



# The Role of Work Health and Safety in personal injury claims

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# Scenarios

- A spectator leans on the railing of a temporary spectator stand to catch a souvenir thrown by a sports star and the railing gives way and the spectator falls to the ground.
- A shopper slips and falls on a wet area of tiles in a shop/ shopping mall.
- A customer is walking around a furniture warehouse and is struck by a forklift being driven unsighted by a storeman.
- A child is playing around a department store display, which collapses on the child.
- A parent is helping out at a school working bee and a paid contractor drops a retaining wall log on their foot.
- The employee of a contractor is injured in the course of their work duties by the employee of another contractor at the site.
- An employee is injured in the course of performing their work duties as a result of an unsafe system of work and/ or unsafe plant and equipment and/ or an unsafe workplace.
- A passenger is injured in the course of a day cruise in Australian waters.

# Scenarios cont'd

Each of those scenarios, by reason of:

- The severity of the injuries sustained; or
- The nature of the incident

may be a **notifiable incident** for the purposes of the *Work Health and Safety Act 2011* (Qld) (**WCRA**) and it may be worthy of taking the time to either:

- RTI the associated records; or
- report the incident on the injured person's behalf if not already reported/ investigated.

# Background

## Brief Overview

Queensland's work health and safety legislation has been in place as stand-alone legislation since 1989. The title of the current legislation, however, belies its potential for more general application to personal injury matters and its utility for claimant lawyers in the preparation of their case.

## Coverage

### **10**      *Act binds all persons*

- (1)      *This Act **binds all persons including the State** and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.*
- (2)      *The State, the Commonwealth and the other States are liable for an offence against this Act.*
- (3)      *Without limiting subsection (1), the State, the Commonwealth and the other States are liable for a contravention of a (WHS) civil penalty provision.*

# Background cont.

## Workplace

### 8 *Meaning of workplace*

- (1) *A workplace is **a place where work is carried out** for a business or undertaking and **includes any place where a worker goes, or is likely to be, while at work.***
- (2) *In this section, place includes—*
  - (a) *a **vehicle, vessel, aircraft** or other mobile structure; and*
  - (b) *any waters and any installation on land, on the bed of any waters or **floating on any waters.***

# Background cont.

## **14** *Duties not transferable*

*A duty can not be transferred to another person.*

## **15** *Person may have more than 1 duty*

*A person can have more than 1 duty by virtue of being in more than 1 class of duty holder.*

## **16** *More than 1 person can have a duty*

(1) *More than 1 person can concurrently have the same duty.*

(2) *Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty.*

(3) *If more than 1 person has a duty for the same matter, each person—*

(a) *retains responsibility for the person's duty in relation to the matter; and*

(b) *must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.*

# Duty to notify – section 38

## 38 *Duty to notify of notifiable incidents*

- (1) A person who conducts a business or undertaking **must ensure that the regulator is notified immediately after becoming aware that a notifiable incident** arising out of the conduct of the business or undertaking has occurred.

Maximum penalty—**100 penalty units**. (1 unit = \$154.80, 100 units = \$15,480.00 & will increase each 1 July)

- (2) The **notice must be given as required under this section and by the fastest possible means**.

- (3) The notice must be given—

(a) by telephone; or

(b) in writing.

Example— The written notice can be given by facsimile, email or other electronic means.

# Section 38 WHSA cont'd

- (4) *A person giving notice by telephone must—*
  - (a) *give the details of the incident requested by the regulator; and*
  - (b) *if required by the regulator, give a written notice of the incident within 48 hours of that requirement being made.*
- (5) *A written notice must be in a form, or contain the details, approved by the regulator.*
- (6) *If the regulator receives a notice by telephone and a written notice is not required, the regulator must give the person conducting the business or undertaking—*
  - (a) *details of the information received; or*
  - (b) *an acknowledgement of receiving the notice.*
- (7) *A person conducting a business or undertaking must keep a record of each notifiable incident for at least 5 years from the day that notice of the incident is given to the regulator under this section.*

