Conducting Workplace Investigations in Schools with Procedural Fairness

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The Second Annual Schools

Law and Regulation Conference

Gold Coast

25 and 26 October 2018

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- Former President of the NSW Chapter of the Australia and New Zealand Education Law Association.
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- A member of the Editorial Board of the CCH *School Principals Legal Guide*.
- The editor of *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments.
- A reviewer for the *International Journal of Law and Education*.
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What is this paper about?

The increased emphasis on child protection in the past two decades, backed in many jurisdictions by legislation, has created a problem for administrators in schools: how to investigate the plethora of allegations against staff and students. Administrators are mostly former teachers who have rarely been trained in investigative skills. Allegations of abuse are often investigated in a highly charged atmosphere with pressure being brought to bear by distraught and angry victims or their parents, anxious staff and their unions, and officious bureaucrats from government departments, children's commissions or ombudsmen's offices. The result is frequently less than perfect.

The Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse noted that its case studies revealed numerous instances where institutions "engaged in poor investigation standards"[1]. As a consequence, children were not adequately protected. The Royal Commission recommended that schools should adopt ten Child Safe Standards. Standard 6 is *Processes to respond to complaints of child sexual abuse are child focused*. Child safe schools are to respond to complaints by immediately protecting children at risk and addressing complaints promptly, thoroughly and fairly. Their complaint processes will specify the steps that need to be taken to comply with requirements of procedural fairness for affected parties. This paper will outline the requirements for best practice investigations.

In my presentation, I will be examining the factual situation considered by Young CJ in Eq in *Hedges v Australasian Conference Association Limited*[2] as a case study of how not to conduct an investigation in a school. This case concerned an investigation by the Professional Standards Committee of the Seventh Day Adventist Church in Australia following allegations against a teacher at an Adventist school in Sydney. The investigation was put under judicial scrutiny and found to be lacking in many respects.

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 7, Page 13
[2] [2003] NSWSC 1107

Why do schools investigate?

Senior executives in schools do not investigate just because they feel legally obliged to do so. They investigate because allegations are made against people within their community. Students allege misconduct by other students; students and their parents allege misconduct by teachers; and teachers allege misconduct by their colleagues. There is nothing new in this. However, going back 20 years or more, it was relatively easy for a school principal to ignore such allegations or to dismiss them as frivolous. That, fortunately, happens less frequently today than in the past. However, as the Royal Commission discovered, child sexual abuse in institutions continues today and is not just a problem from the past. Nevertheless, since the 1997 Royal Commission into the Police Service in New South Wales and the raft of child protection legislation which followed it, schools and school executives throughout Australia have been far more diligent when allegations have been made. This is because the 1997 Royal Commission had found that teachers and schools, while aware of abuse of children, had not taken appropriate action. The Commission in its report stated that, within schools, "Paedophilia was a subject best not spoken about; and if forced to be confronted, it was dealt with in a way that was based upon denial and protection of institutional reputation rather than regard for the welfare of children".[3] Sadly, the Royal Commission into Institutional Responses to Child Sexual Abuse reached similar conclusions.

The law has always required school executives to investigate allegations of the kind mentioned above. The common law imposes a duty of care on schools and teachers to take reasonable care for their students' safety.[4] If a student alleges that another student is engaging in conduct which is likely to bring about harm to that student or to some other student, it is probably reasonably foreseeable that there is a risk of injury to a student. There may well be a significant probability of harm occurring and a reasonable person is likely to conclude that a teacher should take steps to minimise the risk. It follows that the school and its teachers ought to investigate allegations to see if they disclose situations in which students might be at risk of harm.

[3] *Royal Commission into the New South Wales Police Service: Final Report*, Volume IV, page 562
[4] *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258 at 269 per Mason J

Likewise, if students, their parents or teachers allege misconduct by teachers, the same duty of care requires that an investigation be undertaken to see if, once again, students are likely to be at risk of harm.

Schools as employers also have a common law duty of care to ensure that reasonable care is taken of their employees. Under workplace health and safety legislation, employers have an even more onerous duty to ensure the health, safety and welfare of employees and others at the place of work. Once again, where allegations are made of misconduct against employees, this must be investigated.

The legislation throughout Australia which governs the registration of independent schools typically requires schools to have a safe and supportive environment for their students brought about by, amongst other things, school policies and procedures that make provision for the welfare of students. Good policies and procedures will definitely include provision for investigation of allegations. Child Safe Standard 6 referred to on page 1 underlines the importance of this.

