



Bullying and Sexual Harassment in the Workplace

Identifying and Managing
the Conduct

Today's Session

- Bullying fundamentals
- Current state of the law: Bullying and Sexual Harassment
- Respect@Work Report and Sex Discrimination and Fair Work (Respect at Work) Amendment Bill (2021)
- Sexual Harassment in Employment: Lessons learned from the leading cases
- Practical Considerations for Employers in Managing this Behaviour - Investigations
- Key Take-Aways



Why is this important?

Practical Consideration

- Harmonious workplace
- Positive workplace culture
- Productive (happy) staff
- Less time spent dealing with issues (complaints and grievances)
- Staff turnover
- Workers compensation claims
- Other financial costs
- Reputational costs

Legal Liability

1. Employees are liable for their own conduct (harassment, bullying, discrimination)
2. A person who causes, induces, aids or permits another person to discriminate or harass
3. Employer also liable unless it took "*all reasonable steps*" / practicable steps to eliminate or minimise risks
4. Employer's duty of care



Bullying

Bullying

What is it?

Fair Work Act 2009 (Cth) s.789FD(1)

1. Statutory definition
2. A worker is **bullied at work** if:
 - a. while the work is at work in a constitutionally covered business:
 - an individual;
 - or group of individuals;repeatedly behaves unreasonably towards a worker or a group of workers at work, and
 - a. the behaviour creates a risk to health and safety.

What is bullying?

What types of behaviours do we commonly see?

1. Verbal Abuse
2. Excluding/isolating an employee or group of employees
3. Belittling someone's opinions
4. Unwarranted criticism
5. Setting someone up to fail
6. Failing to provide appropriate resources or training
7. Consistently ignoring an employee

Includes any behaviour that is victimising, humiliating, intimidating or threatening

Must be **repeated behaviour** – a range of behaviours over time

What is bullying?

What the Commission/Court has said

In *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 Vice President Hatcher indicated that some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work were:

... intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.

In *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* [2007] NSWCA 377 (21 December 2007) Spigelman CJ, Beazley JA, and Basten JA noted:

There is a substantial body of evidence of racial vilification and personal abuse incorporating a range of insults including “black boy”, “black cunt”, “monkey face”, “curry muncher”, “boofhead”, “poofter”, “hopeless”... It is accurate to describe the course of conduct as bullying or harassment. The evidence suggests that the conduct was frequent enough to be characterised as systematic.

When is behaviour not bullying

What isn't bullying?

Fair Work Act 2009 (Cth) s.789FD(2)

To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner

1. This section reinforces that '*bullying conduct must of itself be unreasonable*'
2. Also emphasises the right of business owners/management to take management action and make management decisions in the workplace
3. Requirement that such actions be **reasonable**
4. What is reasonable is a question of fact – the test is an objective one

What is management action?

Comprises three elements:

1. the behaviour (being alleged as bullying conduct) must be management action;
2. it must be reasonable for the management action to have been taken; and
3. the management action must have been carried out in a manner that is reasonable.

Examples of management action include:

- counselling meetings or otherwise disciplining a worker for misconduct
- performance management (including more formal performance improvement plans)
- investigating allegations of misconduct

When is management action reasonable?

From the Fair Work Commission

Re Ms SB [2014] FWC 2104, Hampton C stated at paras 49–50:

Determining whether management action is reasonable requires an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time. Without limiting that assessment, the considerations might include:

- a. the circumstances that led to and created the need for the management action to be taken;*
- b. the circumstances while the management action was being taken; and*
- c. the consequences that flowed from the management action.*

The specific 'attributes and circumstances' of the situation including the emotional state and psychological health of the worker involved may also be relevant.

When is management action reasonable?

