

When the inspector calls - your rights!

Following extensive lobbying, last November the Liberal Party moved a significant amendment to the *Work Health and Safety Bill 2011* which resulted in South Australia being the only state or territory to have a statutory provision implementing the common law privilege against self-incrimination. The amendment was significant because the model laws in other jurisdictions specifically contain an abrogation of the common law privilege.

The *Work Health and Safety Act 2012 (the Act)* came into operation in South Australia on 1 January 2013. Section 172 of the Act was amended in June 2013¹ to clarify earlier ambiguous drafting which arguably extended the privilege to corporations. The Act now very clearly provides that the privilege extends only to an individual person.

What does this mean?

An individual person (who may also be an Officer of a Corporation) has the right to refuse to answer questions or provide documents as requested by a SafeWork inspector on the grounds the answer or the documents may tend to incriminate them. The privilege does not require a likelihood of incrimination before it becomes available. All that is required is a reasonable ground to apprehend danger. In these circumstances the courts will give a witness a great deal of latitude. Accordingly, the privilege extends to answers and documents, which whilst not

directly incriminating, may be used as a step towards obtaining evidence against that person².

In practical terms, the Corporation must provide documents if lawfully requested, unless such documents are subject to a claim of client legal privilege. However, as a Corporation can only answer questions through its Officers (who are individual persons and therefore entitled to exercise their right not to self-incriminate) the Officer should consider whether those answers incriminate him or her before complying with a request. If you are unsure about whether your answers are incriminating or whether you are legally required to comply with a direction issued by a SafeWork inspector you should seek legal advice before taking any action.

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It is important you take note as to whom the inspector is directing his or her questions and the request for documents. If the inspector does not make it clear, you should ask for clarification. You should also request the inspector identify himself or herself by producing his or her identity card and explain to you the reason for the entry into the workplace and the powers they are exercising. An inspector is required by the Act:

- to warn you that a failure to comply with a requirement to answer or produce a document **without reasonable excuse** will constitute an offence³;
- advise you about the effect of the privilege against self-incrimination⁴; and
- advise you about the effect of client legal privilege⁵.

We consider that refusing to answer or to provide documents on the grounds that you wish to seek legal advice is a reasonable excuse and on that basis we recommend that you seek that advice prior to complying with any request made by an inspector.

If you require further information about your rights in safety investigations please refer to our Fact Sheet on Client Legal Privilege or contact Jodie Bradbrook on (08) 8227 2829.

Endnotes

1. *Work Health & Safety (Self-Incrimination Amendment Bill 2013 (SA)*
2. *Correll v AG NSW 2007 NSWSC 1385*
3. s173
4. s173
5. s173 & s269

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