FEDERAL COURT OF AUSTRALIA

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

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| Appeal from: | *Von Schoeler v Allen Taylor & Company Ltd Trading as Boral Timber & Ors* (Federal Circuit Court of Australia), BRG 893 of 2011, Orders dated 7 February 2019 |
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| File number: | QUD 148 of 2019 |
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| Judge: | **FLICK, ROBERTSON AND RANGIAH JJ** |
|  |  |
| Date of judgment: | 20 February 2020 |
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| Catchwords: | **HUMAN RIGHTS** – discrimination – allegations of sexual harassment – vicarious liability – whether employer took all reasonable steps to prevent sexual harassment – delay between trial and decision by primary judge – whether judgment is unsafe due to delay of six years – whether primary judge failed to give adequate reasons – appeal allowed |
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| Legislation: | *Australian Human Rights* *Commission* *Act 1986* (Cth) s 46PO(4)  *Sex Discrimination Act 1984* (Cth) ss 4, 5, 14, 28A, 28B, 48, 94 and 106 |
|  |  |
| Cases cited: | *Abalos v Australian Postal Commission* (1990) 171 CLR 167  *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17  *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273  *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470  *PRD Realty Pty Ltd v Expectation Pty Ltd* [2005] HCATrans 164  *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31; [2013] FCA 102  *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 |
|  |  |
| Date of hearing: | 13 November 2019 |
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| Date of last submissions: | 15 November 2019 (Appellant)  19 November 2019 (First Respondent) |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 122 |
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| Counsel for the First Respondent: | Mr M Healy |
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| Counsel for the First Respondent: | FCB Lawyers and Consultants |
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| Counsel for the Second and Third Respondents: | The Second and Third Respondents did not appear |

ORDERS

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|  | | QUD 148 of 2019 |
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| BETWEEN: | LILO HANA VON SCHOELER  Appellant | |
| AND: | ALLEN TAYLOR AND COMPANY LTD TRADING AS BORAL TIMBER  First Respondent  JOHN URQUHART  Second Respondent  TIMOTHY HEY  Third Respondent | |

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| JUDGES: | FLICK, ROBERTSON AND RANGIAH JJ |
| DATE OF ORDER: | 20 FEBRUARY 2020 |

THE COURT ORDERS THAT:

1. The name of the first respondent is amended to “Allen Taylor and Company Ltd trading as Boral Timber”.
2. The appeal is allowed.
3. The orders numbered 1, 2 and 3 made by the Federal Circuit Court of Australia on 7 February 2019 are set aside (for clarity, this order does not set aside the declaration made on that date).
4. It is declared that the first respondent is vicariously liable for the sexual harassment carried out by the second respondent against the appellant on 28 August 2009.
5. The matter, including assessment of damages for the sexual harassment carried out by the second respondent against the appellant on 28 August 2009, is otherwise remitted to the Federal Circuit Court of Australia for reconsideration in accordance with law by a judge other than the primary judge.
6. The first respondent pay the appellant’s costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. This is an appeal from a judgment of the Federal Circuit Court dismissing the appellant’s proceeding against the first and third respondents. A startling feature of the appeal is that the judgment was delivered more than six years after the trial and delivery of final submissions. The material before the Court fails to reveal any explanation for the delay.
2. The appellant, Lilo Hana Von Schoeler, was employed by the first respondent, Allen Taylor and Company Ltd Trading as Boral Timber (**Boral**). In her proceeding, she alleged that she had been sexually harassed by the second respondent, John Urquhart. Ms Von Schoeler alleged that Mr Urquhart and other Boral employees, including the third respondent, Timothy Hey, then victimised and discriminated against her because she had complained about the sexual harassment. She alleged that Boral was vicariously liable for the conduct of its employees.
3. Mr Urquhart did not appear in the proceeding before the Federal Circuit Court, or in the appeal. Mr Hey was represented before the Federal Circuit Court, but did not appear in the appeal. Boral was the only active respondent in the appeal.
4. The primary judge upheld Ms Von Schoeler’s allegation of sexual harassment against Mr Urquhart, but dismissed her claims against Boral and Mr Hey.
5. The Notice of Appeal contains ten grounds, although two were abandoned. The focus of the parties was upon grounds alleging that the judgment is unsafe by reason of the delay in delivering the judgment, that the reasons for judgment are inadequate and that the primary judge erred in holding that Boral was not vicariously liable for the sexual harassment.
6. The primary judge’s reasons for judgment are written in a somewhat disordered and confusing manner. This may have been contributed to by the pleadings, which his Honour described as creating “difficulties”. However, as his Honour acknowledged, the threads of the applicant’s case were discernible from a combination of the pleadings, the evidence and the submissions. It is necessary to begin by identifying those threads in order to understand Ms Von Schoeler’s case and the reasons for judgment, before considering the parties’ submissions.