From the Fair Work Commission

Re Ms SB [2014] FWC 2104, see para 51:

The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was *'more reasonable'* or *'more acceptable'*. Accordingly:

1. management actions do not need to be perfect or ideal to be considered reasonable;
2. a course of action may still be reasonable action even if particular steps are not;
3. to be reasonable, the action must also be lawful, not *'irrational, absurd or ridiculous'*;
4. any unreasonableness must arise from the actual management action in question, rather than the applicant's perception of it; and
5. whether the management action involved a significant departure from established policies or procedures, and if so, whether that was reasonable in the circumstances.

Examples of reasonable management action

A non-exhaustive list:

1. Counselling an employee about poor performance and conduct, in a constructive manner maintaining confidentiality and where designed to assist the employee to improve their performance
2. Setting reasonable performance standards, objectives and deadlines taking into consideration a worker's job requirements, skills and experiences, and after consulting with the worker
3. Placing an employee on a formal documented Performance Improvement Plan
4. Fairly allocating work in compliance with systems/skills
5. Rostering work hours in a consistently reasonable and fair manner
6. Not promoting an employee, where this decision is based on fair and objective measures of performance
7. Transferring an employee for genuine operational reasons

What have the cases said?

Amie Mac v Bank of Queensland Limited and Others [2015] FWC 774

Example of reasonable management action

*My overall conclusion is that the decision to place Ms Mac on a PIP, and the manner in which the PIP process was implemented, was not unreasonable. ...shortcomings in her performance had been identified by Ms Mac's managers over a considerable period of time. ... BOQ was clearly entitled to take some form of action to achieve an improvement in Ms Mac's performance. The PIP process was the standard means by which this was done within BOQ. It was unsatisfactory that BOQ's Performance Management Policy made no reference to the PIP process, with the result that the process was not fully transparent to all employees. Nonetheless, **performance plans which clearly identify targets for improvement, require achievement of those targets within identified timeframes, and which provide support and feedback to employees to assist them to achieve such targets, are a legitimate and commonly used means to improve employee performance.** In that context, the use of the PIP process by BOQ in relation to Ms Mac was reasonable. [98]*

Cases cont'd

Applicant v Respondent (PR548852)

- An order was granted following a conference between the parties before a member of the Commission
- The “bullying” employee:
 - ◆ Must complete their exercise before 8am
 - ◆ Have no contact with the Applicant alone
 - ◆ Make no comment about the Applicant’s clothes or appearance
 - ◆ Shall not send emails or texts to the Applicant
 - ◆ Shall not raise work issues without notifying the Chief Operating Officer of the Respondent, or his subordinate, beforehand

Cases cont'd

Application by Ms Y [2021] FWC 6347

- The Applicant in this case was a HR Manager
- Respondents were a school, the principal, deputy principal and director of staff
- Breakdown in professional relationship occurred over the course of 2020
- HR Manager was very precise in the performance of her role, and the Commission in this case found her *'inflexible and uncompromising approach'* was *'at the heart of much of the conflict and tension between her'* and a colleague against whom she alleged bullying conduct
- Amongst other issues, she refused to onboard a returning casual employee, due to their police check, she refused take over a volunteer program (saying onboarding 'volunteers' was not part of her role because her PD stated 'employees'), and she repeatedly declined to attend a handover meeting relating to the program.

Cases cont'd

Application by Ms Y [2021] FWC 6347

Commission examined each of the allegations, finding amongst other things that:

In all the circumstances, I do not consider that the direction to issue a contract and onboard the employee was unreasonable. As a professional and senior employee Ms Y initially acted appropriately in raising her concerns. However, both Mr B, and later Mr M and Mr D, explained to her that they did not consider it necessary for new police check to be obtained, and that if there were any problems, Ms Y would not be held to account. Further, it was not unreasonable for Mr B and Mr M to decide that the onboarding of the employee was appropriate, they had the authority to do so, and exercised that authority reasonably. The direction to Ms Y was reasonable, however Ms Y's continued refusal to follow it was not. [74]

Application by Ms Y [2021] FWC 6347

(Cont'd)

