

Conducting Effective Investigations: A practical guide

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Abstract

Investigations into suspected unlawful activity may trigger one or more enforcement options available to AMOs, including administrative mechanisms such as Control Orders and otherwise, expiation or prosecution. AMOs must strictly abide the scope and limitations of their statutory powers as the enforcement options they may pursue as a result of their investigations are amenable to challenge by way of judicial review. This is where the Courts are called upon to review the administrative processes including the decisions and actions of AMOs to ensure they have exercised their administrative powers lawfully, fairly and reasonably. Furthermore, where a prosecution eventuates, trial Courts will observe the 'rules of evidence'. An effective investigation is one that is carried out in accordance with the legal principles that regulate the investigation process, and, therefore, an understanding of these matters is essential. In particular, this paper examines the principles and practices of conducting effective investigations, including the fundamentals of evidence gathering and the key rules of evidence.

Separately, of course, the empowering legislation may also provide for a merits review (not of the processes) of a particular enforcement action.

Introduction

A crucial function of an AMO is to monitor and enforce compliance with legislation and other regulatory administrative controls. Where allegations arise that tend to show an offence may have occurred or, a situation exists that warrants a control order being issued, an AMO must ensure that he/she has sufficient evidence before a prosecution is commenced or, as the case may be, an order is issued. It is through the process of an investigation that the AMO will obtain the necessary evidence.

It is, therefore, essential that AMOs are properly equipped with investigation skills. Indeed, successful enforcement, whether it is by way of issuing a control order, an expiation or by commencing a prosecution, will be dependent upon the information (or evidence) that has been obtained during the course of the investigation.

An investigation is fundamentally a process of inquiry, the objective of which is to establish a set of facts that may, for example, expose the existence of a criminal offence or a breach of legislation. The key to conducting an effective investigation is, in my view, achieved where the investigator has a clear strategy in place (i.e. it is a *strategic investigation*). Specifically, a 'strategic investigation' revolves around adequate planning to identify, from the outset, the evidence required to prove a set of facts and the way in which that evidence can be obtained to satisfy the applicable evidentiary burden.

The components of an effective investigation

The Role of the Investigator: Knowing your Powers

The investigator is responsible for discerning all relevant facts required to establish the occurrence of an offence or a breach of legislation. Since an investigation is an inquisitorial rather than adversarial process, an investigator must conduct himself/herself impartially, with integrity and in an objective manner. Facts, especially those that are in dispute which could have a decisive impact upon the outcome, should not be accepted at face value. Rather, throughout the course of an investigation, the investigator must perpetually examine, analyse and, where necessary, challenge the information that is collated to ensure it has the highest probative value (i.e. the evidence is credible, has been lawfully obtained and serves to prove the existence of a fact).

Investigators should take account of local, cultural and social sensitivities because a successful investigation relies upon the goodwill and cooperation of victims, witnesses and the community. A heavy-handed, discriminatory approach or, taking actions that are disproportionate to the offence (or breach), risk losing that cooperation. An effective investigator is, therefore, one who achieves a balance in conducting an objective investigation and maintaining an approach that recognises the concerns of all the parties involved.

Ordinarily, an investigator will obtain information from witnesses, experts or records. Investigators need to assess the powers they have available to them under legislation to be sure they have at their disposal the necessary powers to obtain the information they require.

Legislation generally confers certain "*inspectorial*" powers upon investigators (including AMO's) to better equip them for conducting investigations and gathering evidence. For example, as an AMO, you may be authorised under legislation to enter onto land, require a person to produce documents, take photographs, access documents and/or require a person to state their name. Importantly, each of these statutory powers is limited by the relevant legislation and may only be exercised in accordance with those limitations.

Where the investigator acts beyond his/her statutory powers, the integrity of information gathered may be undermined and any subsequent enforcement action taken upon the basis of that information may (in the case of a control order) be deemed void by the Courts, or (in the case of a prosecution) fail. For this reason, it is essential that the investigator has regard to the relevant legislation and maintains an awareness of the statutory powers required to effectively investigate a matter and the limitations upon those powers.