## The evidence before the Federal Circuit Court

1. The most convenient place to begin is with Ms Von Schoeler’s evidence at the trial. She commenced employment with Boral at Ipswich in Queensland in August 2005. She was employed full-time as a “grader”, which involved sorting veneer or plywood boards into various grades according to their quality. Boral’s premises consisted of two sections, known as the Top Mill and the Bottom Mill. She was initially employed at the Bottom Mill.
2. Ms Von Schoeler alleged that on Friday, 28 August 2009, Mr Urquhart groped her buttocks. She was very upset about this and confronted him. He apologised, but she felt his response was insincere and she decided to complain about his conduct.
3. Ms Von Schoeler complained to her supervisor, Michael Scott, on Monday, 31 August 2009. She alleges that Mr Scott kept attempting to persuade her to accept a verbal apology from Mr Urquhart in settlement of the issue. She alleges that Mr Scott failed to inform Human Resources of the complaint and did not follow Boral’s sexual harassment policy.
4. Ms Von Schoeler alleges that after making her complaint, Mr Urquhart and other employees started calling her a “dobbing dog” and other insulting names. She says she also complained of this to Mr Scott. She had to relieve Mr Urquhart at his station and was only able to avoid direct and prolonged daily contact with him through fellow employees taking her place on the relief roster. She alleges that no action was taken in relation to her complaint until she sought the assistance of her union, which contacted Boral’s production manager, Anthony Johns. After investigating the complaint, Mr Johns had Mr Urquhart moved to the Top Mill.
5. Ms Von Schoeler alleged that after these events, she was required to relieve Mr Hey at his station. She alleged Mr Hey started to verbally berate her for having Mr Urquhart moved to the Top Mill. Mr Hey would say that Mr Urquhart had a wife and children and that Ms Von Schoeler was penalising all of them by complaining. She alleged that every time she was required to relieve Mr Hey from his position, he would find a way to harass her, for example, by refusing to hand her the chalk he was working with, or snapping it in two, or dropping it on the ground.
6. One day in early 2010, Ms Von Schoeler became aware that Mr Hey had pulled out a plywood board which she had graded and sent it to Quality Assurance for assessment of whether the correct grading had been applied. Ms Von Schoeler interpreted this as another example of Mr Hey harassing her. She said she confronted Mr Hey and asked if he had a problem with her grading. She said that Mr Hey responded by saying, “Fuck off Lilo”, and she responded with “No, you fuck off”.
7. Mr Hey made a complaint about Ms Von Schoeler’s conduct. His version was that she had aggressively confronted him using foul language and that he had responded in kind. After several days, she was informed by Mr Scott and Mr Johns that she was going to receive a written warning about her conduct. She said she complained that they had not interviewed a particular witness to the incident, but was told that they did not need to do so. She was then given the written warning.
8. Ms Von Schoeler claims that from about 3 March 2010, her supervisor, Chris Manuel, started keeping records about her punctuality and attendance at work. She claimed that management singled her out for such surveillance because of her complaint about the sexual harassment.
9. In mid-2010, Boral decided to close the Bottom Mill. On 15 October 2010, Ms Von Schoeler was told by Wayne Hansen, the production manager for the Top Mill, that she would be transferred to the Top Mill and would be given a rotating-shift. She had been on a day-shift at the Bottom Mill. Ms Von Schoeler said she told Mr Hansen she could not work a rotating-shift because she cared for her sick mother at night and was also concerned about her safety while riding her bicycle home at night, that being her only means of transportation.
10. Ms Von Schoeler was very unhappy about the decision that she would work rotating-shifts and obtained the assistance of her union. She attended a meeting with Mr Scott and Mr Hansen and another meeting with Mr Johns. She said that the outcome was that Mr Johns said he would arrange a day-shift as soon as one became available.
11. On 2 November 2010, Ms Von Schoeler was absent from work because her mother had an operation. She said that Mr Hansen reprimanded her for being absent and stated that she had taken the day off for the Melbourne Cup. She offered to provide a medical certificate, but he refused to take it.
12. On 8 November 2010, Ms Von Schoeler discovered that casual employees were getting day-shifts that she could have done. She arranged an appointment to discuss the situation with Mr Johns, but, instead, Mr Hansen met her and told her that Boral was increasing the day-shift staff from four to six staff, but she was not going to be one of those staff. Mr Hansen stated that they needed someone reliable for the day-shift, and since she had to attend to her mother, she was not considered reliable. She alleged that Mr Hansen said that he had looked at her employment records and her recent absenteeism made her a liability to the company. At that point, she began crying. She alleges that Mr Hansen said, “Stop crying, you stupid little girl”. She began to have a panic attack and left his office.
13. Ms Von Schoeler attended her general practitioner on 17 November 2010, and was diagnosed with a severe anxiety disorder. She went off work on workers’ compensation and did not return.
14. Boral’s factory was severely damaged in the January 2011 floods. A decision was made to close the factory and Ms Von Schoeler’s position was made redundant in about June 2011.
15. Ms Von Schoeler called several former co-workers who corroborated various parts of her evidence. Deborah Grantham recalled Mr Hey having an argument with Ms Von Schoeler in which he blamed her for Mr Urquhart being moved, although she did not recall exactly what was said. She was not cross-examined about this evidence.
16. Kim Beardmore gave evidence that after Ms Von Schoeler made her complaint, she was targeted by Mr Urquhart and his mates. They made her life hell and picked on her, causing her to often go home in tears. Ms Beardmore said she had witnessed an incident where another worker told Mr Hey to shut his mouth when he was talking about getting revenge on Ms Von Schoeler for complaining about Mr Urquhart. She was not cross-examined about this evidence.
17. Ngaire Morrison gave evidence that, contrary to Mr Johns’ claim that he had interviewed her about the incident that resulted in Ms Von Schoeler receiving a written warning, she was not interviewed.
18. Boral and Mr Hey called Mr Johns and Mr Hansen to give evidence. In his evidence, Mr Hey denied bullying or harassing Ms Von Schoeler. He denied that he sent the board graded by her to Quality Assurance as a form of harassment. He denied that he manufactured his complaint about her conduct as a form of payback for her complaint of sexual harassment against Mr Urquhart.
19. Mr Johns gave evidence that on 27 October 2009, he became aware of the incident with Mr Urquhart and investigated the matter. He understood that a supervisor, Beverley Roberts, had started investigating, but had been told by Mr Urquhart that Ms Von Schoeler had accepted his apology. Mr Johns decided that Mr Urquhart would be given a written warning and moved to the Top Mill so that he would be working in a different area to Ms Von Schoeler.
20. Mr Johns denied that the written warning was given to Ms Von Schoeler for any reason connected with her complaint of sexual harassment. Mr Johns stated that he received a complaint about her from Mr Hey, investigated and concluded that other employees supported Mr Hey’s version of events. He found that Ms Von Schoeler had acted inappropriately and provoked the incident. As a result, she was given a written warning.
21. Mr Hansen explained that he inquired as to why Ms Von Schoeler was absent on Melbourne Cup day because there had been five employees absent, but had accepted that she was absent because her mother was having an operation. He denied that Ms Von Schoeler was singled out for surveillance, and said that a number of employees were monitored for punctuality and attendance.
22. Mr Hansen denied that Ms Von Schoeler was not given a day-shift because of her complaint about Mr Urquhart. He said that on 10 November 2010, he told Ms Von Schoeler that she would not be offered a day-shift and she started crying and appeared to be very distressed. He denied that he said, “Stop crying, you stupid little girl”.

## Ms Von Schoeler’s case before the Federal Circuit Court

1. Having regard to the evidence, the pleadings and the submissions, the principal allegations that Ms Von Schoeler sought to advance before the Federal Circuit Court may be summarised as follows:
2. In contravention of s 28B of the *Sex Discrimination Act 1984* (Cth) (**SDA**), Mr Urquhart sexually harassed Ms Von Schoeler on 28 August 2009, for which, pursuant to s 106(1), Boral was vicariously liable.
3. In contravention of s 14(2) of the SDA, various employees discriminated against Ms Von Schoeler on the ground of her sex, for which Boral was vicariously liable under s 106(1), as follows:
   1. Mr Scott and Ms Roberts failing to investigate, or delaying in investigating, her allegation of sexual harassment;
   2. Mr Urquhart and other employees verbally abusing Ms Von Schoeler after she complained;
   3. Mr Scott failing to take action to curtail the abuse;
   4. Mr Hey verbally abusing and harassing Ms Von Schoeler, including by fabricating the complaint against her;
   5. Mr Johns issuing a written warning to Ms Von Schoeler following Mr Hey’s complaint without proper investigation;
   6. Mr Hansen telling her, “Stop crying, you stupid little girl”.
4. In contravention of s 94(1) of the SDA, various employees victimised Ms Von Schoeler on the ground that she had made the allegation of sexual harassment, for which Boral was vicariously liable under common law principles, as follows:
   1. Mr Urquhart verbally abusing Ms Von Schoeler after she complained;
   2. Mr Hey bullying and harassing Ms Von Schoeler, including by fabricating the complaint against her;
   3. Mr Johns issuing the written warning;
   4. Mr Manuel singling her out and monitoring her punctuality and performance;
   5. being placed on a rotating-shift and being denied a day-shift position.
5. In contravention of s 14(3A) of the SDA, discriminating against Ms Von Schoeler on the ground of family responsibilities by monitoring her attendance, transferring her to the Top Mill, placing her on a rotating-shift and denying her a day-shift.

## The judgment of the primary judge

1. The primary judge’s reasons began by noting a number of deficiencies in Ms Von Schoeler’s pleadings, but concluded that the respondents had not been prejudiced by those deficiencies.
2. His Honour then provided a summary of the evidence. It was by no means comprehensive. It did not, for example, refer to the evidence of Ms Grantham, Ms Beardmore and Ms Morrison. It did not refer to the absence of evidence from Mr Scott, Ms Roberts and Mr Manuel.
3. The primary judge then identified the following series of facts in dispute between the parties:

30. Accordingly, the facts in dispute are:

a. Whether the applicant experienced abuse from the second respondent, third respondent, or any other co-workers after her initial complaint;

b. If so, whether the first respondent, through its agents or otherwise, did anything to curtail that abuse;

c. Whether there was an attempt to coerce the applicant into accepting the second respondent’s apology;

d. Whether the applicant was required to relieve the second respondent at his station on a daily *or* infrequent basis both before and after Mr Johns’ investigation;

e. Whether the first respondent delayed in addressing the applicant’s complaint, and in particular, the extent of any delay by Ms Roberts in consulting the second respondent about the incident;

f. The extent to which the applicant sought updates on or expressed dissatisfaction with the progress of her complaint from Mr Scott or Ms Roberts and how Mr Scott responded;

g. Whether the third respondent fabricated a complaint about the applicant’s work;

h. Whether the applicant initiated the confrontation with the third respondent and whether she was the aggressor;

i. Whether the workforce at large knew about the warning issued to the applicant before she herself knew;

j. Whether the applicant was singled out by the first respondent as requiring surveillance;

k. Whether the first respondent accused the applicant of being at a race meeting on 2 November 2010 and whether Mr Scott refused her medical certificate;

l. Whether the applicant’s transfer to the rotating shift was a demotion or scheme to cause her to be unsafe in her commute and make it difficult for her to care for her mother;

m. Whether Mr Hansen told the applicant words to the effect that she was unreliable due to her having to care for her mother and that her absenteeism indicated she was a liability; and

n. Whether Mr Hansen said to the applicant words to the effect “stop crying, you stupid little girl”.