In circumstances where Ms Y had refused a direction to oversee the volunteer program and time was of the essence, I do not consider that it was unreasonable for Mr B to take the opportunity to again calmly ask Ms Y to attend the handover meeting. [89]

I accept that Ms Y has been genuinely highly distressed and gravely affected by her perception of what occurred. However, the legislation requires that I focus on the reasonableness of the relevant conduct, rather than Ms Y's subjective perception of it. [100]

For the reasons set out above, I am not satisfied that the incidents raised by Ms Y, considered either individually or collectively, involved unreasonable behaviour by any of the persons named. I find that Ms Y has not been bullied within the meaning of s.789FD of the Act. [101]



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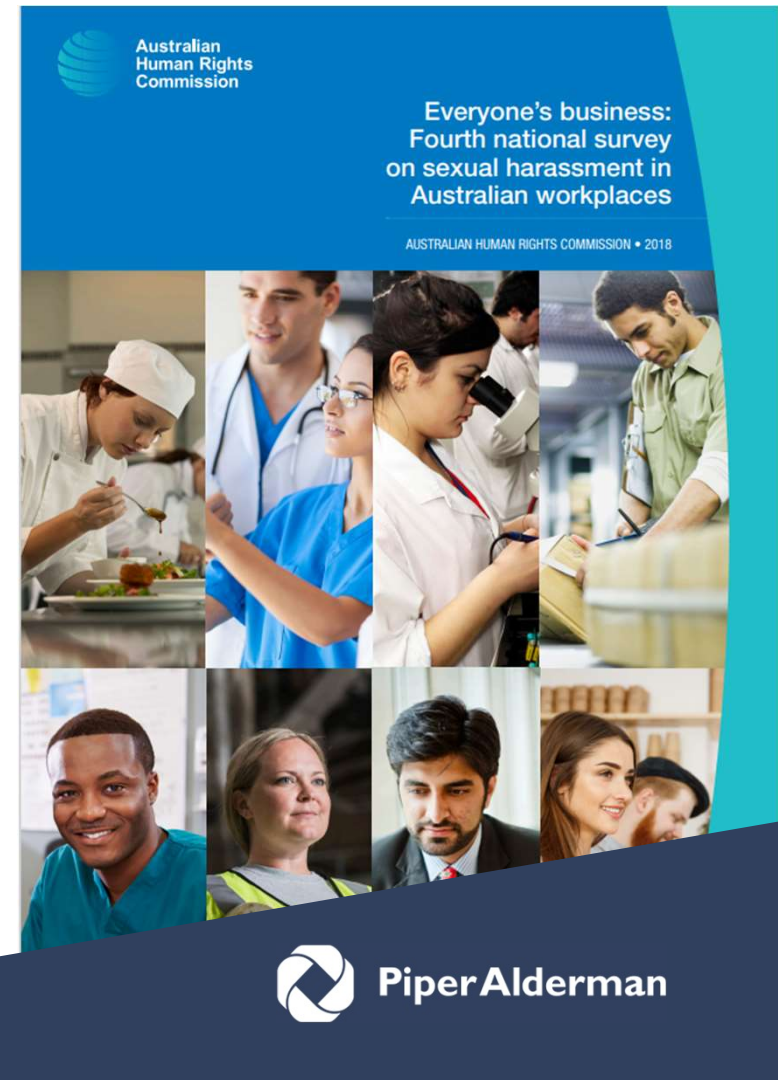
Sexual Harassment



