Annotated Civil Liability Act 2003 (Qld)

Chapter 1 – Preliminary: Part 1, Part 2, Part 3

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CHAPTER 1 – PRELIMINARY

PART 1 – INTRODUCTION

1 Short title

This Act may be cited as the Civil Liability Act 2003.

2 Commencement

(1) Subject to subsections (2) and (3), this Act is taken to have commenced on 2 December 2002.

(2) The following provisions commence on assent—

• chapter 2, part 1, division 7, part 3, division 2 and part 4

[2.010] Commencement of volunteer protection provisions

The division of the Act containing the volunteer protection provisions\(^1\) commenced on 9 April 2003.\(^2\) Any act or omission made after this date by a volunteer performing community work organised by a community organisation, or as an office holder of the organisation, is subject to the volunteer protection provisions.

PART 2 – APPLICATION OF ACT

4 Application of Act

(1) Subject to section 5, this Act applies to any civil claim for damages for harm.

[4.010] Areas of liability where volunteer protection applies

This section provides that the Act applies to any civil claim for damages for harm, subject to the liabilities excluded under section 5. “Claim”, “damages” and “harm” are all defined in Schedule 2 of the Act.

Refer: Schedule 2, definitions of “claim”, “damages” and “harm”.

The types of “claims” falling under the Act are claims for damages for personal injury, property damage or economic loss that are based on a liability in:

\(^1\) Civil Liability Act 2003 (Qld), Chapter 2, Part 3, Division 2.

\(^2\) Queensland Legislation Annotations (2004), Issue 25, Table 1, p 124.
• tort (for example, negligence);
• contract (for example, breach of contract); or
• another form of action, including breach of statutory duty (for example, discrimination).

For fatal injuries, the Act also covers a claim for the deceased’s dependants or estate.

Despite the wide definition of “claim”, a volunteer will be unable to claim the protection afforded by the Act where they are subject to claim under a federal law. This is because of where there is an inconsistency between a Commonwealth law (imposing a liability) and State law (providing protection form the liability), the Commonwealth law prevails. The State law providing protection is overridden by the Commonwealth law.

“Damages” are defined as including any form of monetary compensation.

“Harm” is defined as meaning any type of harm, including:

• personal injury;
• property damage; and
• economic loss.

As the definition uses “includes”, the forms of harm that a person may claim for are not limited to these headings above, and may include other types of harm recognised at law.

The consequence of this section for volunteers is that where they perform “community work” either:

• organised by a community organisation; or
• in the capacity of an office holder of a community organisation;

and as a result of their conduct become the subject of a “claim” for “damages” for “harm” within the meaning of the Act, they may be entitled to be protected from incurring personal liability.

For example, where a volunteer negligently fails to warn another person of the dangers of working with a particular chemical and the person suffers personal injury as a result of the volunteer’s failure to warn, the Act will apply to a claim for damages made by that person against the volunteer and the volunteer may be protected from incurring personal civil liability.

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3 Commonwealth of Australia Constitution Act 1900 (Imp), s 109.
5 Civil liability excluded from Act

This Act does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes—

(a) an injury as defined under the WorkCover Queensland Act 1996, other than an injury to which section 36(1)(c) or 37 of that Act applies; or

Example for paragraph (a)—

A worker employed under a contract of service with a labour hire company is injured at the premises of a host employer while driving a defective machine. The worker pursues claims for damages for civil liability against the labour hire company, the host employer and the manufacturer of the machine. The worker suffers a number of injuries but only 1 of them is accepted as an injury under the WorkCover Queensland Act 1996, section 34. This Act does not apply to any of the claims for damages

(b) an injury that is a dust-related condition; or

(c) an injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.

[5.010] Liability for certain types of personal injuries are excluded from the volunteer protection provisions

This section provides that civil “claims” for “damages” for certain types of “personal injury” are excluded from the application of the volunteer protection provisions. The first exclusion relates to an employee’s injury, the second and third relate to claims based on dust diseases and tobacco products respectively.

The effect of the section is that if the “breach of duty” owed to a claimant by volunteer results in the claimant suffering a personal injury of the type excluded, the volunteer will be unable to seek the benefit of the Act’s protection. Importantly, the Act uses the words “is or includes” in relation to harm the suffered by the claimant from the breach of duty. This means that although a claimant may suffer a number of injuries as a result of the act or omission of a volunteer, if one of those injuries is within one of the areas excluded, no protection will apply to all of the injuries.

“Claim”, “damages”, “personal injury”, “harm” and “breach of duty” are all defined in the Act.

Refer: [4.010] and Schedule 2, definitions of “claim”, “damages” and “harm”; [5.070] and Schedule 2, definitions of “personal injury” and “breach of duty”.

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4 Now see, Acts Interpretation Act 1954 (Qld), s 14H; Workers’ Compensation and Rehabilitation Act 2003, 34 (1) (c) (was s 36 (1) (c)) and s 35 (was s 37).
[5.020] Liability for an “injury” under the Workers’ Compensation and Rehabilitation Act 2003 (Qld) is excluded from protection

If the liability of a volunteer relates to an “injury” as defined under section 32 of the Workers’ Compensation and Rehabilitation Act 2003 (Qld) (WCRA), the volunteer protection provisions will not apply and the liability will be decided in accordance with the WCRA and other applicable law.

