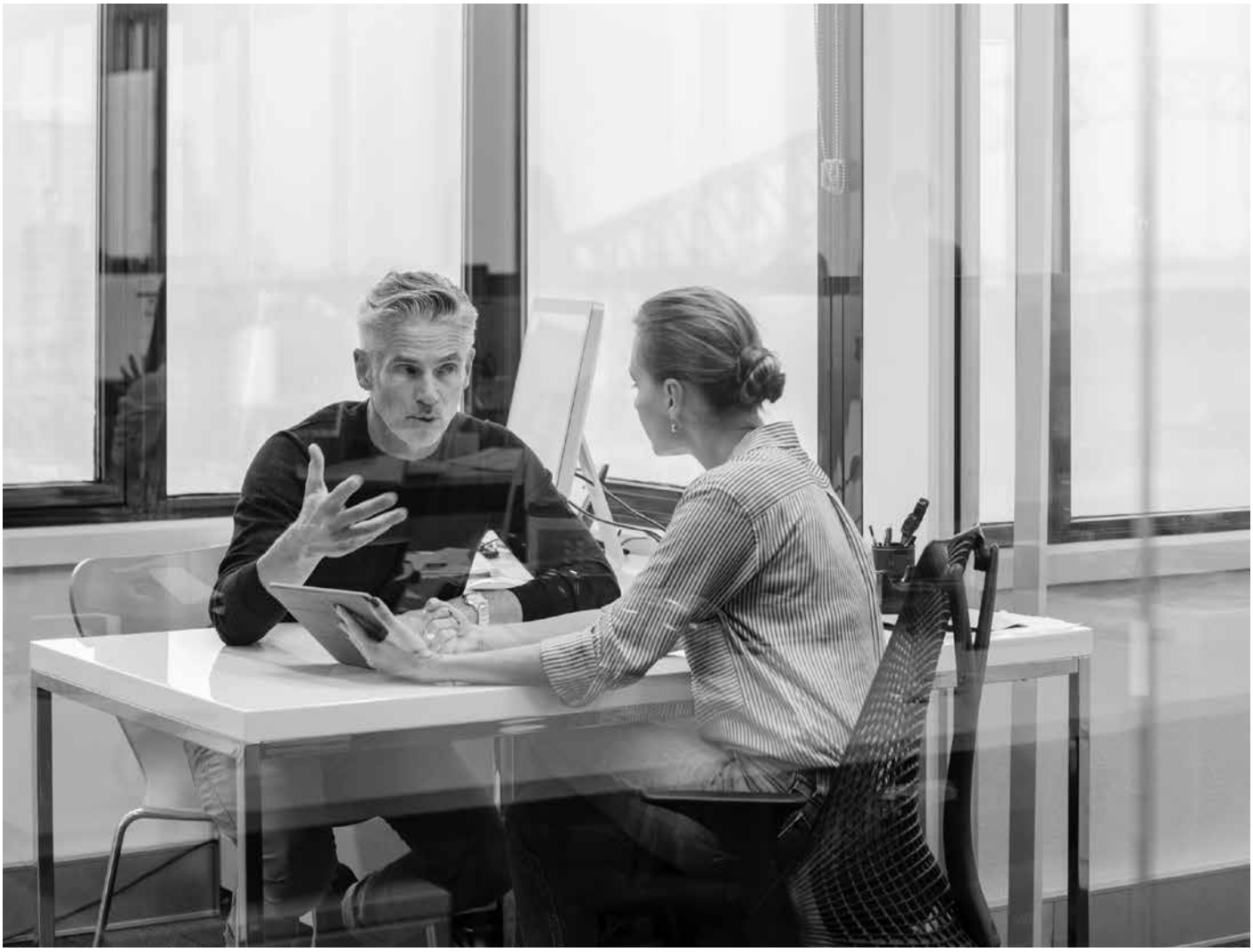
One reason is the language associated with investigations, which encourages an adversarial environment. Applying rules of evidence (like the "*Briginshaw* standard") imposes a burden that does not always lead to good or timely decisions.