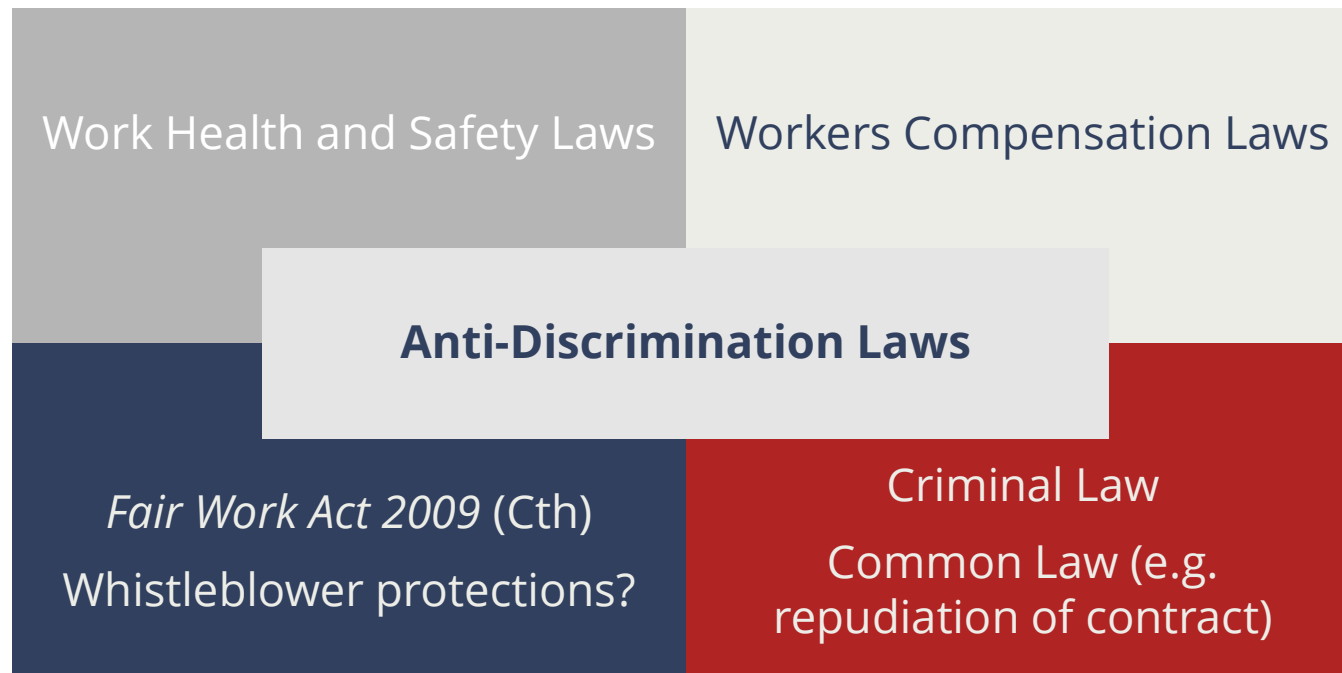
Prevalence of Workplace Sexual Harassment

The *National Survey on Sexual Harassment in Australian Workplaces* (2018) found that between 2013 – 2018:

- **1 in 3 workers** had been sexually harassed at work
- **39% of women** had been sexually harassed at work
- **26% of men** had been sexually harassed at work
- **17% of workers** made a formal complaint or report of sexual harassment in the workplace



Current Legal Framework



What is Sexual Harassment?

Unwelcome sexual advance

OR

Unwelcome request for sexual favours

OR

Unwelcome conduct of a sexual nature

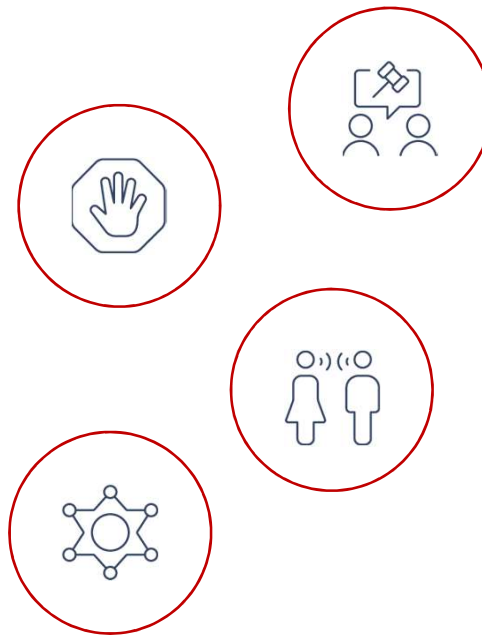
AND

Reasonable person, having regard to **all the circumstances**, would have anticipated the **possibility** that the person would be **offended, humiliated or intimidated**

What might Sexual Harassment look like?

