

**Colin
Biggers
& Paisley**

HR Highlights Series.

Workplace Investigations

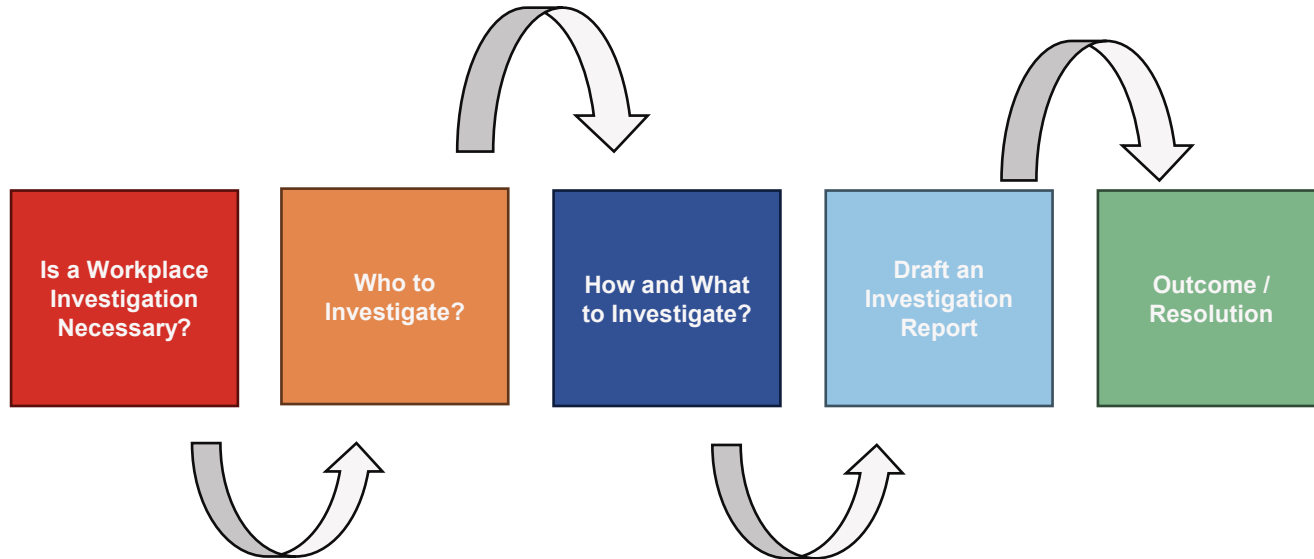
Matthew Giles, Partner
Tuesday 11 August 2026

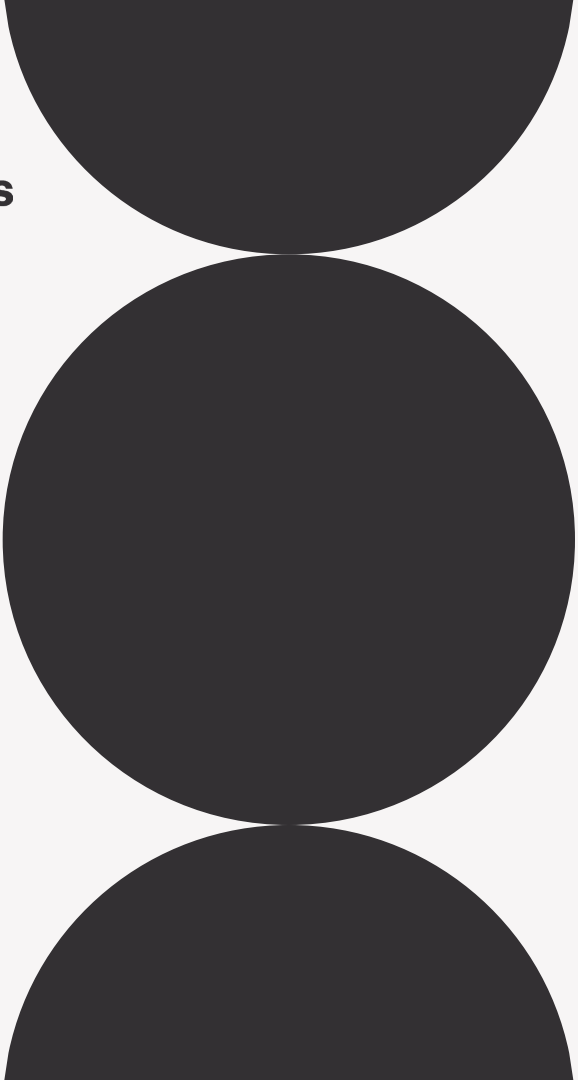


Contents.

