



## TIPS AND TRAPS

# Participating in a WorkSafe WA interview following a serious or critical incident

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Whether you are a general employee of a company or organisation, or a director or other officer, taking part in an interview with a WorkSafe WA inspector after a critical incident is a significant event; potentially with a significant flow-on effect to you personally, for the company or organisation and all involved, depending on what comes out of the interview.

One primary factor which will affect how an interview proceeds is whether participation is voluntary or the subject of a mandatory direction given by the WorkSafe inspector (or a 'compelled interview').

Following a spate of incidents around WA on various worksites, knowing your rights and responsibilities with respect to participating in interviews with WorkSafe WA are vital.

### Understanding the differences between voluntary and compelled interviews in a WorkSafe WA investigation.

There are two different mechanisms by which a WorkSafe WA inspector can initiate an interview of an employee, director or officer for the purposes of a workplace investigation.

Under Western Australian workplace health and safety legislation, an inspector has broad powers to interview any person who:

1. was employed at the workplace up to three years prior to the interview;
2. was employed at the workplace and occupying residential premises that are relevant to the inspector's enquiries;
3. was present at a workplace/ residential premises during a time that was relevant to the inspector's enquiries; or
4. is a person who may be able to provide information relevant to the matter.

In doing so, an inspector can either:

1. request a person to participate in a voluntary interview; or
2. require a person to participate in a compelled interview.

### The benefits of participating in a voluntary interview...

...are few and far between. If an inspector requests that you participate in a voluntary recorded interview, you are required to participate to the fullest extent possible,

so there is generally no right to silence or any right not to provide an answer to a question posed. If you agree to participate voluntarily in an interview conducted by an inspector, you:

- must answer truthfully;
- have no right to answer with "no comment";
- have no right to refuse to provide an answer.

When participating in a voluntary interview with an inspector, any evidence that you give can be counted against you personally in any prosecution that may arise, as well as against the company or organisation that is the subject of the investigation.

### The benefits of participating in a compelled interview...

...are somewhat better than participating in a voluntary interview. If you refuse to participate in a voluntary interview, an inspector can then take steps to "require" you to attend a compelled interview.

Once again, in a compelled interview you also:

- must answer truthfully;
- have no right to answer with “no comment”;
- have no right to refuse to provide an answer.

However there is one poignant difference when participating in a compelled interview rather than a voluntary interview, insofar as any evidence provided by you in a compelled interview cannot be held against you personally in any prosecution that may ensue.

**What is the role of a legal representative in a WorkSafe interview?**

A legal representative can be invaluable in assisting you in the course of an interview, the preparation leading up to it and all broader matters related to the incident. Aside from providing you with advice in

respect of your rights and obligations under the Occupational Safety and Health Act 1984 (WA), a legal representative may, in certain circumstances, accompany you to an interview to provide support and guidance. Whilst a legal representative cannot answer a question for you, they are entitled to ensure that the only questions posed are those that are relevant to the investigation, and are not wider than is absolutely necessary.

Such support can be extremely valuable in the course of an investigation where, on occasion, inspectors may be inclined to ask questions that are somewhat outside the scope of that investigation. These circumstances can arise when evidence of other breaches are uncovered which may give rise to further enquiries, but are not necessarily within the scope of the initial investigation.

Nothing that has been said above, however, prevents you from answering a question by stating that “(you) don’t know” - if indeed that is the case. If you are in doubt with respect to attending either voluntary or compelled interviews, or your rights or obligations when participating in those interviews, we recommend that you seek legal representation at the earliest opportunity.

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**(an anonymous Client Choice Awards survey respondent, 2015)**