Sexual Harassment can be **overt**, **covert**, or **subtle** and include:

- Requests for sex
- Suggestive comments or jokes
- Unwelcome touching, hugging or kissing
- Persistent requests for a date
- Indecent exposure
- Suggestive nicknames for co-workers
- Inappropriate staring
- Repeated or inappropriate advances online
- A direct or implied threat or benefit
- Physical or sexual assault



Who can be liable?



Perpetrator

An employee or other person is liable for their own acts of discrimination, harassment and bullying



Observer

A person who causes, induces, aids or permits another person to discriminate or harass can be liable



Employer

Employer liable unless it took *reasonable steps* to eliminate or minimize risks

What constitutes the “workplace”?



Seminars and
Conferences



Social Events



Working Offsite



Travel for
business
purposes



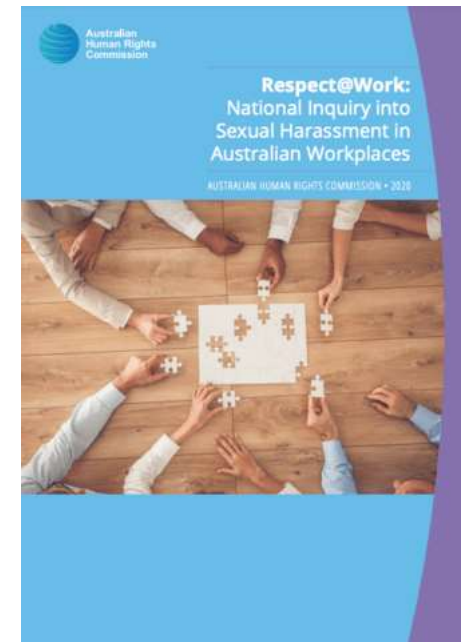
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Respect@Work 2020 Report

- On 5 March 2020, the Sex Discrimination Commissioner delivered the **Respect@Work: Sexual Harassment in Australian Workplaces Report**
- Number of **key recommendations** for the prevention and response
- The recommendations have **significant implications** for employers
- Recommends a **holistic** and **multifactorial approach**
- Employers need to look at:

- *Leadership*
- *Culture*
- *Risk Assessment*
- *Transparency*

- *Knowledge*
- *Support*
- *Reporting*
- *Measuring*



Sex Discrimination and Fair Work (Respect at Work) Amendment Bill (2021)



Anti-Bullying
Order



Valid Reason for
Dismissal



Definition of
Serious
Misconduct



Positive Duty

Safe Work Systems and Procedures under WHS laws



Discrimination Laws



Employers can be held **legally responsible** for acts of sexual harassment that occur in the workplace or in connection with a person's employment



Employers must demonstrate they have taken **all reasonable steps** to prevent harassment from occurring in the workplace



Anti-Discrimination laws do not provide a **clear definition** of "reasonable steps"

What are “reasonable steps”?



Effectively preventing and responding to sexual harassment: A Code of Practice for Employers (2008)

“Five Simple Steps to Prevent Sexual Harassment”

- 1 Get high-level management support
- 2 Write and implement a sexual harassment policy
- 3 Provide regular training and information on sexual harassment to all staff and management
- 4 Encourage appropriate conduct by managers
- 5 Create a positive workplace environment

Richardson v Oracle Corporation Australia Pty Ltd

The leading case concerning when an employer will be vicariously liable



Complainant was “pressured” to make a formal complaint, when she wanted it to be dealt with informally and discreetly



Complainant had to continue to work with the accused during the investigation



The employer’s policy (and procedures) did not meet the standards set in the AHRC Code of Practice