Making the decision: When is an investigation required?	04
Conducting a fair and effective workplace investigation	08
Evaluating evidence and drafting report	14
Avoiding common mistakes and recent case examples	18

Stages of an investigation.





**Colin
Biggers
& Paisley**

Making the decision.

When is an investigation required?

Legal and policy triggers.

Statutory obligations

- *Fair Work Act 2009* (Cth)
- *Work Health and Safety Act 2011* (Qld)
- Discrimination legislation
- Industry specific legislation

Common law duties

- Comply with terms of contract
- The duty of fidelity and good faith

Policies and procedures

- Code of conduct
- Policies and procedures (e.g. bullying)
- Complaints management framework / grievance procedure
- Enterprise agreement

An investigation should be initiated when:

- a) The allegations are serious or complex
- b) To ensure compliance with legislation
- c) There is a need to determine facts before taking action

Initial assessment.



The "So What?" Test

- Is the complaint trivial, vexatious, or malicious?
- Does it raise genuine issues of misconduct, breach of policy, or legal non-compliance?
- What are the potential consequences if the allegations are substantiated?
- What is the impact on the complainant, respondent, and broader workplace?



Threshold for formal investigation.

Not all complaints require a formal investigation. Employers should consider:

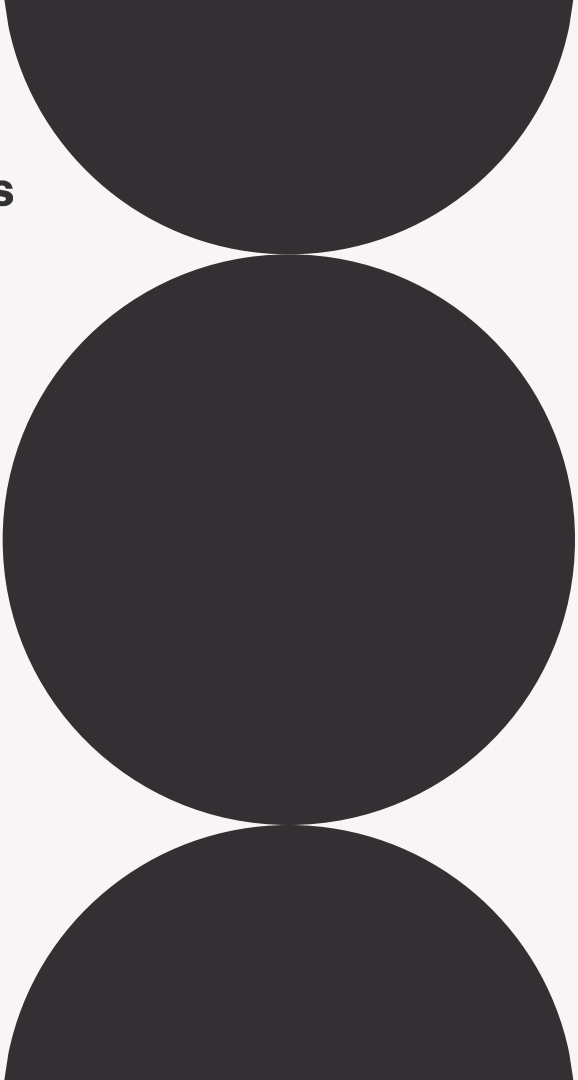
1. **The seriousness of the allegations:** More serious allegations require a more rigorous process. What might a likely outcome be if the allegations are proved.
2. **The complexity of the matter:** Multiple witnesses, overlapping issues, or legal implications may necessitate formal inquiry.
3. **The complainant's intent:** If the complainant seeks informal resolution, mediation or counselling may be more appropriate.
4. **The respondent's history and mental health:** Consider whether the respondent has a history of similar conduct or is vulnerable.
5. **The potential for informal resolution:** Some matters may be resolved through early intervention, clarification, or facilitated discussion.

The **Investigator** should be:

a) Independent of the parties involved.

b) Free from actual or perceived bias.

c) Competent to assess the evidence and apply relevant standards.



**Colin
Biggers
& Paisley**

**Conducting a fair
and effective
investigation.**

Step 1 - Preparation

Establishing

- Define roles
- Determine scope
- Internal v External
- Is legal professional privilege required?

Familiarisation

- Review policies, procedures and legal frameworks
- Understand the complaint and its context
- Identify relevant witnesses and documents

Planning

- Determine interviews required and order
- Draft correspondence (notices of interview, requests for information)

A fair and effective workplace investigation is essential for ensuring procedural fairness, maintaining organisational integrity, and mitigating legal risk.