Schools not only investigate when allegations are made because of their common law and statutory duties but also because their stakeholders (in particular, their parents) require it. In independent schools, parents pay substantial fees and, as a result, more and more, they are demanding a high level of accountability from those administering those schools. Parents will quickly voice their concerns if rumours are circulating about inappropriate conduct by students or teachers.

Who are the investigators?

Although fulfilment of legal duties does require schools to investigate allegations, the law does not specify who the investigator should be. The task may be that of the principal, other appropriately qualified executive staff or people engaged by the school for that purpose.

The Royal Commission, in Volume 13 of its Final Report dealing with institutional responses to child sexual abuse in schools, referred to inadequate, poor quality investigations as one of the factors which perpetuated the risk of sexual abuse to children in schools. The Commission noted that many schools were struggling to know how to respond to complaints both of child sexual abuse and about children with harmful sexual behaviours. In many cases dealt with by the Commission, the

handling of complaints was ineffective because investigations were not carried out by a qualified person or children were interviewed inappropriately.

For example, in the *Toowoomba Catholic school and Catholic Education Office* case study, an investigation was conducted by the school principal and one of the school's child protection officers.[5] The investigation was instituted when a female student told her father that her year 4 teacher had sexually abused her. The principal arranged a meeting with the student, her father and the child protection officer. The student was asked to describe the teachers conduct towards her. She was then asked to demonstrate by pretending that her father was the teacher. She was asked to use her father's hands to show where the teacher had touched her.

There was a discrepancy between the student's description of the conduct and what she demonstrated. The child protection officer reasoned that, if the student was prepared to demonstrate the conduct on her father, the conduct could not have been as inappropriate as if she had indicated she was not prepared to perform any kind of demonstration. However, neither the principal nor the child protection officer considered that the student may have been reticent to demonstrate what had occurred because she did not want to have her father put his hand up her skirt or into her shirt.

Today, many schools have one or more executive staff who have undertaken some training in how to conduct investigations. Unfortunately, it is optimistic to think that these people, no matter how well intentioned, are properly equipped to investigate serious allegations when their training was relatively brief, the number of investigations they have conducted is limited, there is no adequate supervision available to them, and they have all their normal teaching and administrative responsibilities within the school.

It is therefore often appropriate for schools to engage an external investigator. This is particularly the case where:

(a) the allegation is against the principal; or

(b) the allegation is against a member of staff perceived to be close to the principal (for example, a relative, long term friend or close colleague); or

[5] Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 13, Page 180

(c) the school does not have the required skills or resources to conduct a particular investigation.

The important thing is that the investigation should be carried out by an impartial, objective and trained investigator whether that be a school employee or an independent investigator.

What is procedural fairness?

Procedural fairness (or natural justice, as it is sometimes called) refers to a body of principles that have evolved to provide fairness to people who are being investigated or charged or who are the subjects of administrative action which may adversely affect them. While these principles are generally becoming better known, it seems that, almost as a result of this familiarity, people are losing sight of the fact that natural justice usually means observing practical fairness. In other words, as Young CJ in Eq said in *Hedges*, "Different situations will give rise to requirements of satisfying the general principle of natural justice in different ways."[6] Gleeson CJ of the High Court of Australia put it this way:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*[7]

Mason J, in the High Court's decision in *Kioa v West*, said:

> *The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.*[8]

He also said:

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*[9]

In the Federal Court of Australia, French & Lee JJ said:

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[6] [2003] NSWSC 1107, para 121
[7] *In re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502 at 511
[8] (1985) 159 CLR 550 at 585
[9] (1985) 159 CLR 550 at 585

> *What constitutes procedural fairness varies according to the relevant statutory framework and, within that framework, according to the circumstances of the particular case …*[10]

All these Judges are underlining the importance of the particular situation when determining the content of procedural fairness. This is particularly important in schools where the circumstances may relate to very trivial allegations or to very serious ones.

The Royal Commission noted that institutions should comply with the requirements of procedural fairness when investigating a child sexual abuse complaint and determining outcomes. It stated: "By observing procedural fairness, an institution manages risk properly, ensures that it responds in a manner that is fair to affected parties and minimises the prospect that its decisions might be challenged."[11]

What does procedural fairness look like?