“

The **policy did not state in clear terms** that sexual harassment is **against the law**, and the **source of that authority**. The policy further failed to emphasise **Oracle’s interest** in ensuring compliance with the policies, and **failed to inform workers** that “**legal action could be taken** against them individually for sexual harassment and that they could also be exposing the company to liability”

Richardson v Oracle Corporation Australia Pty Ltd (2014) FCR 334



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Effectively preventing and responding to sexual harassment: A Code of Practice for Employers (2008)

Essential Elements of a Sexual Harassment Policy

- A strong opening statement on the organisation's stance on sexual harassment
- An outline of the organisation's objectives regarding sexual harassment
- A clearly worded definition of sexual harassment
- Examples of sexual harassment that may be relevant to the particular working environment
- What sexual harassment is not
- A statement that sexual harassment is against the law
- The circumstances in which sexual harassment may occur
- The consequences that can be imposed if the policy is breached
- Responsibilities of management and staff
- Information on where individuals can get help, advice or make a complaint
- A brief summary of the options available for dealing with sexual harassment

“

What must be taken is all steps that are reasonable to take. What steps are reasonable will depend upon the whole of the circumstances.

Von Schoeler v Allen Taylor & Company Ltd Trading as Boral Timber (No 2)
[2020] FCAFC 13



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Key Points – Von Schoeler v Allen Taylor & Company Ltd Trading as Boral Timber



Policies are important but only the start of all reasonable steps



Relevant factor is whether an employer's policy complies with guidelines published by AHRC



All reasonable steps defence requires substantial evidence



Employers must develop, implement and maintain sexual harassment policies

Recommended Steps

The following are some recommended reasonable steps that employers can adopt to reduce the risk of sexual harassment:

1. Develop and promote a **written policy** which rules out sexual harassment in the workplace.
2. Inform all your staff of what you **expect** of them.
3. Make sure managers and supervisors know how to promote a **safe and fair workplace**.
4. Provide **awareness training** for managers and staff.
5. Know how to handle **inappropriate behaviours** before they escalate.
6. Have a **complaint handling procedure** for dealing with problems if they arise.
7. Encourage staff to **come forward** with problems or complaints.
8. Treat complaints **seriously, quickly and confidentially**.
9. Monitor the **workplace culture**.
10. Survey staff on sexual harassment or **discuss it** at staff meetings.

Other cautionary tales



Vitality Works Australia Pty Ltd v Yelda [2020] NSWCATAP 210

- Employer engaged in sexual harassment when a female employee's photograph was used for a spine safety poster placed near the men's toilets, called "Feel great – lubricate!"
- The use of the double entendre amounted to sexual harassment and sex discrimination



Orchard v Frayne Higgins [2020] TASADT 11

- Employee mentioned a "creep" third party courier (who had previously slapped her on the behind) to her employer. The employer, without the employee's consent, raised the incident with the courier's employer.
- The courier served a defamation "concerns letter" on the employee, who then commenced proceedings, ultimately receiving \$45,000 in total as damages (\$20,000 as aggravated damages) from the courier for the harassment



Hughes v Hill [2020] FCAFC 126

- A lawyer who thought he was "like Mr Darcy", in fact bombarded his paralegal with inappropriate emails, coerced hugs, and veiled threats to end her employment.
- The paralegal (who resigned when her hours were cut) was awarded \$120,000 in general damages and \$50,000 in aggravated damages

Checklist for Sexual Harassment Investigations

- 1 Ensure that **sexual harassment policies and procedures** are established and discussed with employees
- 2 Correctly **identify the claim** as a sexual harassment claim
- 3 Take **all reasonable steps** to protect the complainant and immediately investigate
- 4 Make **detailed notes** and **document all correspondence**
- 5 Offer **support** to **both parties**
- 6 Ensure the respondent is afforded **procedural fairness** and given the opportunity to **respond**
- 7 Protect the **interests of the parties**. Maintain **confidentiality** (to extent it is possible/appropriate)