Bias and conflicts of interest.

Workplace Investigations and Bias

- Workplace investigators must be someone who has no connection with the facts under investigation and who is free from bias
- Bias can be actual or perceived

Actual

Where the investigator has an actual personal interest in the outcome

Perceived

Where a fair-minded lay observer reasonably apprehends that the investigator might not bring an impartial mind to the matters they are required to decide.

Step 2 - Investigation



Interviewing witnesses

- Offer support person and confirm role
- Record interviews (or take detailed notes if consent not provided)
- Use appropriate questioning techniques



Drafting allegations

- Clarity and specificity
- Confirm allegations with complainant
- Does it pass the "so what?" test?



Gathering evidence

- Types of evidence (CCTV, emails, text messages, documents, witness transcripts and/or statements)
- Record observations regarding witnesses when corresponding with and providing evidence

Procedural fairness & natural justice.

- Natural justice requires that a person whose rights may be affected by a decision is:
 - informed of the case against them in sufficient detail to enable them to respond
 - provided with a reasonable opportunity to respond and be heard without bias
- The person's response must be taken into account by a workplace investigator when making findings
- An unfair investigation may not uncover all the relevant information and will undermine employee confidence in the disciplinary process



Procedural fairness & natural justice.

Provide sufficient detail of the allegations and supporting evidence



Allow reasonable time for the respondent to respond



Consider all relevant information and avoid “bundling” allegations

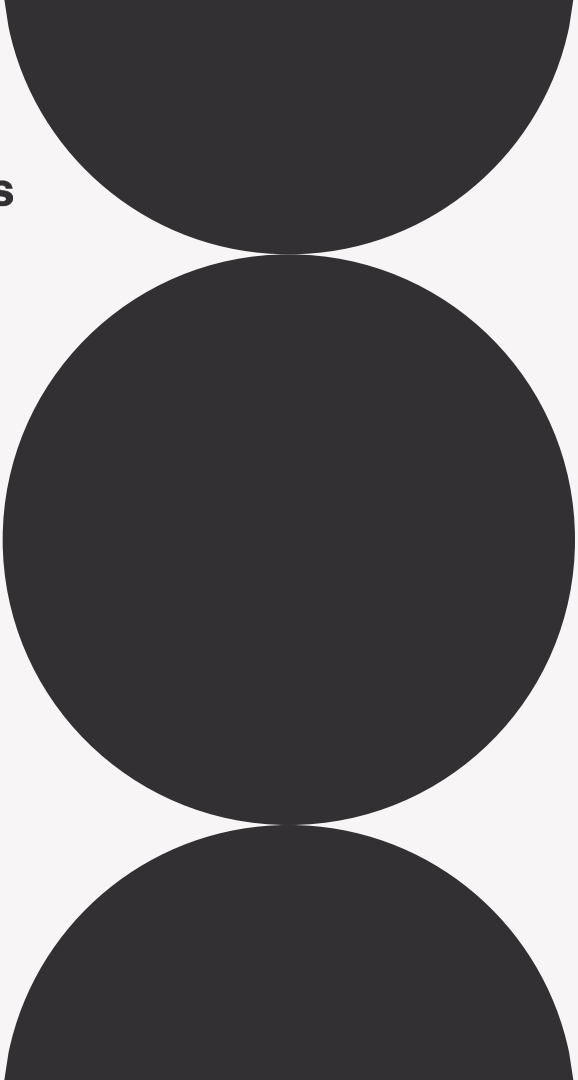


Allow support persons in meetings



Issue warnings for performance issues before dismissal





**Colin
Biggers
& Paisley**

**Evaluating
evidence and
drafting report.**

Standards of proof.

A. Balance of Probabilities

The standard of proof in workplace investigations is the **balance of probabilities**, which requires that it is **more likely than not that the alleged conduct occurred**. This is the standard applied in civil matters and is the baseline for all findings in internal investigations.

B. The Briginshaw Principle

The Briginshaw principle does not raise the standard of proof beyond the balance of probabilities, regardless of the allegations.

Instead, it requires a **higher degree of satisfaction** and **stronger, more persuasive evidence** when the allegations are grave or where the consequences of a finding are particularly serious, such as termination of employment or reputational harm.

Evaluating evidence.

Haslam v Fazche Pty Ltd (2013), the FWC excluded covert recordings made by an employee

Jurecek v Director, Transport Safety Victoria [2016], the court accepted social media evidence as admissible and relevant

Evaluating evidence

Types of evidence

- Documentary evidence
- Witness testimony
- Expert evidence

Credibility and probative value

- Is it hearsay?
- Is it corroborated?
- Is the source reliable?
- Are there other motives?