The Preliminary Stage: Identifying the Material Facts

An AMO's ability to exercise his/her statutory powers and to take enforcement action is always contingent upon the existence of certain material facts. Material facts are those facts which must be proven to establish that an offence has been committed or that a breach of legislation has occurred. Therefore, from the outset of any investigation, the material facts must be clearly identified. Ordinarily, this is achieved by reference to the relevant legislation.

For example under the *Dog and Cat Management Act 1995* (SA), an AMO's ability to issue a control (barking dog) order¹ to a dog owner will depend upon the existence of the following material facts:

- the dog that is the subject of the order is a nuisance; and
- it has created noise by barking in circumstances that would constitute an offence under the Act (that is, the barking must persistently occur or continue to such an extent that it unreasonably interferes with the peace, comfort or convenience of a person².)

Alternatively, under the *Domestic (Feral and Nuisance) Animal Act 1994* (Vic), a dog owner will have committed an offence in relation to an attack by his/her 'dangerous dog'³ where the following material facts are proven:

- the dog is a dangerous dog within the meaning of that Act⁴; and
- it is not a guard dog guarding non-residential premises; and
- the dog attacks or bites any person or animal.

Once the material facts have been identified, the AMO can embark upon an investigation to obtain evidence demonstrating the existence of those facts. Findings in relation to the facts must be based upon evidence that it is relevant and logically capable of supporting the findings and must satisfy the applicable standard of proof. That is, facts upon which administrative enforcement mechanisms are based must be proven 'on the balance of probabilities'. However, in criminal proceedings, the relevant facts must be proven 'beyond reasonable doubt'.

A failure to obtain sufficient evidence to support such findings can be grounds for a review of any enforcement action taken, such as an appeal against a control order that has been issued by an AMO. Where the appeal is successful, there may be adverse cost implications for the AMO's employer. Alternatively, if insufficient evidence exists in the context of a prosecution, a conviction will not be recorded against the accused, which may result in negative publicity for the employer. Furthermore, where an employer's regulatory functions are poorly executed as a result of reliance upon insufficient evidence, public confidence in the employer may be compromised. Therefore, in order to avoid such consequences, the primary objective of any investigation is to obtain accurate and relevant evidence to properly establish the existence of material facts.

Planning and Preparation: The Investigation Plan

Mastering the art of strategic investigation requires an AMO to adopt and observe a sound procedure for making enquiries and gathering evidence. Planning, an important aspect of preparing for an investigation, will be a crucial component of such a procedure. Indeed, the effectiveness of any investigation will hinge upon the level of planning the investigator undertakes in the initial stages. Planning an investigation is important so that the investigator may ensure that:

- the investigation is carried out strategically;
- resources are adequately utilised; and
- sources of evidence are not overlooked.

An investigation plan should always be prepared before embarking upon an investigation. The plan will define the parameters of the investigation and provide clarity with respect to the approach taken by the investigator. Importantly, it will set out the relevant objectives so the investigator knows from the outset what they must achieve. An effective investigation plan will contain the following:

- the nature of the allegations;
- the material facts that must be established to substantiate the allegations and determine whether an offence has been committed or a breach of legislation has occurred;
- the applicable standard of proof (i.e. in civil enforcement, facts must be proven 'on the balance of probabilities', however, in criminal proceedings they must be proven 'beyond reasonable doubt');
- the issues that require investigation and the key questions that must be addressed;
- the sources of evidence (i.e. identify potential witnesses and the need to obtain documents such as photos, reports etc)
- reference to relevant legislative provisions, standards and/or guidelines; and
- the type of enforcement action that may be pursued (if any).

The purpose of the investigation plan is to encourage the investigator to consider, in the initial stages, the evidence that is required and the sources that may be pursued to obtain that evidence. The nature of the material facts to be established will determine the avenues of enquiry including the witnesses that need to be interviewed, the documents to be collated and whether the opinion of an expert should be sought.

All evidence gathered must be relevant, reliable and logically probative, meaning it must tend to prove (or disprove) the existence of a material fact. To ensure that the investigation remains focused, the investigator should continue to refer to the investigation plan as a reminder of the facts and issues that need to be proved.

