

Voluntary interviews – recent developments

Anyone who has watched an American TV cop show would know by heart the words “You have the right to remain silent”. This is far more than an entertainment cliché, and has strong ties to every person’s common law rights.

Voluntary interviews

Investigators and compliance officers from all fields can, as part of their duties, undertake a voluntary interview with a suspect. Prior to undertaking the interview, the officer must advise the suspect of their common law right to silence. They do this by complying with the requirements of s.139 of the Evidence Act 1995 and cautioning the person being interviewed. The words used are:

“You do not have to say or do anything but anything you say or do will be recorded and may be used in evidence.”

More important than giving the caution is that the recipient acknowledges that they understand it. This may mean that the caution needs to be written or an interpreter may have to be used. If the caution is not acknowledged as understood, it is the same as if the caution was not issued at all.

Any admission made by the suspect without the caution, with the incorrect wording of the caution, or without acknowledgement that the caution was understood, may result in any admissions made being ruled inadmissible as evidence.

The Common Law rights

Common law rights were brought to Australia, along with the rest of the English legal system, with the arrival of the First Fleet in January 1788. Two of these common law rights, that are directly applicable to investigators and compliance officers undertaking voluntary interviews, are:

- The right to silence – where a judge or jury is not to make adverse inferences where a defendant has refused to answer questions regarding a matter.
- The right to not self-incriminate - where a person can refuse to answer any question if the answer would tend to incriminate that person.

These rights have been consistently upheld by the courts where suspects have been improperly questioned and/or questioned without being informed of their rights.

Recent developments

A recent case heard by the NSW Land and Environment Court ([Port Macquarie-Hastings Council v Waite](#)) that dealt with the admissibility of evidence obtained from a voluntary interview with the suspect (Mr Waite). This case will have implications for investigation and compliance officers everywhere as to how they go about undertaking voluntary interviews.

In this matter, Mr Waite was invited to attend a voluntary interview. He agreed and acknowledged that he understood the correctly given caution, exercised his right to silence during parts of the interview and, at the conclusion of the interview, acknowledged that he participated at his own free will. However, the Land and Environment Court found that the evidence obtained during this interview was inadmissible as Mr Waite’s participation was not truly voluntary.

The facts and circumstances of this case are detailed and complicated. The key outcome of this case for investigation and regulatory officers was that there cannot even be the slightest inference of coercion or compulsion for a suspect to attend and participate in an interview. The NSW Land and Environment Court has demonstrated that Courts will interpret an individual Common Law rights very conservatively and rule to protect these rights.

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