Legal considerations

Lawfulness: Has it been lawfully obtained?

No surveillance unless authorised in a policy/contract

Disclosure

Respondents must be given an opportunity to respond to evidence against them

Limited to those with a legitimate need to know

Reporting.

Structure of the Report

Allegations: Clearly state each allegation

Chronology: Provide a timeline of relevant events

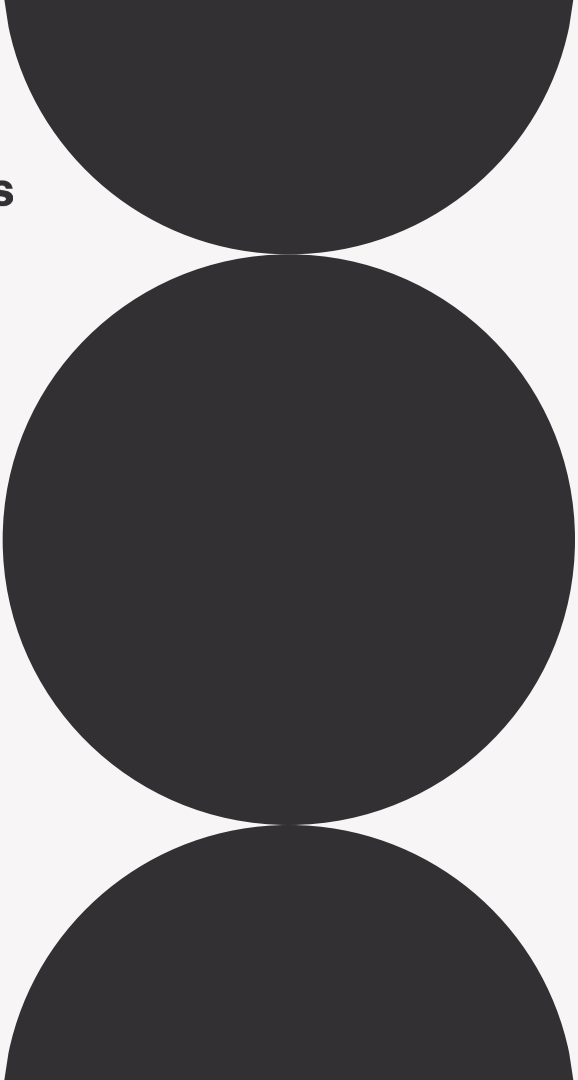
Methodology: Describe how the investigation was conducted

Evidence: Include a list of all evidence obtained, including witness interviews and relevant documents

Findings: State whether each allegation is substantiated, partially substantiated, not substantiated, or unable to be substantiated, with sufficient explanation as to why that finding was made

Recommendations: (Optional) Suggest appropriate action based on findings





**Colin
Biggers
& Paisley**

**Avoiding
common
mistakes and
recent case
examples.**

Getting it wrong.

Inadequate
Scoping &
Briefing

Procedural
Failures

Poorly Drafted
Allegations

Over-
Formalisation or
Too Quick

Ignoring
Wellbeing

Poor
Documentation

Lack of Clarity in
Roles, Policy or
Direction

Rejecting
Reports Without
Basis

Overreliance on
Weak or
Unreliable
Evidence

Not Raising
Issues in a
Timely Way

Combining
Roles

Link Between
Decision and
Workplace Right

NSW Department of Education v SafeWork NSW (No 2) [2026] NSWIRComm 1014

Employer issued with two improvement notices after SafeWork NSW found that the employer's workplace investigation exposed the respondent to psychosocial risks

- Respondent received correspondence advising that she was the subject of a misconduct investigation and was directed to immediately leave the workplace
 - Respondent instructed to undertake alternate duties at a different workplace
- Respondence received formal letter of allegations 3 months after receiving the initial correspondence and had still not been provided with sufficient particulars of the allegations prior to making a complaint to SafeWork NSW approximately 7 months after receiving the initial correspondence
- Almost 12 months after the investigation had commenced and more than 6 weeks after SafeWork NSW had issued the improvement notices, the employer advised the respondent that all allegations of misconduct had been substantiated and that she would be issued with a caution and reprimand

Key takeaways:

- Ensure timely completion of investigation, depending on the complexity
- Communication obligations during investigations are clearly defined and followed in practice
- Alternate duties are meaningful and commensurate with the employee's substantive role, otherwise it may be appropriate to stand down on full pay
- Psychosocial risk assessments expressly identify and consider workplace investigations and disciplinary processes