*Maximum penalty—50 penalty units.*



# Duty to preserve incident sites – section 39

- (1) *The person with management or control of a workplace at which a notifiable incident has occurred must ensure so far as is reasonably practicable, **that the site where the incident occurred is not disturbed until an inspector arrives at the site or any earlier time that an inspector directs.***

*Maximum penalty—100 penalty units.*

- (2) *In subsection (1) a reference to a site includes any plant, substance, structure or thing associated with the notifiable incident.*
- (3) *Subsection (1) does not prevent any action—*
- (a) *to assist an injured person; or*
  - (b) *to remove a deceased person; or*
  - (c) *that is essential to make the site safe or to minimise the risk of a further notifiable incident; or*
  - (d) *that is associated with a police investigation; or*
  - (e) *for which an inspector or the regulator has given permission.*

# The approved notification form

A link for the notification form is [here](#)

([https://www.worksafe.qld.gov.au/data/assets/pdf\\_file/0023/14963/incidents\\_form.pdf](https://www.worksafe.qld.gov.au/data/assets/pdf_file/0023/14963/incidents_form.pdf))

**For discussion, here are relevant extracts as to information requirements in the form:**

*Please provide as much detail as possible, for instance: **the events that led to the incident**; the work being undertaken when the incident happened; **the overall action, exposure or event that best describes the circumstances that resulted in the injury, illness, fatality or dangerous incident**; the object, substance or **circumstance which was directly involved in inflicting the injury, illness, death or dangerous incident**; the name and type of any machinery, equipment or substance involved. Was anyone else Involved? Was electricity or electrical equipment involved?*

***Describe any actions taken immediately following the incident to prevent reoccurrence:***

*Describe any longer term action proposed to prevent a reoccurrence:*

# So, what is a notifiable incident?

## 35 *What is a notifiable incident*

*In this Act, notifiable incident means—*

- (a) the death of a person; or*
- (b) a serious injury or illness of a person; or*
- (c) a dangerous incident.*

# Serious injury or illness – section 36

*In this part, serious injury or illness of a person means an injury or illness requiring the person to have—*

- (a) immediate treatment as an in-patient in a hospital; or*
  - (b) immediate treatment for—*
    - (i) the amputation of any part of his or her body; or*
    - (ii) a serious head injury; or*
    - (iii) a serious eye injury; or*
    - (iv) a serious burn; or*
    - (v) the separation of his or her skin from an underlying tissue (for example, degloving or scalping); or*
    - (vi) a spinal injury; or*
    - (vii) the loss of a bodily function; or*
    - (viii) serious lacerations; or*
  - (c) medical treatment within 48 hours of exposure to a substance;*
- and includes any other injury or illness prescribed under a regulation but does not include an illness or injury of a prescribed kind.*

# Dangerous incident – section 37

In this part, a **dangerous incident** means an incident in relation to a workplace that exposes **a worker or any other person** to a serious risk to a person's health or safety emanating from an immediate or imminent exposure to—

- (a) an **uncontrolled escape, spillage or leakage of a substance**; or
  - (b) an uncontrolled implosion, explosion or fire; or
  - (c) an uncontrolled escape of gas or steam; or
  - (d) an uncontrolled escape of a pressurised substance; or
  - (e) **electric shock**; or
  - (f) the **fall or release from a height of any plant, substance or thing**; or
  - (g) the collapse, overturning, failure or malfunction of, or damage to, any plant that is required to be authorised for use under a regulation; or
  - (h) the **collapse or partial collapse of a structure**; or
  - (i) the **collapse or failure of an excavation or of any shoring supporting an excavation**; or
  - (j) the inrush of water, mud or gas in workings, in an underground excavation or tunnel; or
  - (k) the interruption of the main system of ventilation in an underground excavation or tunnel; or
  - (l) any other event prescribed under a regulation;
- but does not include an incident of a prescribed kind.