Some try to summarise the principles of procedural fairness into what are often described as the 'hearing rule' and the 'right to an unbiased decision'. However, there is potentially much more to procedural fairness than these two things. The substantive requirements of procedural fairness involve:

(a) fully informing a person of any allegations made against them;

(b) giving them the opportunity to state their case, provide an explanation or put forward a defence;

(c) ensuring that proper investigation of the allegations occurs, that all parties are heard and relevant submissions considered;

(d) ensuring that the decision-maker acts fairly and without bias.

I will now examine each of these requirements in the context of investigations in schools.

[10] *WABZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 30 (18 February 2004)
[11] Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 7, Page 17

Fully informing people of allegations made against them

The person against whom the allegations have been made (the subject) must be told the substance of those allegations. The High Court of Australia's decision in *Kioa v West* is very important in this regard:

> *... recent decisions illustrate the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it*[12]

In practice, this means putting the allegations to the subject with sufficient particularity as to allow the subject to respond meaningfully. Young CJ in Eq describes this as putting to the subject "a clear statement of the matters he or she must answer".[13] By comparison, in *Hedges*, the investigator's policy was that "Perpetrators aren't told the allegations prior to interview."[14] Clearly, the subjects must be given every opportunity of knowing what has been alleged against them and by whom.[15] This is particularly important in schools where broad descriptions like "professional misconduct" are used. Where such expressions are used, procedural fairness requires that sufficient particulars be given.[16]

In *Kelson and McKernan v Anne Forward in her capacity as Director of the Merit Protection and Review Agency*[17], one element of the procedural oppression found by the Court was the "vagueness, imprecision and lack of specificity" of the allegations. The Court found that, while the subjects were given an opportunity to comment on the allegations, what was being asked of them was unfair.

Not only must the subject be told the substance of the allegations, he or she must also be given a reasonable opportunity to prepare a response to the allegations. A reasonable time must be provided to allow the subject to prepare evidence and to prepare a case in response to any adverse evidence to be taken into account by the investigator or decision-maker.[18]

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[12] (1985) 159 CLR 550 at 587 per Mason J
[13] *Hedges*, [2003] NSWSC 1107, para 124
[14] *Hedges*, [2003] NSWSC 1107, para 32
[15] *Carter*, [2004] NSWSC 737 at para 121
[16] *Plenty and Plenty v Seventh-Day Adventist Church of Port Pirie* [2003] SASC 68 (10 March 2003)
[17] (1995) 60 FCR 39
[18] *Lever v Frederick and Anor* (unreported, SC(SA), Debelle J, No SCGRG2271/96, 4 December 1996, BC9605977)

Fully informing the subject of the likely consequences

Just as the subject must be informed of the allegations, so too must he or she be told the nature of the proceedings against him or her. This must include references to the statutes, rules or policies under which the investigation is proceeding and to the possible penalties or disciplinary action which could follow. Otherwise, the subject may not appreciate the gravity of the matter or what procedural rights there are available to him or her. In *Carter v NSW Netball Association*[19], not only did Ms Carter not know the nature of the proceedings against her, it seems that the Netball Association also failed to correctly identify the nature of the proceedings.[20] According to Palmer J, that compounded the injustice of the proceedings.[21]

Giving people the opportunity to state their case, provide an explanation or put forward a defence

Once the substance of the allegations has been put to the people being investigated, they must be given ample opportunity to respond.[22] This may mean giving them time to consider the allegations and opportunity to respond in writing as well as in person. This is often referred to as "the right to be heard". The elements of this right will vary from case to case but will generally include all or some of:

(a) a reasonable opportunity and adequate time to make submissions, give evidence and call witnesses in support;

(b) notice of:

  (i) the time, date and place of the hearing;

  (ii) the subject matter and potential adverse consequences of the decision;

  (iii) the case to be answered;

(c) disclosure of material to be relied on by the decision-maker;

(d) disclosure of any adverse conclusion not obviously open on the known material.[23]

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[19] [2004] NSWSC 737
[20] A similar situation arose in *Forbes v Boston* [1999] NSWSC 1217 (14 December 1999)
[21] [2004] NSWSC 737 at [120]
[22] *Carter*, [2004] NSWSC 737 at para 122
[23] See the cases supporting the existence of these elements listed by McClellan J in *Hall v University of New South Wales* [2003] NSWSC 669 (15 August 2003) at para 68

Ensuring that proper investigation of the allegations occurs, that all parties are heard and relevant submissions considered

