



## COVID-19 outbreaks: WorkCover investigates residential aged care providers



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The health and wellbeing of Australians in residential aged care facilities has been a critical concern throughout the COVID-19 pandemic. In Victoria, a number of facilities have experienced COVID-19 outbreaks, particularly throughout 2020. Sadly, many of these outbreaks resulted in the deaths of residents. We are now aware that the Victorian WorkCover Authority (**WorkCover**) is investigating the circumstances of these deaths. Some providers of residential aged care (**providers**) have now been issued with a *Notice to Give Information and Produce Documents* (**Notice**) under the *Occupational Health and Safety Act 2004* (**Act**). These investigations could form the basis of criminal prosecutions.

Under section 9 of the Act, WorkCover may require a provider to give WorkCover certain information or produce document. Although providers may be familiar with responses to the Coroners Court or the *Aged Care Quality and Safety Commission*, these Notices are not analogous. Importantly, it is an offence to refuse or fail to comply with such a Notice and the information obtained in providers' responses to these Notices can lead to criminal prosecutions.

### Compliance with the Act – Key sections to be aware of

For providers who suffered fatal COVID-19 outbreaks, it is likely that WorkCover will investigate compliance with the following sections of the Act:

#### Section 21

Providers must, so far as is reasonably practicable, provide and maintain for their employees a working environment that is safe and without risks to health.

#### Section 23

Providers must ensure, so far as is reasonably practicable, that persons other than their employees are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.



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## Section 26

A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health.

In some circumstances officers of an organisation may be personally liable for the organisation's contraventions of the Act.

For all suspected contraventions, WorkCover will evaluate providers' compliance with the relevant sections in the context of their responsibility to prevent or minimise the impact of COVID-19 outbreaks in their facilities. For example, providers may be asked to demonstrate that they had effective incident management systems, infection control procedures and staffing arrangements.

Given that the responses to those questions may give rise to the prosecution of the organisation, it is important to get legal advice before submitting a response.

### What powers do inspectors have?

Inspectors have broad powers under the Act. For example, inspectors can enter the premises of a provider at any time if they reasonably believe that there is an immediate risk to the health or safety of a person arising from the conduct of an undertaking at the place.

#### On entry, an inspector can:

- inspect, examine and make enquiries at the place;
- inspect and examine any thing (including a document) at the place;
- seize any thing (including a document) at the place that may afford evidence of the commission of an offence against the Act; and/or
- take photographs or measurements or make sketches or recordings.

Inspectors can also require a person to produce a document, or to answer any questions put by the inspector.

A provider's response to a Notice may have consequences beyond the Act. For example, during the course of a performance assessment, the *Aged Care Quality and Safety Commission* (**Commission**) will consider if a provider has been subject to any adverse findings by another regulatory agency or oversight body such as WorkCover. Evidence obtained during a performance assessment will be used to determine if a provider complies with the *Aged Care Quality Standards*, which ultimately influences re-accreditation.

### How we can help

Russell Kennedy has expertise in WorkCover investigations and prosecutions, as well as specialty aged care experience. Providers should seek legal advice before responding to a Notice to minimise the likelihood of an investigation proceeding to a prosecution. If you require assistance navigating your response to a Notice, please contact [Victor Harcourt](#) or [Anthony Massaro](#).

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