1. The primary judge’s reasons then proceeded by considering, in order, Ms Von Schoeler’s allegations of sex discrimination, family responsibilities discrimination, victimisation, sexual harassment and, finally, vicarious liability for the sexual harassment.
2. Dealing with the allegations of sex discrimination, the primary judge observed that under s 5(1) of the SDA it was necessary to compare Ms Von Schoeler’s treatment with the way a hypothetical male employee would have been treated in the same circumstances. His Honour considered that the evidence was insufficient to prove that a male employee would not have experienced verbal abuse from other employees if he had made a complaint of sexual harassment in the same circumstances as Ms Von Schoeler. The primary judge took a similar approach to a number of Ms Von Schoeler’s other allegations of sex discrimination, including that Mr Scott attempted to coerce her into accepting an apology, that she was required to relieve Mr Urquhart at his station after she made the complaint and that there was delay in dealing with the complaint. His Honour indicated that this made it unnecessary to make findings of fact about whether these events had in fact occurred.
3. The primary judge considered Ms Von Schoeler’s allegation that Mr Hansen had singled her out for her absence from work on 2 November 2010 and had accused her of being at a race meeting. His Honour accepted Mr Hansen’s evidence that he interviewed all five employees who were absent that day and that he had accepted that she did not attend a race meeting. His Honour stated that Mr Hansen’s answers under cross-examination did not displace Mr Hansen’s evidence, but did not otherwise explain why his evidence was accepted. His Honour also concluded that even if he had accepted that Ms Von Schoeler was accused of being at a race meeting, he would not accept that a male employee would not have been similarly accused.
4. The primary judge considered the allegation that Mr Hansen said words to the effect “Stop crying, you stupid little girl” as an allegation of sex discrimination. His Honour concluded that Mr Hansen probably lost his patience with Ms Von Schoeler, but was not satisfied that he said the specific words “stupid little girl”. His Honour was not satisfied that Ms Von Schoeler was treated differently on the ground of sex, because there was no evidence that Mr Hansen would not have lost his patience with a male employee in the same circumstances.
5. The primary judge concluded that Boral had not engaged in sex discrimination against Ms Von Schoeler in contravention of s 14(2) of the SDA. His Honour did not specifically make a finding in respect of the allegations of sex discrimination against Mr Urquhart and Mr Hey.
6. The primary judge observed that s 14(3A) of the SDA provided (at the relevant times):

It is unlawful for an employer to discriminate against an employee on the ground of the employee’s family responsibilities by dismissing the employee.

His Honour held that “dismissing” meant discharging or removing an employee from service. As Ms Von Schoeler had not been dismissed, her claim of discrimination on the basis of family responsibilities failed. Proceeding to consider the claim in case he was wrong, his Honour accepted that the applicant had “family responsibilities” within the meaning of s 4A(1) of the SDA in respect of her mother. Ms Von Schoeler had argued that Boral treated her less favourably by reason of her family responsibilities by monitoring her attendance for lateness, putting her on a rotating-shift and transferring her from the Bottom Mill. His Honour considered that there was very little to persuade him that Boral would have treated an employee without Ms Von Schoeler’s family responsibilities differently. His Honour stated that he had some difficulties with Mr Hansen’s evidence concerning the reasons for the monitoring of Ms Von Schoeler’s performance, but was unpersuaded that an employee without her family responsibilities would not be similarly monitored in the same circumstances.

1. The primary judge then turned to the issue of victimisation. His Honour was satisfied that Ms Von Schoeler had made an allegation that Mr Urquhart had done an act of the kind referred to in s 94(2)(g) of the SDA and that Boral had knowledge of her allegation.
2. His Honour considered Ms Von Schoeler’s allegation that she had been victimised by being singled out for punctuality and attendance by Mr Manuel. Mr Hansen had explained that she was not singled out and that other employees had also been monitored. His Honour noted, however, that performance notes relating only to Ms Von Schoeler were put into evidence. His Honour observed that Mr Hansen had difficulty answering a number of counsel’s questions, difficulty reconciling parts of his evidence and struggled to answer other of counsel’s questions. His Honour noted that counsel sought to have an inference drawn that it was no coincidence that Ms Von Schoeler began to be monitored by Mr Manuel in March 2010, subsequent to her complaint in late 2009.
3. His Honour found, however, that other explanations for the monitoring or surveillance were available on the evidence apart from the explanation offered by Mr Hansen. His Honour said that one possible explanation was that Ms Von Schoeler did in fact have issues with her attendance and performance. His Honour noted that the respondents had not submitted that Ms Von Schoeler had a history of poor attendance or performance, but said that there was some evidence about her performance and attendance prior to March 2010. His Honour did not identify what that evidence was or its significance. His Honour said he had also considered whether the applicant had merely been identified by management as a problematic employee in general, quite apart from specifically making the sexual harassment allegation. His Honour rejected that possibility. However, his Honour went on to conclude at [66]:

The applicant bears [the] onus of proof. The competing possibilities are equally open. I am not satisfied that the first respondent undertook the surveillance activities because the applicant made a sexual harassment claim.

1. The primary judge next addressed Ms Von Schoeler’s allegation that Boral’s employees had delayed in addressing her complaint about Mr Urquhart. His Honour found that there was delay and that this was detrimental to Ms Von Schoeler, given that she had to remain working with Mr Urquhart until her complaint was addressed. However, his Honour considered that the evidence as to a causal link between this detriment and Ms Von Schoeler having made a complaint was ambiguous at best. His view was that bureaucratic inefficiency or incompetence on the part of Mr Scott and Ms Roberts was just as likely to be the reason for the delay as some intent to victimise the applicant. His Honour declined to find that the delay amounted to victimisation in breach of s 94(2) of the SDA.
2. The primary judge considered Ms Von Schoeler’s allegation that she was subject to “unchecked victimisation by supervisors and staff” upon making her sexual harassment complaint. His Honour considered that Ms Von Schoeler’s case was deficient in that she had not pleaded or particularised the supervisors and staff said to have subjected her to victimisation, nor the acts said to amount to victimisation. His Honour said he was not persuaded on the balance of probabilities that she was subject to unchecked victimisation by supervisors and staff upon making the sexual harassment complaint. It may be noted that his Honour did not deal with the allegation that Mr Urquhart himself had subjected Ms Von Schoeler to verbal abuse.
3. The primary judge found that the closure of the Bottom Mill and the attendant transfer of employees to the Top Mill generally precluded any finding that Ms Von Schoeler was victimised by being denied a permanent day-shift because she had made her sexual harassment complaint.
4. The primary judge considered Ms Von Schoeler’s allegation that Mr Hey fabricated the complaint about the quality of her work as retribution for making the complaint. His Honour concluded that even if Mr Hey fabricated the complaint as a form of retribution, there was nothing to prove that his motivation was based upon Ms Von Schoeler having made a sexual harassment allegation. His Honour concluded that the highest it could be taken was that Mr Hey was motivated merely by Ms Von Schoeler having made a complaint about his friend. His Honour said that the only evidence that Mr Hey’s actions were due to the complaint of sexual harassment was his lamentation that Mr Urquhart had been punished by having to “go home and tell his family” about the incident. His Honour went on to say, however, that many types of complaints could be made against an employee, the subject matter of which would be undesirable or uncomfortable to tell one’s family. The primary judge held that Boral had not victimised Ms Von Schoeler in contravention of s 94(2) of the SDA.
5. The primary judge turned to the allegation of sexual harassment. Mr Urquhart had not participated in the proceeding and Boral had admitted that he had touched Ms Von Schoeler near the area of her buttocks. His Honour was satisfied that the touching was that of an unwanted sexual nature. His Honour held that Mr Urquhart had breached s 28B(2) of the SDA.
6. The primary judge then considered whether Boral was vicariously liable for Mr Urquhart’s sexual harassment. Boral defended the proceeding on the basis of the defence under s 106(2) of the SDA that it had taken all reasonable steps to prevent Mr Urquhart from engaging in sexual harassment. His Honour held:

81. The first respondent argues that it is not liable for any sex discrimination nor sexual harassment engaged by the second or third respondents, if the Court were to find such. Pursuant to s.106(2), the first respondent would not be liable for the second respondent’s breach of s.28B(2) if the Court finds that it “took all reasonable steps to prevent the employee or agent from doings acts of the kind referred to in [s.106(2)]. The primary basis for the defence is that the first respondent promulgated a so-called “Working With Respect” policy (“the policy”) amongst its workforce. Annexed to Mr John’s affidavit is what appears to be a slideshow used in a training session for employees. The slideshow discusses bullying and sexual harassment. It does not discuss discrimination at all. The notes on sexual harassment, however, are substantial and align with the definition in s.28A. There is also an employee attendance record at the end of the document.

82. As the first respondent points out, the evidence is that all of the first respondent’s employees who gave evidence were aware of the policy, as indeed was the applicant. Furthermore, the evidence is that the second respondent in particular attended the relevant training.

83. The first respondent also argued that its conduct in handling the complaints by the applicant about the sexual harassment incident as well as its handling of the complaint by the third respondent against the applicant showed that the first respondent had an adequate system of investigation and disciplinary [sic] in regards to complaints concerning such matters. I find this argument entirely unconvincing, not least because of the first respondent’s admitted delays in conducting an investigation into the applicant’s complaint, but because such examples are not only retrospective in nature, but too singular to convince me of the existence of such a system.

84. Nevertheless, I decline to find that the first respondent is vicariously liable for the sexual harassment perpetrated by the second respondent. I find that, by developing the policy and conducting training sessions, the first respondent took all reasonable steps to prevent that act occurring. While I am not satisfied that this defence would cover an employee’s breach of the discrimination prohibitions of the Act, I have already declined to find that the second or third respondents engaged in discrimination against the applicant and so the point is ultimately moot.

1. The primary judge made a declaration that Mr Urquhart had sexually harassed Ms Von Schoeler, but dismissed the proceeding against Boral and Mr Hey. His Honour also ordered that Ms Von Schoeler pay Boral’s costs, partly on a party-and-party basis and partly on an indemnity basis.

## Consideration

1. It is convenient to begin with the eighth, ninth and tenth grounds of appeal, the grounds upon which the parties focussed.

### Ground 8: Whether the primary judge erred in finding that Boral took all reasonable steps to prevent the sexual harassment

1. Ground 8 of the Notice of Appeal alleges that the primary judge erred in concluding, for the purposes of s 106(2) of the SDA, that Boral had established that it took all reasonable steps to prevent Mr Urquhart from unlawfully sexually harassing Ms Von Schoeler.
2. The primary judge’s conclusion that Boral had satisfied s 106(2) was based upon Boral having developed a policy known as “Working With Respect” and conducting training in relation to that policy. The totality of the reasoning revealed for that conclusion (in paras [80]–[84]) was that Mr Urquhart had recently attended a “Working With Respect” training session and the notes contained in a “slideshow” used for that training were, “substantial and align with the definition in s 28A”.
3. Ms Von Schoeler argues, firstly, that merely devising and communicating a policy is not sufficient to constitute “all reasonable steps”. She further argues that even if that is insufficient to establish error on its own, a conclusion of error should be drawn in circumstances where the primary judge found that Mr Urquhart had sexually harassed her, that Boral delayed in investigating and resolving her sexual harassment complaint, and was not satisfied that Boral had an adequate system of investigation and disciplinary action in relation to sexual harassment.
4. Ms Von Schoeler submits that the Court is in as good a position as the primary judge to determine whether Boral discharged its onus of proving that it took “all reasonable steps”, and should conclude that it had failed to do so.
5. Boral submits that the primary judge was correct to find that the “Working With Respect” policy was a substantial one, that all the employees who gave evidence were aware of the policy and that the perpetrator had attended training only four days before the sexual harassment took place. Boral argues that, having regard to these findings, there is no error in his Honour’s conclusion that it had taken all reasonable steps to prevent the sexual harassment.
6. Section 28B(2) is within Div 3 of Pt II of the SDA and provides:

(2) It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.

1. Section 28A(1) provides that a person “sexually harasses” another person if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature in relation to the person harassed, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
2. Section 106 of the SDA provides:

**106 Vicarious liability etc.**

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

1. Section 106(1) of the SDA operates to make an employer or principal vicariously liable for an act of unlawful discrimination (under Div 1 or 2 of Pt II) or of sexual harassment (under Div 3 of Pt II) by their employee or agent in the circumstances described in the provision. The provision does not apply to an act of victimisation under s 94(1) (which is in Pt IV).
2. For s 106(1) to apply it is first necessary for the person alleging an act of unlawful discrimination or harassment to prove that it was done. It is then necessary to prove that the person who did the unlawful act is the employee of the employer or an agent of the principal. It is also necessary to prove that the unlawful act was done in connection with the employment of the employee or with the duties of the agent as an agent: see generally *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at [41]–[42], [61]–[70].
3. The effect of s 106(2) of the SDA is that an employer or principal to whom s 106(1) applies will not be liable for the act of unlawful discrimination or sexual harassment if the employer or principal establishes that it took “all reasonable steps” to prevent its employee or agent from doing the relevant act. The word “all” is significant. It is not enough for the employer to demonstrate that it took some of the reasonable steps available to prevent the employee from doing the unlawful act.
4. However, it is unnecessary for the employer to take all steps necessary to prevent the employee or agent from doing the relevant act. What must be taken is all steps that are reasonable to take. What steps are reasonable will depend upon the whole of the circumstances, including the size of the organisation, the nature of its workforce, the conditions under which the work is carried out and any history of unlawful discrimination or sexual harassment.
5. The reasonable steps taken must be “to prevent” the employee or agent from engaging in the unlawful discrimination or sexual harassment. The focus is upon preventative steps taken before any relevant act occurs. However, in some circumstances, the way a complaint is dealt with after the act may have relevance to the question of whether all reasonable preventative steps were taken. For example, a failure by an employer to comply with policies for investigating and dealing with complaints may be reflective of a workplace culture that tolerates unlawful discrimination or sexual harassment.
6. Further, the focus must be on what steps would or might prevent an employee from doing the relevant unlawful act. A criticism that may be levelled at some of the cases decided by anti-discrimination bodies in this area is that they tend to focus upon perceived deficiencies in policies and training without adequate consideration of whether those deficiencies could have made any difference to the doing of the relevant act.
7. Section 106(2) requires the taking of all reasonable steps to prevent “the employee or agent” who did the unlawful act from doing acts of that kind. The employer must demonstrate that the steps it relies upon were adequately communicated to the particular employee who did the unlawful act. Where the employer relies upon workplace policies, it may be necessary to demonstrate not only that the policies were communicated to the relevant employee, but that they were periodically reinforced.
8. It is common for employers to seek to establish that they took all reasonable steps to prevent an employee from doing the unlawful act by relying upon policies published and training provided in the workplace. In such a case, the content of the policies and training informs the question of whether all reasonable steps were taken. A relevant factor is whether the content conforms to guidelines for avoidance of unlawful discrimination and sexual harassment published by the Australian Human Rights Commission under s 48(1)(ga) of the SDA.
9. The significance of effective policies and training includes that they deter unlawful discrimination and sexual harassment. They do so through education both about the effects of such acts upon victims and about the consequences for the perpetrators and their employers. Accordingly, in *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31; [2013] FCA 102, Buchanan J held:

[163] In my view, advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly the consequences for breach of company policy might be stated. I take the same view about advice that an employer might also be liable for sexual harassment by an employee. That is an additional element emphasising the lively and real interest that an employer will have in scrupulous adherence to its warnings.

In this passage, Buchanan J emphasised the deterrent value of clear statements that sexual harassment is against the law and company policy and that the consequences for the employer mean that the employer will regard sexual harassment very seriously.

1. In this case, Boral relied upon the implementation of its “Working With Respect” policy and training of its employees about that policy to demonstrate that it had taken all reasonable steps to prevent Mr Urquhart from carrying out the sexual harassment. In particular, it relied upon training carried out on 24 August 2009. It will be recalled that the sexual harassment of Ms Von Schoeler occurred four days later, on 28 August 2009.
2. However, the evidence called by Boral about the content of its training was very limited. In fact, the bulk of the evidence concerned training that took place in 2010, after the sexual harassment of Ms Von Schoeler had occurred.
3. Mr Johns deposed that Boral had a “Working With Respect” program which involved employees attending a course, consisting of a day of training at work. A number of presenters discussed with groups of employees the types of behaviour that were inappropriate in the workplace. They went through examples of behaviour by way of case studies—looking at different environments, different circumstances and outcomes. Mr Johns deposed that the program was reviewed and reissued by Boral’s Human Resources’ personnel in mid-2009. Employees at the Ipswich plant, including Mr Urquhart, attended “Working With Respect” training on 24 August 2009. Mr Johns deposed that the training was reinforced periodically through “WWR Refreshers” at site meetings and toolbox talks. Boral also appointed contact officers, whose names and contact details were placed on notice boards around the site so that employees could raise matters informally with them as an alternative to contacting the union or management.
4. Mr Johns’ affidavit annexed a copy of a “WWR Refresher presentation” dated May 2010, which consists of a number of PowerPoint slides. He did not assert that these slides were presented on 24 August 2009. There were two slides relevant to the topic of sexual harassment. The first was entitled “What is Sexual Harassment?”, and stated:

A person harasses another person if he or she makes;

* An unwelcome sexual advance
* An unwelcome request for sexual favours
* Unwelcome conduct of a sexual nature (eg. discussions about sex in the workplace)

1. The second slide was entitled “Examples of Sexual Harassment?” and stated:

* Comments about a person’s sex life or physical appearance
* Suggestive behaviour such as leering
* Unnecessary physical intimacy
* Sexual jokes
* Photographs / reading matter
* Continued sexual propositions
* Physical such as touching or fondling
* Indecent assault or exposure

1. These were the slides that the primary judge described as “substantial and align[ing] with the definition in s.28A”. The remainder of the PowerPoint presentation dealt with bullying, contact officers, reporting options and an employee assistance program.
2. Mr Hansen’s evidence did not touch upon the “Working With Respect” program. Mr Urquhart did not give any evidence at all.
3. Mr Hey did not give any evidence about the training on 24 August 2009. However, he deposed that in February 2010 (after the sexual harassment), he attended a “Working With Respect” session. He said that the key messages of that training included zero tolerance for workplace bullying and harassment and that disciplinary action would result in either a written warning or termination of employment for breaching this policy. He deposed that the “Working With Respect” program was also discussed at various times in toolbox talks during his employment with Boral and employees would be given refresher sessions on the program. He deposed that there was a “Bullying, Harassment and EEO policy” in place at Boral, but did not indicate whether this was separate from the “Working With Respect” policy and did not identify the terms of the policy. He said that the policies were reviewed and reiterated, normally at the beginning of the year and then via toolbox talks throughout the year.
4. Ms Von Schoeler’s affidavit comprising her evidence-in-chief referred to being shown a video about “Working With Respect” at a time after she had made her sexual harassment complaint. Under cross-examination, she agreed that in August 2009, she was aware that Boral had sexual harassment policies and procedures in place by way of the “Working With Respect” program. She agreed she knew that, as part of that program, Boral indicated that it had a zero tolerance attitude towards harassment in the workplace. She knew that if someone harassed a workmate, they could be the subject of disciplinary action, but, it may be noted, she was not asked about the source of that knowledge. She accepted that the “Working With Respect” policy was discussed at toolbox talks and at refresher training at various times during her employment.
5. Ms Beardmore, Ms Grantham and Ms Morrison accepted that they were aware that Boral had a discrimination and harassment policy in the form of the “Working With Respect” program. They were aware that the policy was reviewed and revisited with employees through refresher briefings and presentations and toolbox talks. They were aware that Boral had a zero tolerance policy towards bullying and harassment.
6. The primary judge’s reasons for finding that Boral had taken all reasonable steps to prevent Mr Urquhart from carrying out the sexual harassment were based solely upon the implementation of the “Working With Respect” policy and a training program in relation to that policy. As Mr Urquhart had attended training on 24 August 2009, four days before he sexually harassed Ms Von Schoeler, Boral cannot be criticised for the timing of the training.
7. However, the evidence said very little about the content of the “Working With Respect” training that took place on 24 August 2009. The slides that are in evidence were for refresher training in May 2010, not the training on 24 August 2009. Even if it is assumed that there was similar training on 24 August 2009, the slides show only that sexual harassment was defined and examples were provided. The primary judge’s description of the slides as “substantial” cannot be accepted. Mr Johns’ evidence went no further than saying that presenters met employees in groups to discuss inappropriate behaviours and case studies. There is a paucity of evidence as to the content of the information and training provided to Mr Urquhart prior to 28 August 2009.
8. Some of the witnesses were aware that Boral had a zero tolerance attitude towards harassment in the workplace. However, the evidence did not disclose how they arrived at this understanding, or precisely what this expression meant. It follows that the evidence does not demonstrate that Mr Urquhart was aware of the zero tolerance policy or precisely what it meant.
9. There was no evidence that the “Working With Respect” training on 24 August 2009 included any statement that disciplinary action would be taken in cases where sexual harassment was proven, and what that disciplinary action would be. While Mr Hey’s evidence suggests that some information concerning disciplinary measures may have been provided in 2010, Boral produced no evidence that it was provided prior to the sexual harassment taking place. Under cross-examination, Ms Von Schoeler agreed that she knew that if someone harassed a workmate they would be subject to disciplinary action, but there is no evidence as to how this knowledge was acquired and precisely what action could be taken. Further, there was no evidence that the “Working With Respect” training included advice to the effect that sexual harassment is against the law and that Boral would take sexual harassment seriously because it could also be liable for sexual harassment by an employee. In *Richardson*, these deficiencies were of significance, as they are in the circumstances of this case. In the absence of provision of such information, the training lacked any substantial deterrent effect.
10. The paucity of evidence as to the steps actually taken to convey the seriousness and consequences of sexual harassment to employees, including Mr Urquhart, leads to the conclusion that Boral failed to establish that it took all reasonable steps to prevent Mr Urquhart from engaging in the sexual harassment.
11. It may be observed that two other Boral documents dealing with sexual harassment were in evidence, but were not adverted to by the primary judge. The first was dated 25 August 2005 and entitled “Sexual Harassment Policy”. It provided, relevantly:

The Company considers sexual harassment to be unacceptable behaviour which will not be tolerated. Sexual harassment is also unlawful.