It is often correctly said that investigations within schools are not bound by the rules of evidence. Nevertheless, it must be remembered that these rules are a useful guide to any investigator. They should only be departed from "where consideration of equity, good conscience and substantial merit so justify."[24] Evatt J made the same point in *R v War Pensions Entitlement Appeal Tribunal; exp Bott*:

> *After all, [the rules of evidence] represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and solicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice".*[25]

Young CJ in Eq was critical of the investigator in *Hedges* for accepting gossip and hearsay. At one point, he said: "The bizarre allegation that was also put to the investigator as fact based on hearsay that the plaintiff had had a love child with the lady which the lady categorically denied, was another feature which should have registered a red light with the investigator."[26]

In some cases, procedural fairness will dictate that people under investigation be allowed legal representation. This is more likely to be the case where complex issues are involved, where the consequences to them of a finding against them are serious or where they are not capable of presenting their own case.[27]

The relevant standard of proof for investigations by schools is "on the balance of probabilities". Such investigations do not amount to criminal proceedings, no matter how serious the allegation. Accordingly, to find that an allegation is sustained requires proof on the balance of probabilities - the ordinary standard of proof required of a party who bears the onus in civil litigation in Australia. It is often suggested that this civil standard is given

[24] *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2004] NSWIRComm 65 at para 322
[25] (1933) 50 CLR 228 at 256
[26] [2003] NSWSC 1107, para 63
[27] *Li Shi Ping v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 557 per Drummond J at 570

an extra dimension where the issue under consideration is more serious. The basis for this suggestion is found in the judgment of Dixon J in *Briginshaw v Briginshaw*:

> *The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, an 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 references.* [28]

It is not uncommon for schools to be required to investigate alleged behaviour which could constitute criminal activity in situations where the police have already investigated but decided against bringing charges. The school finds itself in the invidious position of having to investigate the alleged criminal activity when the police have decided that there is not enough evidence to prove what is alleged beyond reasonable doubt - the appropriate burden of proof in criminal matters. The decision by the police not to charge a student or teacher cannot be relied upon by the school as being determinative of the issues which are the subject of the investigation. As the Full Bench of the Industrial Commission said in *Wang v Crestell Industries Pty Ltd*:

[28] (1938) 60 CLR 336 at 361-362

> *The onus of proof in such a case is on the employer and the standard of proof must be such as to enable a positive finding that the misconduct occurred. The standard is, of course, the civil and not the criminal one, but the requisite degree of satisfaction must have regard to the seriousness of the alleged conduct and gravity of the consequences of the finding*.[29]

The High Court made similar comments in *Neat Holdings Pty Limited v Karajan Holdings Pty Limited*:

> *... the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*[30]

Ensuring that the decision-maker acts fairly and without bias

There should be a neutral investigator.[31] Obviously, this means that investigators have to be, and have to be seen to be, objective and impartial. It is not always appreciated that neutrality can be affected by a conflict of interest. For example, investigators who know that they should be impartial and yet have some personal relationship with either the party making the allegation or the party against whom the allegation is made necessarily have a conflict of interest. However, the circumstances of the case will determine whether a relationship between, say, the investigator and the person against whom the allegation has been made will be important enough to amount to a denial of natural justice. In schools, many investigations will be carried out by principals who necessarily have a professional relationship with all their

[29] (1997) 73 IR 454 at 463-464
[30] (1992) 67 ALJR 170 at 170-171
[31] *Hedges*, [2003] NSWSC 1107, para 18

staff. This may not matter except in cases involving alleged conduct of a very serious nature.[32]

In emphasising the importance of the appearance of impartiality in an investigation, Young CJ in Eq in *Hedges* suggested that it would be better not to use terms like "victims" and "perpetrator" or even "alleged perpetrator or offender" as they give a suggestion of bias against the person being investigated.[33] The way an investigation is carried out may also lead to a perception that the investigator is biased. Palmer J formed this view in *Carter*,[34] noting that the investigator "did not have the open mind of an investigator; rather, she had taken on the role of prosecutor."

What are findings?