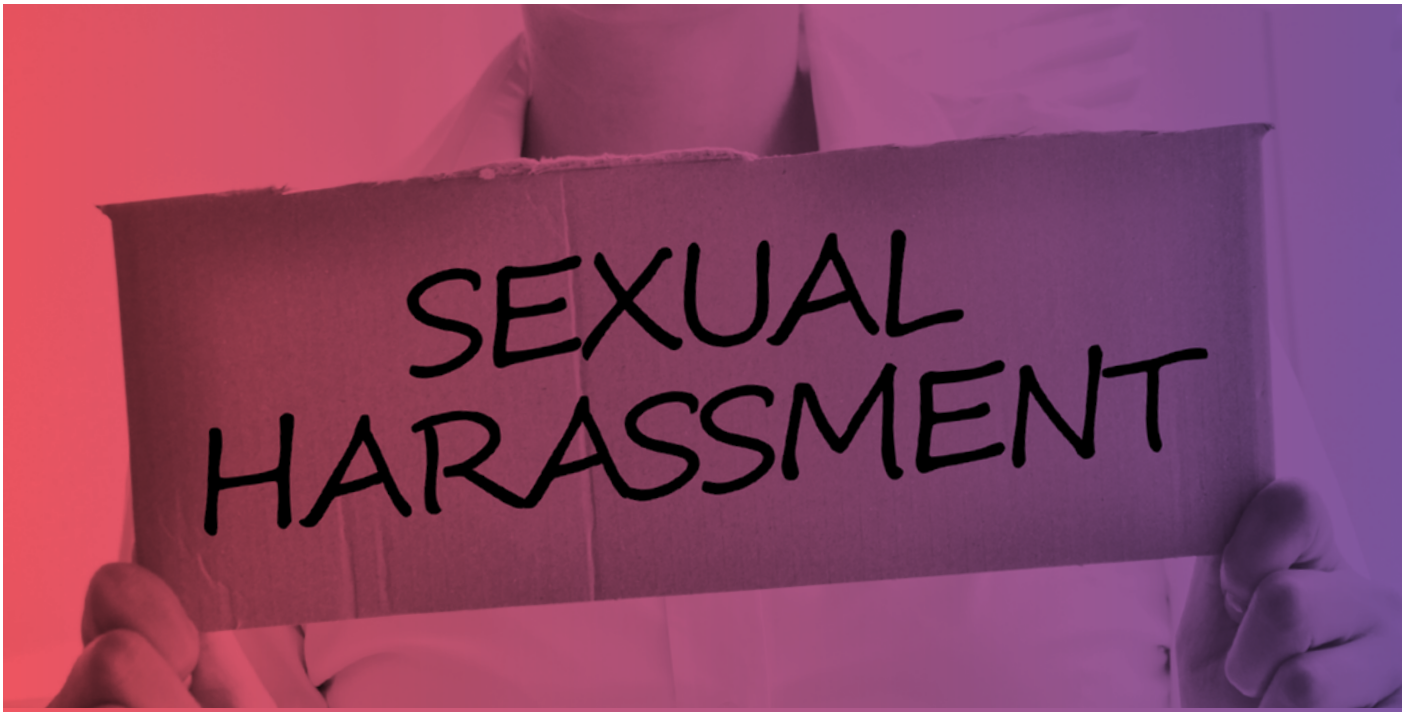
In this bulletin we:

1. examine whether it is appropriate to always respond to a complaint or claim with an investigation
2. look at an aspect where decision-making in an investigation is often complicated, unnecessarily.

A non-investigative approach

Employees could be forgiven for believing they are entitled to have all claims and complaints investigated.





One judgment stated that on receipt of a claim or complaint *"it is reasonable for* [an employer] *to consider it* [has] *a duty to investigate" (Blow v SBD Services Pty Limited* [2013] FWC 5733). Similarly, and in the context of bullying allegations, it has been stated that an employer has *"a responsibility to investigate"* (see *S.B.* [2014] FWC 2014 at [18]).

In practice, and regardless of their legal obligations, most employers would indeed investigate a formal complaint of sexual harassment or bullying and a denial of the allegations by the named employee. That is what happened in *East Coast Pipeline Pty Ltd v Workers' Compensation Regulator* [2016] QIRC 101.

The Queensland Industrial Commission was critical of an employer responding to such complaints with a formal investigation. This approach led to the accused employee seeking workers compensation for the psychological injury triggered by the allegations and investigation.