# In my experience.....

- Most PCBUs don't seem to know about (or comply with) their obligations in relation to notifiable incidents.
- Most PCBUs believe that their obligations to notify are limited to an incident involving their own worker at their own workplace (and as we have seen, these provisions are not so limited).
- WHSQ have no objection to receipt of notifications from persons other than the obligated PCBU, especially if the PCBU has failed to notify.
- WHSQ, while subject to well known budget and resource limitations, have demonstrated an admirable interest in “third party notifications”; and have initiated investigations in all bar one of the matters I have notified in (including in respect of an incident which occurred two years ago).
- Notifications have resulted in WHSQ site visits, interview of PCBU representatives, the issuing of improvement notices and prosecutions.

# Why is WHSQ investigation useful?

## **171** *Power to require production of documents and answers to questions*

- (1) *If an inspector enters a workplace under this division, or has within the last 30 days entered a workplace under this division, the inspector or another inspector may—*
  - (a) *require a person to tell the inspector who has custody of, or access to, a document; or*
  - (b) *require a person who has custody of, or access to, a document mentioned in paragraph (a) to give the document to the inspector; or*
  - (c) *require a person at the workplace to attend before the inspector at a stated reasonable time and place to answer questions put by the inspector.*
- (2) *A requirement under subsection (1)(b) must be made by written notice unless the circumstances require the inspector to have immediate access to the document.*
- (3) *An interview conducted by an inspector under subsection (1)(c) must be conducted in private if—*
  - (a) *the inspector considers it appropriate; or*
  - (b) *the person being interviewed so requests.*

# Section 171 cont'd

- (4) *Subsection (3) does not limit the operation of section 166 or prevent a representative of the person being interviewed from being present at the interview.*
- (5) *Subsection (3) may be invoked during an interview by—*
  - (a) *the inspector; or*
  - (b) *the person being interviewed;**in which case the subsection applies to the remainder of the interview.*
- (6) *A person must not, without reasonable excuse, refuse or fail to comply with a requirement under this section.*

*Maximum penalty—100 penalty units.*

**Note**— *See sections 172 and 173 in relation to self-incrimination and section 269 in relation to legal professional privilege.*

- (7) *Subsection (6) places an evidential burden on the accused to show a reasonable excuse.*



# Self Incrimination & LPP

## **172** *Abrogation of privilege against self-incrimination*

- (1) *A person is not excused from answering a question or providing information or a document under this part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.*
- (2) *However, the answer to a question or information or a document provided by an individual, and other evidence directly or indirectly derived from the answer, information or document, **is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.***

## **269** *Act does not affect legal professional privilege*

*Nothing in this Act requires a person to produce a document that would disclose information, or otherwise provide information, that is the subject of legal professional privilege.*

# So, in summary....

- Reporting of notifiable incidents by claimant/ plaintiff representatives is an unused, yet useful, tool in your litigation toolbox.
- The notification process is extremely simple and quick.
- Notification may result in penalties for the responsible PCBU, the issue of improvement and prohibition notices, and prosecutions for breaches of the WHSA.
- If a notifiable incident is investigated, a resulting RTI may provide a wealth of information and documentation, including witness statements with all relevant questions answered (and infinitely better than the inadequate investigation reports we often see produced by respondents).
- Information obtained through RTI of an WHSQ investigation can then form the basis of questioning under section 27 PIPA and section 279 WCRA (and hopefully making the usual position of “not liable and 100% contributory negligence” untenable).
- The obligation to retain notifiable incident records for 5 years may result in useful evidence supporting allegations of failure to identify and remedy workplaces and systems of work already known to be unsafe (an RTI for all records held by WHSQ regarding the relevant and similar incidents).
- Resulting prosecutions and penalty actions may result in changes to unsafe workplaces and systems of work, reducing the occurrence of serious injury, illness and death.



# Thanks!

Any questions?