Field Work: Gathering the Evidence and Interview Techniques

Evidence gathering is a process of effectively and efficiently obtaining information relevant to an allegation. Evidence can be either direct or circumstantial. Direct evidence is evidence that a person has directly experienced (i.e. they have seen, heard or felt). For example a witness might see a dog attack another dog. Circumstantial evidence is evidence from which facts may be inferred, an inference being a conclusion that possesses some degree of probability. For example, a dog owner who finds the gate to his property open and his dog gone, might infer his dog has escaped and is wandering at large.

During the evidence-gathering phase, evidence may be collected by various means and include statements from witnesses, records of the investigator's observations, incident and/or site inspection reports, records of interviews with the accused and documents or objects relating to the case such as photos, file notes and reports.

Collecting evidence often begins at an on-site attendance or inspection. Of course, investigators may only enter private property where that have lawful authority to do so and, therefore, must be aware of their rights of entry and the circumstances where they may require a warrant. Upon entering a property, the investigator will need to be able to explain the purpose of their attendance and, where necessary, identify persons who are authorised to speak on behalf of a business. Where photographs are taken, they should be date stamped and contemporaneous notes made as to what each photograph depicts. Investigators should take notes of anything of significance that occurs during the course of an investigation including the time, date, location and the name and address of people present.

The simple rule is, "if it is worth remembering, write it down!"

Interviewing a witness is a crucial part of evidence gathering. Conducting an interview can be a difficult task, however, the manner in which an interview is conducted can significantly impact both the extent and the quality of information obtained. The investigator should always ensure the objective of the investigation is at the forefront of their mind before conducting an interview. Having regard to the objectives, the investigator should first plan the interview and ensure that they have a clear idea of the information that they want to obtain and, of the lines of enquiry to be pursued so that all relevant issues are canvassed.

Despite planning an interview, different witnesses will respond in different ways. For example, some witnesses may feel confident in giving evidence whilst others may feel intimidated and require support. An effective investigator will modify his/her own behaviour to respond effectively to the witness and will tailor their style of questioning to discern the maximum relevant information. In obtaining oral evidence, an investigator must remain conscious of a witness subsequently denying, changing or contradicting their evidence. Where inconsistencies in oral evidence do occur, the investigator must be prepared to deal with them by asking questions to clarify the evidence. Further, where the investigator is aware (or has a theory supported by the evidence) of a version of events that differs to that

described by a witness, the investigator must put the competing version to the witness.

Of course, listening skills are an important part of an interview and the investigator should summarise what the witness has said so as to confirm his/her understanding of the evidence. Doing so may serve to prompt a witness to clarify their answers or to provide more details.

In conducting an interview, an investigator should not ask leading questions of the witness that tend to suggest the answer to the question (i.e. *Was the dog in Mr Smith's yard at the time of the attack?*). Rather, the investigator should ask open questions which follow the 'who, what, when, where, why and how' approach (i.e. *Where was the dog at the time of the attack?*). Open questions allow the witness full range in answering the questions and do not lead the witness in any particular direction. Closed questions (those which require a 'yes' or 'no' answer) should also be avoided as such questions should be reserved for clarifying aspects of the oral evidence given.

During an interview, the investigator will need to prepare a statement to capture the relevant parts of the witness' oral evidence. In doing so, an investigator should always be aware of the possibility that the evidence they prepare may be used in formal court proceedings and, therefore, care should be taken to ensure the accuracy of all information that is recorded. In taking a statement, it is important to record the exact words of the witness (i.e. use the witness' own language).

Witness statements (based upon the detailed notes taken contemporaneously during the course of an interview) should be finalised *immediately* following the interview. It is not appropriate for the statement to be prepared several days later as the evidence it contains may be deemed to be unreliable. Indeed, when assessing the admissibility of file and/or interview notes, a relevant consideration the Courts will take into account is whether the notes are a contemporaneous record (i.e. they were made during the course of an interview or site inspection). The Courts consider contemporaneous notes to be the most reliable as they are made when the facts were 'fresh in the memory' of the investigator.

The rules of evidence

The rules of evidence are the recognised and accepted principles of 'fairness', which are observed by the Courts. The rules will differ between jurisdictions. A basic understanding of the rules of evidence will be beneficial for any investigator. Given any allegations may ultimately become the subject of legal proceedings, it is important that all evidence obtained during an investigation is admissible and goes towards proving the occurrence of an offence. The fundamental rules of evidence are:

Relevance

The most fundamental consideration applying to any evidence is "*relevance*". There must be a logical connection between the evidence and the facts in issue. If evidence renders the existence of a material fact probable, then it can be said to be relevant.