Management is therefore committed to action which ensures the absence of sexual harassment in the workplace. Appropriate disciplinary action will be taken against any individual engaging in such conduct.

1. The second document was dated June 2007 and was entitled “Harassment Policy”. It stated:

In line with Boral’s Value of “Respect”, Boral is committed to maintaining a workplace that harbours no form of harassment towards its employees or members of the community.

The Company requires its employees to:

* Do everything possible to create and sustain an organisational environment that supports mutual trust and assists open participation.
* Practice the highest ethical standards with each other, with customers, government and the community.

Boral considers all forms of harassment as unacceptable behaviour. [indecipherable] runs counter to our aims [indecipherable]. Harassment includes discrimination, bullying, victimisation, vilification or hostility with respect to gender, race, religion, ethnicity, national origin, age, disability, marital status, family responsibilities, pregnancy, sexual orientation, political conviction or trade union activity. Harassment can take many forms including verbal and non-verbal communications such as displaying offensive material in the workplace and inappropriate internet, email and SMS messaging. Disciplinary action will be taken against any individual engaged in harassment. Employees are required to make it clear that harassment is unacceptable and report any incidents of harassment to their supervisor, manager or their Human Resources Manager. Any employee who reports a breach or suspected breach of this policy will not be subject to retaliation, retribution or other recriminations for making that report.

1. There was very little evidence about the Sexual Harassment Policy and Harassment Policy documents. They were tendered by Ms Von Schoeler’s counsel in the course of cross-examining Mr Johns. The documents were photocopied on different sides of the same sheet of paper and counsel does not appear to have realised that the 2007 policy was on the other side of the sheet. Mr Johns was asked about the 2005 policy and was asked whether that document was current at the time the sexual harassment incident occurred. Mr Johns responded that he was not sure, but that he believed so. There was no other evidence concerning these policy documents.
2. If evidence had been led that the Sexual Harassment Policy and Harassment Policy documents had been brought to Mr Urquhart’s attention before he carried out the sexual harassment, it might have assisted Boral to demonstrate that it took all reasonable steps to prevent him from carrying out the sexual harassment. However, there was no such evidence.
3. Boral submits that the Court should not determine the question of vicarious liability in the event that any errors were discerned in the primary judgment, but should remit the issue to the Federal Circuit Court to decide. Boral submits that it would be prejudiced if the Court were to remit some issues for rehearing, but decide that it was vicariously liable for the sexual harassment of Ms Von Schoeler. It argues that a rehearing could not be properly carried out unless it dealt with all issues.
4. Boral’s submission cannot be accepted. The allegation of sexual harassment by Mr Urquhart was decided by the primary judge and the declaration consequently made is not the subject of any cross-appeal. The question of vicarious liability for that sexual harassment is discrete from the remaining issues of unlawful discrimination and victimisation in the case. The determination of the issue does not depend upon any question of the credit of any witnesses, but turns upon an assessment of the adequacy and sufficiency of such evidence as was given. Boral will not be prejudiced in its defence of the issues of unlawful discrimination and victimisation upon remittal.
5. It must be concluded that Boral failed to prove that it took all reasonable steps to prevent Mr Urquhart from engaging in sexual harassment. Accordingly, the defence under s 106(2) of the SDA fails. Boral is liable under s 106(1) for the sexual harassment perpetrated by Mr Urquhart.
6. The Federal Circuit Court will be required to assess Ms Von Schoeler’s damages for Boral’s contravention of s 28B(2) of the SDA pursuant to s 46PO(4) of the *Australian Human Rights* *Commission* *Act 1986* (Cth).

### Grounds 9 and 10: Delay and failing to provide adequate reasons

1. Grounds 9 and 10 of the Notice of Appeal are related, making it convenient to deal with them together. Ground 9 alleges that the judgment is unsafe in circumstances where the hearing was conducted on 8 and 9 October 2012 and final submissions were provided on 26 October 2012, but judgment was not delivered until more than six years later, on 23 November 2018. Ground 10 of the Notice of Appeal alleges that the primary judge erred by failing to give reasons, or adequate reasons, for a number of factual conclusions.
2. Ms Von Schoeler submits that the effects of the delay make the judgment unsafe. She submits that critical aspects of the judgment turn upon assessment of the reliability and credit of witnesses and that assessing the evidence six years later presents obvious and extreme problems. Further, the delay must have created great pressure for the primary judge to complete the judgment and created a risk that the simplest determination of the case would be preferred, whether consciously or otherwise. She argues that these problems are reflected in the reasons which, for example, reflect acceptance or rejection of the evidence of some witnesses without adequate explanation.
3. The delay of over six years in the delivery of the judgment was extraordinary and deplorable. It is rare to encounter delay of this magnitude. The delay is unexplained. The long wait for the judgment must have created tension, uncertainty and a sense of injustice for all parties. Inevitably, the losing party, Ms Von Schoeler, must feel a greater sense of injustice, arising from an understandable suspicion that, after a delay of such length, the primary judge could not have adequately or properly considered her case.
4. However, it is common ground that the circumstances in which delay of itself would vitiate a judgment are rare. In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 473–474, Gleeson CJ observed:

[5] Undue delay in decision-making, whether by courts or administrative bodies, is always to be deplored. However, that comfortable generalisation does little to advance the task of legal analysis when it becomes necessary to examine the consequences of delay. The circumstances in which delay, of itself, will vitiate proceedings, or a decision, are rare... A court of appeal, reviewing a decision of a primary judge, may conclude that delay in giving judgment has contributed to error, or made a decision unsafe. Again, the ground of appellate intervention is the error, or the infirmity of the decision, not the delay itself. Where delay gives rise to a ground of supervisory or appellate intervention, the remedy must be tailored to the circumstances and justice of the case. In adversarial litigation, for example, neither party may be at fault, and it may be unnecessary and unjust to visit the successful party with all the consequences that flow from having to start again.

(Citations omitted.)

1. In *NAIS*, Kirby J, addressing the need for promptness in making determinations as to the credibility of witnesses, stated:

[68] The general unwillingness of courts, conducting an appeal or judicial review, to go behind findings as to the credibility of parties or witnesses is a well-known feature of all litigation where a determination is challenged after a first instance decision. This fact reposes a great responsibility upon primary decision-makers. Respect for their decisions comes at a price. That price is the reasonably prompt determination of contested questions of credibility whilst memories of impression are fresh and true reasons can be given for preferring some, and rejecting other, evidence.

(Citations omitted.)

1. In *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at 32–33, the Full Court considered the effect of inordinate delay upon the approach of an appellate court to the identification of error:

[69] Delay between the taking of evidence and the making of a decision is not, of itself, a ground of appeal, unless the judge could no longer produce a proper judgment or the parties are unable to obtain from the decision the benefit which they should…Nor does such delay of itself indicate that a trial has miscarried or that a verdict is in any manner unsafe. However, where there is significant delay in giving judgment, it is incumbent upon an appellate court to look with special care at any finding of fact challenged on appeal. In ordinary circumstances, where there is a conflict of evidence, the trial judge who has seen and heard the witnesses, has an advantage.