The issue was whether the investigation was reasonable management action. The Commission found that formalising the complaints, conducting formal interviews and a two-stage interview process, recording meetings, requiring confidentiality and the signing of records was *"unnecessarily forensic or elaborate".* While some may consider the approach "self-evidently reasonable", the Commission felt otherwise. The formal investigative approach did not focus on resolution of the issue, but instead polarised staff and made a dysfunctional office even more unworkable.

The lesson here is that workplace investigations into disputes and grievances between colleagues can be damaging and counterproductive to restoring appropriate work relations. Neither the complainant nor perpetrator (to use descriptors that are also counterproductive) are likely to be satisfied with the outcome. As Mr Kimber SC astutely observes:

> The routine use of investigations not only discourages alternative approaches but may also reduce opportunities for good business decisions and outcomes.

Investigators' reports inevitably identify the "winners" and the "losers" and make findings and comments about them that often will, unless a termination or transfer of the "loser" results, provide a real obstacle to the restoration of a harmonious working relationship between the parties to the dispute. Hence, the real attractiveness of utilising mediation or more informal "facilitation" processes in the workplace context, instead of, or at least prior to, any investigation. If such processes are used it is likely that an investigation will then be unnecessary or, if not, will at least be narrower (more focused) in scope and hence prove to be more useful and much cheaper.

Workplace investigations are just part of a process and do not themselves resolve conflicts (unless the employment of one of the parties is terminated). As such, alternatives should be considered from the outset.

The relevance of *Briginshaw* to workplace investigations

The High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 33 gave guidance on how it is that a court may find that something happened. Its oft-quoted statement reads: *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences...*

This has led industrial tribunals to make statements such as *"the allegation* [must be] *established with … comfortable satisfaction": Paul Barnett v Qantas Airways Limited* [2006] AIRC 698. It is also said that *Briginshaw "require*[s] *the respondent to make out its case in a convincing way": Budlong v NCR Australia* [2006] NSWIRComm 288. In the reaching of any decision, the *"gravity of the consequences flowing from a particular finding"* is a consideration. Dismissal is a serious consequence, and hence, it is said, *Briginshaw* is to be followed.

Some investigators have told us that the value of applying *Briginshaw* is to impose at an early stage the same standard that would be applied were the matter to proceed to a contested hearing. If the investigator is not satisfied the *Briginshaw* standard has been met, then how is a tribunal or a court to be satisfied if the decision is disputed? However, this approach pays no attention to the differences between an investigator and a court or tribunal (or their different experiences, skills and qualifications).

An investigator's work is quite different to a court's work. There may be identified concerns or even some allegations, but the reality is that nothing much is yet known, and the investigator's task is to find out. There are no adversarial parties. There have been no court pleadings. There are no statements upon which witnesses will be cross-examined. What may be found by the investigator is unknown and unconstrained by the scope of a particular dispute.

The utility of an investigation that pays too much attention to Briginshaw must be questioned. Worrying about the amount of evidence required to overcome considerations of the gravity of the consequences will lead to mistakes. And what of the gravity of the consequences of not making a decision?

Complaints of ongoing sexual harassment or bullying are often matters of word against word. Given the gravity of the consequences of an adverse finding, an investigator following *Briginshaw* might feel compelled to find such allegations "not substantiated". Does the employer then take no action? The consequences of no action may be that the sexual harassment or bullying continues.

These are just too many differences between the work of an investigator and that of a court or tribunal to support any consideration of *Briginshaw* in an investigation.

McHugh J, during the course of the hearing of an appeal, astutely said:
The problem is that there are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. I know Briginshaw is cited like it was some ritual incantation. It has never impressed me too much. I mean, it really means no more than, "Oh, we had better look at this bit more closely than we might otherwise", but it is still a balance of probabilities in the end.

In our view, when making a decision employers are not bound by concepts of standards of proof. They can consider the array of information to hand. Although they may consider whether the decision can be defended if challenged, that does not require the application of *Briginshaw.* A wise employer will carefully attend to the information gathered in a common sense way, and will not be caught up in evidentiary concepts that tax even the well-paid lawyer.

This bulletin is an extract of the award winning paper written by James Mattson and Mark Paul, 'Workplace investigations: time to reform our thinking', as presented to the Australian Labour Law Conference in Melbourne, November 2016.

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