Internal vs External Investigation

Internal Investigation

- Internal Investigation
- Minor issue
- Uncharacteristic for the employee(s)
- Employee(s) otherwise a good performer and engaged
- Employee is in a business critical role or it is a critical time in a project
- Employee is in probationary period

External Investigation

- External Investigation
- Serious allegation of sexual harassment
- Ongoing issue or multiple issues have arisen with employee
- Employee is disengaged or not taking informal intervention seriously
- Need to draw a line in the sand or set example for newer employees
- Policy mandates formal intervention

Key Takeaways

- 1 Review **policies** and **procedures**
- 2 Ensure policies are regularly **updated** and **monitored**
- 3 Consider your **workplace culture**
- 4 Consider the **recent WHS updates** in relation to sexual harassment
- 5 Encourage **reporting** (from both complainants and witnesses)
- 6 Ensure eligible recipients in your workplace are aware of **whistleblower protections**
- 7 Choose the **appropriate investigatory process** – external or internal
- 8 DOCUMENT – **evidence** is extremely important when defending a claim but also **best practice**. But also be mindful of potential future discovery obligations



Questions



Further Information



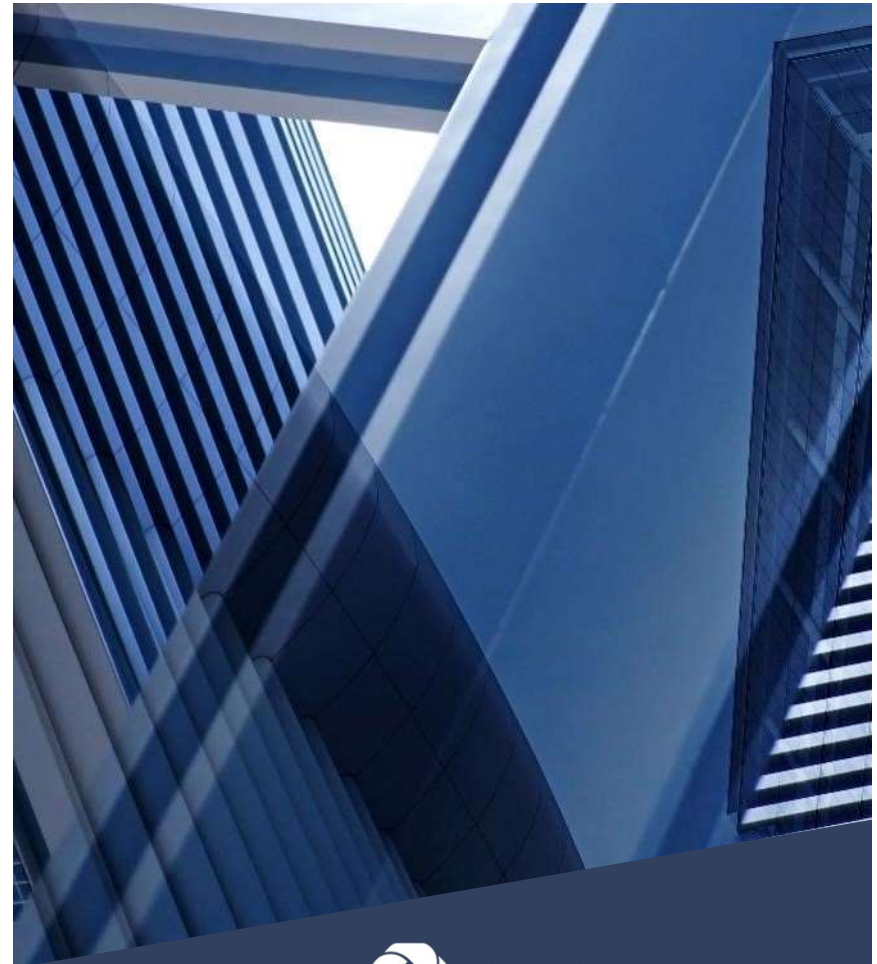
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