Hearsay

Hearsay evidence is second hand information that has been reported to a witness by another person, rather than information that the witness has directly experienced. In general terms, hearsay evidence is inadmissible in Court, however, there are a number of exceptions to this rule.

For the purposes of investigations undertaken by an AMO, hearsay evidence should not be completely discounted but should be a useful source for leads to other relevant witnesses. Hearsay evidence is inherently unreliable and, therefore, carries less weight than direct evidence. Therefore, whenever the primary source is available, the investigator should go straight to that source rather than seek to rely upon hearsay evidence.

Opinion

In respect of opinion evidence, as a general rule, a witness statement must not contain expressions of opinion about a subject unless that witness is an expert who has been requested to provide such opinion. There are exceptions to this general rule as opinion evidence may be admissible if it is based upon what a person saw, heard or experienced and is necessary to convey an adequate understanding of the witness' perception of the matter. Also, where the witness has acquired considerable practical knowledge about a matter through life experience, the witness may be able to express an opinion about that matter even if he or she is not a recognised expert.

Right to Silence and The Caution

Through the course of an investigation, evidence may be obtained which tends to show a person has committed an offence. If this is the case, a caution must be administered before the person (the accused) is asked any questions. For example the person must be advised that he or she does not have to say or do anything but anything said or done may be used in evidence. Evidence obtained in the absence of a caution is taken to be evidence that is improperly obtained and, as a general rule, can be excluded by the Courts. This rule ultimately exists to protect what has been recognised by the Courts as the suspects right to remain silence.

The right to silence is linked to a person's legal privilege to withhold information that may incriminate them. That is, in civil and criminal proceedings, a person is not obliged to answer any questions or produce any documents if, the answer or the document would expose him/her to a criminal conviction or the imposition of a penalty. This means that usually during the course of an investigation, an AMO can only require a person to reveal information that is not self-incriminating. That said, there are some legislative provisions which do require a person to answer even where it might incriminate them – but it is usual to then provide that such evidence will not be used against the person.

Conclusion

Investigations are an inquisitorial process necessary to obtain the evidence required to substantiate an allegation that an offence has been committed or a breach of legislation has occurred.

An effective investigation is one which is conducted strategically and thoroughly in pursuit of clearly identified objectives. It is essential that AMOs are familiar with the elements of an effective investigation including recognising the scope of the AMOs powers, identifying the material facts in question, planning the investigation and effective evidence gathering techniques. Furthermore, AMOs must be familiar with the rules of evidence to ensure that, where legal proceedings eventuate, the evidence they gather can be relied upon by the Court to prove or disprove the existence of facts in issue.

It is important that AMOs master the art of conducting an effective investigation because ultimately, the reliability of evidence obtained by an AMO and his/her ability to take successful enforcement action that withstands challenge will turn upon the effectiveness of the AMOs investigation processes.

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About the author

Cimon was admitted to legal practice in 2007 and holds an honours degree in Laws and Legal Practice and a Bachelor of Arts from the University of Adelaide. Cimon worked briefly in the South Australian Office of the Director of Public Prosecutions before joining Wallmans Lawyers in 2008 as a specialist practitioner in the Local Government team.

Cimon advises metropolitan and regional councils on a diverse range of governance issues and regulatory matters relevant to local government practices and procedures including:

- enforcement procedures (extending to order making, expiation and prosecutions);
- delegations;
- statutory interpretation;
- evidentiary issues and the conduct of investigations;
- the drafting and enforcement of Council by-laws; and
- issues relating to the powers and functions of authorised persons.

With a keen passion for and an appreciation of the political environment in which local government operates, Cimon's approach is to provide her clients with practical solutions that will withstand public scrutiny.

1 See section 51(3) of the *Dog and Cat Management Act 1995* (SA)

2 See section 45A(5) of the *Dog and Cat Management Act 1995* (SA)

3 See section 29(1) of the *Domestic (Feral and Nuisance) Animals Act 1994* (Vic)

4 See section 3 the *Domestic (Feral and Nuisance) Animals Act 1994* (Vic)