[70] That advantage includes seeing the oral and documentary evidence unfold in a coherent manner, which cannot be replicated on appeal … That advantage will ordinarily prove decisive on appeal unless it can be shown that the trial judge failed to use or misused such an advantage. The mere fact of a long delay itself weakens a trial judge’s advantage. Thus, delay must be taken into account when reviewing findings made by a trial judge after a significant delay from the time when the relevant evidence was given.

[71] In the normal course, statements made by a trial judge of a general assertive character can be accepted as encompassing a detailed consideration of the evidence. However, where there is significant delay, such statements should be treated with some reserve. After a significant delay, a more comprehensive statement of the relevant evidence than would normally be required should be provided by the trial judge in order to make manifest, to the parties and the public, that the delay has not affected the decision.

[72] In cases not affected by delay, an appellate court is entitled to assume that the mere failure to refer to evidence does not mean that it has been overlooked or that other forms of error have occurred. However, where there is significant delay, no favourable assumptions can be made. In such circumstances, it is up to the trial judge to put beyond question any suggestion that he or she has lost an understanding of the issues. Where there is significant delay, it is incumbent upon a trial judge to inform the parties of the reasons why the evidence of a particular witness has been rejected. It is necessary for the trial judge to say why he or she prefers the evidence of one witness over the evidence of other witnesses …

…

[74] The problem is not restricted to fading memory. A judge who comes to make an inordinately delayed decision will inevitably be subjected to great pressure to complete and publish the judgment. A conscientious judge could not but feel that pressure. It is almost inevitable that there will also be some form of external pressure — whether from the parties, the management of the Court, the press or parliamentarians. That pressure could well unconsciously affect the process of decision-making and the process of giving reasons for decision. The decision that is easiest to make and express will have great psychological attraction…

(Citations omitted.)

An application for special leave to appeal was refused: *PRD Realty Pty Ltd v Expectation Pty Ltd* [2005] HCATrans 164.

1. In *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at 283, the Full Court of the Supreme Court of Western Australia observed:

[31] In this case, the trial judge had available a full transcript of the evidence and the argument and, of course, the various exhibits. However, even then, a long delay can give rise to disquiet, not only because of the lengthy period of uncertainty with which the litigants are required to live pending the judgment, but also because of the suspicion, on the part of the losing party, that the task may have become too much for the trial judge and that he or she had been unable, in the end, to grapple adequately with the issues.

Their Honours also considered the potential importance of the demeanour of witnesses and further observed:

[38] … Nowhere did his Honour analyse, in any depth, or sometimes at all, why he preferred a version of one witness to another. Nor did he identify which were the witnesses whose reliability he doubted, or in what particulars, or why. He did not say in respect of which witnesses he had found bias, or why, or what he meant by saying that he had “generally” taken it into account. Nor did he say who were the witnesses whose opinions he did not completely accept, or why, or in what respects. While he did later make some comments about particular evidence or opinions, particularly in respect of the valuation evidence, it is by no means clear that it was only to that evidence that these earlier comments were intended to refer.

1. Many of the issues in the proceeding required the primary judge to make an assessment of the credibility and reliability of important witnesses, to resolve competing versions of the facts and to differentiate truth from falsehood. That is clear from the recitation of the facts and the description of the disputed facts appearing in the reasons. The resolution of a number of these issues called for an assessment of the credibility and reliability of evidence given by witnesses at the trial.
2. For example, Ms Von Schoeler gave evidence that on 10 November 2010, Mr Hansen told her to, “Stop crying, you stupid little girl”. This was recognised by the primary judge to be an allegation of sex discrimination. While his Honour accepted Mr Hansen’s evidence that he did not make the comment over Ms Von Schoeler’s evidence that he did, his Honour failed to provide any explanation for doing so. His Honour said only, “Mr Hansen probably lost his patience with the applicant, in my view; however, I am not satisfied that he said the specific words “stupid little girl”.” The primary judge made no finding that Ms Von Schoeler’s evidence was not reliable or credible—the quality of her evidence was not mentioned in the reasons. In one part of the reasons, his Honour doubted Mr Hansen’s evidence concerning the reasons for monitoring Ms Von Schoeler’s punctuality and attendance. Yet, there was simply no explanation provided as to why his Honour preferred Mr Hansen’s evidence to Ms Von Schoeler’s evidence on this issue.
3. Another example is that Ms Von Schoeler gave evidence that Mr Hansen had reprimanded her for being absent from work on 2 November 2010 (Melbourne Cup day) and stated that he believed that she had been at the horse races. Mr Hansen’s evidence was that he had merely asked Ms Von Schoeler why she had been absent and, when she responded that her mother was having an operation, said he understood and accepted that reason. There was a conflict about the nature and tone of the discussion, but his Honour failed to explain why Mr Hansen’s evidence was accepted over Ms Von Schoeler’s. Mr Hansen also gave evidence that he did not single out Ms Von Schoeler, and had questioned other employees who had also been absent. The only explanation given for accepting this aspect of Mr Hansen’s evidence was that his evidence was not dislodged under cross-examination. That was entirely uninformative.
4. The absence of substantial reasons for preferring the evidence of one witness over another may be acceptable in the usual case where there is no substantial delay between the evidence and the judgment. It may be assumed, for example, that the trial judge has taken into account the demeanour of the witness when giving evidence: see *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179. No such assumption can be made after a delay of six years. As the Full Court held in *PRD Realty* at [72], where there is significant delay, it is incumbent upon a trial judge to inform the parties of the reasons why the evidence of a particular witness has been rejected and to say why the evidence of one witness is preferred over the evidence of other witnesses. His Honour provided no explanation as to why Mr Hansen’s evidence was preferred over Ms Von Schoeler’s. The absence of an explanation suggests that, after six years, his Honour was unable to provide one.
5. There are other difficulties with the reasons for judgment. The length of the delay created a substantial risk that the primary judge would, under pressure, gravitate to the conclusion that was easiest to make and express. The reasons tend, in several places, to corroborate Ms Von Schoeler’s submission that the primary judge simply followed the easiest path.
6. For example, when the primary judge dealt with the allegation that Mr Hey victimised Ms Von Schoeler by sending a veneer board she had graded to Quality Assurance, his Honour did not decide whether Mr Hey had done so out of ill-will to Ms Von Schoeler or whether, as Mr Hey claimed, he had genuine concerns about the quality of the grading. Instead, his Honour side-stepped the issue by holding that even if Mr Hey had fabricated the complaint about the board, there was nothing to suggest that his motivation for doing so was Ms Von Schoeler’s complaint of sexual harassment against Mr Urquhart. His Honour considered that at its highest, the evidence suggested that Mr Hey was motivated by Ms Von Schoeler having made a complaint about his friend. His Honour seemed to consider it significant that Mr Hey might have engaged in the same conduct if Ms Von Schoeler’s complaint about Mr Urquhart had been about something other than sexual harassment. His Honour dismissed the significance of a comment Mr Hey made that Mr Urquhart was being punished by having to “go home and tell his family” on the basis that “one can conceive of many types of complaints that could be made against an employee the subject matter of which it would be undesirable or uncomfortable to tell one’s family”.
7. There are at least four difficulties with these aspects of his Honour’s reasoning. Firstly, his Honour’s view that Mr Hey might have engaged in the same conduct if Ms Von Schoeler had made a different complaint about Mr Urquhart was irrelevant. The issue under s 94(1) of the SDA was whether Mr Hey had victimised Ms Von Schoeler because she made her complaint that Mr Urquhart had sexually harassed her. That Mr Hey might, hypothetically, have also harassed her if she had made a complaint about Mr Urquhart concerning a different subject matter could not affect the question of whether Mr Hey harassed her because she made the complaint that she did make.
8. Secondly, his Honour’s reasoning that there was no evidence to suggest that any fabrication of the complaint by Mr Hey was motivated by Ms Von Schoeler’s complaint of sexual harassment is unsupportable. His Honour reasoned that Mr Hey’s comment about Mr Urquhart being punished by having to “go home and tell his family” might instead be related to some complaint about Mr Urquhart other than the complaint about sexual harassment. However, there was no suggestion of Ms Von Schoeler having made any other complaint about Mr Urquhart. His Honour’s reasoning for finding an absence of a connection between the complaint of sexual harassment and Mr Hey’s conduct is unsustainable.
9. Thirdly, his Honour overlooked the evidence of Ms Grantham that she recalled Mr Hey having an argument with Ms Von Schoeler in which he blamed her for Mr Urquhart being moved, and overlooked the evidence of Ms Beardmore that Mr Hey had talked about getting revenge on Ms Von Schoeler for complaining about Mr Urquhart. In fact, his Honour’s reasons made no reference to Ms Grantham and Ms Beardmore even giving evidence.
10. Finally, his Honour’s approach supports Ms Von Schoeler’s submission that the primary judge gravitated to the conclusion that was easiest to decide and express, and which would avoid the difficulty of having to consider the credit or reliability of witnesses after six years.
11. Another example of his Honour appearing to take the easiest path concerns the treatment of the allegations of sex discrimination. In respect of a number of those allegations, his Honour held that there was no evidence indicating that a male would not have been treated in the same way in similar circumstances. That finding is challenged by Ms Von Schoeler in the appeal, but it is unnecessary to resolve it. It is enough to say that by reasoning in that way, his Honour was relieved of the necessity to decide whether the incidents and events that Ms Von Schoeler alleged actually occurred. To do so would have involved having to decide upon the credibility and reliability of various witnesses. The impression given is of his Honour again taking a path that avoided the determination of more difficult questions.
12. Another area where the unsatisfactory nature of the primary judge’s reasons seems to be related to the delay concerns Ms Von Schoeler’s allegation that she was singled out for surveillance and monitoring of her punctuality and attendance because she made the complaint. She argued that there had been no concerns expressed by Boral about her punctuality and attendance prior to making her complaint, but that the surveillance and monitoring started after she made the complaint.
13. The primary judge expressed substantial doubts about Mr Hansen’s evidence that several employees had been targeted for surveillance and Ms Von Schoeler had not been singled out, but it is not clear whether that evidence was ultimately rejected. His Honour went on to say that there were other explanations available on the evidence for Ms Von Schoeler being monitored apart from the explanation offered by Mr Hansen. His Honour considered and rejected a possible explanation that Ms Von Schoeler was considered a problematic employee in general apart from having specifically made the sexual harassment allegation. His Honour said that another possible explanation was that Ms Von Schoeler did in fact have issues with her attendance and performance and displayed a history of such issues. His Honour noted that the respondents did not submit that Ms Von Schoeler had a history of poor attendance or performance, but said that there was some evidence about her performance and attendance prior to March 2010 when the monitoring began. His Honour did not provide an explanation of what that evidence was or its significance. However, his Honour went on to say at [66]:

The applicant bears [the] onus of proof. The competing possibilities are equally open. I am not satisfied that the first respondent undertook the surveillance activities because the applicant made a sexual harassment claim.

1. The “competing possibilities” that his Honour referred to were presumably the possibility that Ms Von Schoeler was singled out for surveillance because she had complained about the sexual harassment and the possibility that she was not singled out, or not singled out for that reason. His Honour seems to have relied on the possibility, not contended for by the respondents, that Ms Von Schoeler was monitored because she had a history of poor attendance and performance prior to the surveillance beginning. If that is the case, his Honour failed to identify the evidence upon which he relied or to explain its significance to the conclusion. Another possibility is that his Honour ultimately accepted Mr Hansen’s evidence that several employees had been monitored, despite having expressed substantial doubts about his evidence. If that is the case, it was necessary to explain why Mr Hansen’s evidence was accepted. It is impossible to understand why his Honour reached the conclusion that the possibilities were equally open. The poor quality of the analysis probably reflects the pressure that his Honour was under to deliver the judgment.
2. A further difficulty is that the primary judge failed to deal with Ms Von Schoeler’s allegation that Mr Hey made a false complaint about her having aggressively abused him, resulting in a written warning being given to her. This was an issue dealt with at some length in her written submissions before the primary judge. His Honour dealt with a different allegation of victimisation by Mr Hey, namely that he had fabricated a complaint about the quality of Ms Von Schoeler’s work by having a board she had graded sent to Quality Assurance, but failed to deal with the issue of whether his complaint about her behaviour had been fabricated.
3. In addition, the primary judge failed to deal with Ms Von Schoeler’s allegation that Mr Urquhart had victimised her by verbally abusing her after she made her complaint, and that Boral was vicariously liable for that victimisation under common law principles. The factual issue was referred to in his Honour’s description of the disputed facts, but was overlooked later in the reasons. Again, that probably reflects the pressure that his Honour was under to deliver the judgment after having been reserved for over six years.
4. The primary judge’s delay created requirements in respect of the reasons that would not ordinarily apply. It was incumbent upon his Honour to inform the parties of the reasons why the evidence of a particular witnesses had been accepted or rejected and to say why the evidence of one witness had been preferred over the evidence of other witnesses. The primary judge was also required to explain how, despite the delay, he was able to recollect the oral testimony and demeanour of witnesses in order to demonstrate that delay did not affect his decision. The reasons do not meet these requirements. In addition, the reasons expose examples of the primary judge appearing to skirt more difficult issues and driving toward simple conclusions. Further, some aspects of his Honour’s reasoning reveal a lack of clarity which suggest that the delay has affected the decision. In addition, his Honour overlooked issues that had been squarely raised in the case. The reasons demonstrate that the primary judge was unable to satisfactorily determine the case six years after hearing the evidence. It must be concluded that the judgment is unsafe.
5. In view of our conclusions upon Grounds 8, 9 and 10 of the Notice of Appeal, it is unnecessary to consider the remaining grounds.

## Conclusion

1. The appeal should be allowed.
2. Order 1 of the orders made by the Federal Circuit Court, which dismisses the application against Boral and Mr Hey, and orders 2 and 3, which require Ms Von Schoeler to pay their costs of the application, should be set aside.
3. Instead, it should be declared that Boral is vicariously liable for the sexual harassment carried out by Mr Urquhart. The question of damages against Boral should be remitted to the Federal Circuit Court. The matter should otherwise be remitted to the Federal Circuit Court for reconsideration in accordance with law.
4. The matter should be heard and determined by a different judge.
5. Upon remittal, it would remain a matter for the new judge to determine how the fresh hearing should proceed. Given the lapse of time, it may be desirable to place such reliance upon the existing transcript and other evidence as may be appropriate. But all such matters should be left to the new judge to resolve, guided by the submissions of the parties. A difficult balancing exercise will have to be undertaken as to whether the passage of time since the events complained of has so tainted the ability of any witness to give reliable evidence that it outweighs such advantages as may be gained by seeing the witnesses give their evidence in person.
6. The first respondent is named in the Notice of Appeal as “Alan Taylor & Company Ltd trading as Boral Timber”. That name appears to have been copied from the reasons of the primary judge. The name stated in his Honour’s orders is another variation, “Allen Taylor & Co trading as Boral Timber”. The originating application named “Allen Taylor and Company Ltd trading as Boral Timber”. The name stated in the originating application appears to be the correct one. There will be an order amending the name of the first respondent accordingly.
7. There should be an order that Boral, as the only active respondent in the appeal, pay Ms Von Schoeler’s costs of the appeal.
8. It should finally be noted that the delay on the part of the primary judge in delivering his judgment has—regrettably—brought the administration of justice into disrepute.

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| I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Flick, Robertson and Rangiah. |

Associate:

Dated: 20 February 2020