Linda Florence McFadden v Mars Australia Pty Ltd [2026] FWC 2772

Supervisor with an unblemished record of 23 years was dismissed following a food safety incident that involved an 850kg carton of mints being damaged by a forklift

- Ms McFadden and Food Safety Specialist agreed approximately half the damaged product should be discarded, but only 80kg was ultimately disposed of
- Ms McFadden believed the agreed position had been followed, but took no steps to verify implementation
- HR manager concluded that Ms McFadden was solely responsible for the incident and lacked accountability, despite evidence that multiple employees departed from required food safety procedures
- FWC found the disciplinary investigation was "too narrow" because it failed to examine broader procedural failures and the role of other employees in implementing the agreed disposal process

Key takeaways:

- Ensure adequate scope of investigation to include all contributing conduct
- Interview all relevant witnesses
- Ensure findings accurately reflect the evidence

Mohammad Israfael Khan v Heston MRO Pty Ltd [2026] FWC 2008

An experienced Licensed Aircraft Maintenance Engineer powered down and restarted an aircraft to clear fault messages, causing a 17-minute delay, and was summarily dismissed for serious misconduct

- An initial investigation by the employer did not recommend any disciplinary action as it had concluded that :
 - Mr Khan had not engaged in misconduct
 - Mr Khan had had not knowingly breached procedures
 - the event was a "no blame error"
- The findings were endorsed internally and provided to Singapore Airlines, who expressed dissatisfaction with the outcome
- The newly appointed Head of Quality and Safety reviewed the matter and reclassified the conduct as a "reckless violation"
- However, he reached that conclusion without interviewing Mr Khan, did not provide him with the revised findings, and did not give him an opportunity to respond before the finding was made

Key takeaways:

- Ensure adequate scope of investigation at outset
- Provide respondent with sufficient opportunity to respond
- Ensure findings accurately reflect the evidence
- Different findings requires new evidence or a demonstrated error in the first investigation

Pravin Kumar Malik v Westpac Banking Corporation [2026] FWC 2711

Long-serving Home Finance Manager was dismissed after an investigation found that he accepted payments from customers linked to lending activity, committed responsible lending breaches, and used WhatsApp for customer banking business

- The FWC described Westpac's investigation as "thorough, detailed and objective"
 - Placed on paid special leave during the investigation
 - Allegations put to Mr Malik during interview
 - Then provided with an 18-page allegations letter and given opportunity to provide written response (extended to allow time for legal advice)
 - Provided with access to relevant systems and records to enable him to provide a response
 - Westpac sought further information and clarification after receiving the written response and provided another opportunity to provide a written response
 - Investigators tested Mr Malik's explanations against documentary evidence, customer records, transaction data, CCTV footage and forensic reviews of work devices

Key takeaways:

- Draft clear and specific allegations
- Where relevant, allegations should include supporting evidence and relevant policies
- Provide respondent with sufficient opportunity to respond
- Notify respondent of seriousness of allegations and potential consequences
- Where appropriate, put respondent on paid leave or provide relevant directions

Frank Kalayzich v Australian Football League [2026] FWCFB 190

Long-serving AFL umpire and coach was dismissed following a physical altercation with a member of the public who entered a closed AFL umpire training session

- Mr Kalayzich cited "HR bias" and "procedural unfairness", because the investigator was the same senior business partner who had dealt with him twice previously in relation to other unrelated incidents
 - Investigation was transferred to a colleague as soon as the issue was raised by Mr Kalayzich
- FWC found the AFL provided procedural fairness by giving Mr Kalayzich access to review the CCTV footage weeks before the dismissal decision was made
 - The AFL's refusal to provide a copy of the footage after dismissal, due to privacy and confidentiality concerns, did not render the process unfair
- The AFL substantiated the allegations as CCTV footage was supported by witness evidence

Key takeaways:

- Consider both actual bias and perceived bias prior to commencement of investigation
- Provide respondent with sufficient opportunity to respond
- Ensure findings accurately reflect the evidence

Presenters.



Matthew Giles

Partner | Colin Biggers & Paisley
Email: matthew.giles@cbp.com.au
Mobile: +61 422 119 794

**Colin
Biggers
& Paisley**

Thank you.

© 2026 Colin Biggers & Paisley Lawyers

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means—electronic, mechanical, photocopying, recording, or otherwise—without the permission of Colin Biggers & Paisley Lawyers.

This document provides an outline of a presentation and is incomplete without the accompanying oral commentary and discussion.

COMPANY CONFIDENTIAL

cbp.com.au