Findings ought to be "what is found to be the case" following an investigation. Where allegations are made, the findings ought to be whether, on the balance of probabilities, the allegations are sustained or not sustained. It may also be important to have findings as to whether the allegations were false, vexatious or misconceived. I mean by these expressions:

Sustained: the evidence supports a finding that the alleged conduct did occur

Not sustained: there is insufficient evidence to establish whether the alleged conduct did or did not occur

False: the evidence supports a finding that the alleged conduct did not occur

Vexatious: the evidence supports a finding that the allegation was made without substance and with the intent of being malicious or to cause distress to the person against whom the allegation is made

Misconceived: the evidence supports a finding that, even though the allegation was made in good faith, it was based on a misunderstanding of what actually occurred

My earlier discussion of the burden of proof is a useful reminder that the object of any investigation is to make findings of fact. Once an allegation is

[32] NSW Ombudsman, *Child protection in the workplace 2004*, Part 5.15.1
[33] *Hedges*, [2003] NSWSC 1107, para 58
[34] [2004] NSWSC 737 at para 42

made, the school must obtain information upon which one can reliably decide whether what is alleged actually happened and, if so, what consequences ought to flow for the person against whom the allegation was made. An investigator's task is to find out what happened; hence, the expression "findings". These are findings of fact. Sometimes, it is quite clear what happened. For example, there may have been an event witnessed by many people who all give identical or near identical testimony about the event. On the other hand, unfortunately, there are many situations where what happened is not nearly as clear. An investigator must speak to all the people involved, look at any relevant documents and make other relevant enquiries - all with a view to making a finding or findings on the balance of probabilities, as to what happened. While all of this may appear obvious, sadly, it is clearly not always obvious to investigators engaged by schools. For example, the investigator in *Carter*, a former police officer, was criticised because she failed to interview any of the witnesses who could have given a contrary view of events to that put forward by those making the allegations.[35] By way of further example, Young CJ in Eq observed in *Hedges* that the investigator never found any facts.[36]

Who is the decision-maker?

The investigator is not usually the decision-maker. Indeed, it is important to separate the investigation role from the decision-making role.[37] However, small schools may not have the people necessary to separate the two roles. In *Hedges*, the Professional Standards Committee acted both as the authority which authorised the investigation and as the adjudicator. Young CJ in Eq said:

> *This is bad practice and usually this fact alone will amount to a denial of natural justice as a person whose ability to earn a living is jeopardised by an adjudication is entitled to have that adjudication performed by an independent group of people: Carver v Law Society of NSW (1998) 43 NSWLR 71.*[38]

The investigator ought to present the decision-maker with preliminary findings of fact. In fairness to people against whom serious allegations have

[35] [2004] NSWSC 737 at paras 26, 28, 33, 34, and 45
[36] [2003] NSWC 1107, para 57
[37] [2003] NSWC 1107, para 43
[38] [2003] NSWC 1107, para 100

been made, they ought to be shown the preliminary findings and be given opportunity to respond to them direct to the decision-maker. The decision-maker ought not simply adopt the investigator's views but must put his or her mind to the matter and to all the evidence. In *White v Ryde Municipal Council*, the Court of Appeal said:

> *As a general proposition, it is plain enough that he who decides must hear. However, this must be understood in the sense that the decision maker has before him the evidence and submissions of those entitled to be heard. It is by no means a universal requirement that the decision making body must see and hear witnesses, much less actually hear submissions or representations ...*[39]

It is, of course, necessary that the decision-maker be appraised of all relevant material in order to evaluate the recommendation and to understand the force of the representations.[40]

In *Hedges*, Young CJ in Eq was critical of the decision-making body (the Professional Standards Committee) because they had nothing before them other than the investigator's report, because they apparently did not turn their minds to the underlying issues but simply adopted the report and because they appeared to have acted in ignorance of the evidence apart from the investigator's inadequate summary of it.[41]

So what does it all mean?

Investigations are now a common feature of life in schools. It is important to take allegations seriously as they may be well founded and investigation of them may save children and others great harm. However, investigations that are "riddled with injustice and illegality"[42] may ruin a person's health, reputation and future employment prospects. Educators must accept that they do not necessarily have the training, skills or time to investigate fairly. Where this is the case, recent court decisions suggest that these educators would serve everyone well either by getting advice at each step of the investigation and decision-making process or by outsourcing the investigation to someone with the skills to do it fairly.

[39] (1997) 2 NSWLR 909 per Reynolds JA at 923-4
[40] *Jeffs v New Zealand Dairy Production and Marketing Board* (1967) 1 AC 551 at 566-569
[41] [2003] NSWC 1107, para 80. See also *Carter*, [2004] NSWSC 737 at para 49, 97-99
[42] *Carter*, [2004] NSWSC 737 at para 147