The WCRA sets up a statutory workers compensation scheme. Under the WCRA all employers and required to insure with WorkCover for injuries to their workers (unless they are a licensed self insurer) and pay an annual premium. For this insurance, WorkCover pays benefits to workers who suffer work related injury or illness within the meaning of the Act. The statutory scheme of workers compensation is often described as a ‘no fault’ scheme, as there is generally no need for the employee to prove the employer was at fault in order to receive compensation for his or her injury. It differs from a common law action for negligence where an injured employee (plaintiff) is required to prove the employer (defendant) was in some way at fault in order to be compensated for his or her injuries.

The WCRA does not operate to deny an action by an employee for common law damages against an employer; rather, the two systems sit side by side. Subject to the limitations in the WCRA, it is open to an injured worker to first seek workers compensation payments under the WCRA, and then to proceed against the employer, or another party, to recover common law damages for his or her injuries. The difference between the two types of remedies (compensation and damages) available to the injured employee is important, as the liability for each may be borne by different persons.

Subsection (a) of section 5 of the Act excludes claims made by injured workers where employment is a substantial contributing factor to the injury from the volunteer protection provisions. Most circumstances covered by the exception will result in a claim may be made by the injured worker to WorkCover, and the worker being compensated for their injury in accordance with the statutory scheme of compensation established by the WCRA. Where this is the only claim made, no liability will be incurred by third parties who are not the worker’s employer or insurer.

This may not, however, be the case in all circumstances. The section is drafted so that the Act (including the volunteer protection provisions) is excluded from operation in all cases where a workers’ injury meets the definition of “injury” in section 32 of the WCRA. The common law and other legislation would thus apply to the disposition of any element of a claim against a non-employer defendant, (such as a volunteer or community organisation) as well as to an employer defendant, where a workers’ injury meets this definition. Consequently, the volunteer protection provisions will be

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5 Previously the WorkCover Queensland Act 1996 (Qld).
6 Explanatory Notes, Civil Liability Bill 2003 (Qld ), p 5.
7 Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 48.
8 Workers’ Compensation and Rehabilitation Act 2003 (Qld), ss 108-9.
9 However, self inflicted injury will not be compensated and injury arising from ‘wilful misconduct’ will only be compensated in certain circumstances: Workers’ Compensation and Rehabilitation Act 2003 (Qld), ss 129, 130.
10 Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 236.
excluded from operation in a situation where a claim for common law damages is made by an injured worker for an injury that meets the definition in the WCRA against either:

- the employer of the injured worker;
- a community organisation who was not the employer of the worker; and
- a volunteer engaged by either the employer of the worker, or of a community organisation who is not the worker’s employer.

Refer: [5.030] where the protection will not apply for a liability for workers’ injuries.

Not all “injuries” within the contemplation of the WCRA compensation scheme are excluded from the operation of the Act. Where a worker sustains an injury in circumstances where employment is not a significant contributing factor to the injury, any liability of a volunteer for that injury will be decided in accordance with Civil Liability Act 2003 (Qld), and the volunteer protection provisions will be thus be applicable.

Refer: [5.040] where the protection will apply for a liability for worker’s injuries.

The exception of liabilities for particular injuries covered by workers compensation legislation from the volunteer protection provisions is unlikely to have a substantial impact on individual volunteers in the majority of cases. Under normal circumstances, a volunteer or volunteer office holder is unlikely to incur a personal liability for an injury under the WCRA as they are not an “employer”. However, it is important to note that it is open for an injured worker to circumvent the operation of the volunteer protection provisions and proceed against a volunteer or volunteer office holder for common law damages where he or she satisfies the section 32 test of “injury” under the WCRA.

[5.030] Where the protection will not apply for a liability relating to a worker’s injuries

The protection will not apply to a liability for an “injury”, as defined under section 32 of the WCRA. “Injury” is defined in this section as “a personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.”

Under the definition in the WCRA, an “injury” includes the following:

- a disease contracted in the course of employment, whether at or away from the place of employment; or death from such a disease;
- an aggravation of the following, or death resulting from the aggravation, if the aggravation arises out of, or in the course of, employment –
  - a personal injury;
  - a disease;
  - a medical condition if the condition becomes a personal injury or disease because of the aggravation;
- loss of hearing resulting in industrial deafness;
- death from injury arising out of, or in the course of, employment.

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12 Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 32 (1).
13 Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 32 (3).
14 An aggravation is an injury only to the extent of the effects of the aggravation.
“Injury”, under the WCRA, does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—

- reasonable management action taken in a reasonable way by the employer in connection with the worker’s employment;
- the worker’s expectation or perception of reasonable management action being taken against the worker;
- action by an insurer in connection with the worker’s application for compensation.¹⁵

The exception of the above types of injuries from the volunteer protection provisions is, in most circumstances, unlikely to have a major impact on volunteers or volunteer office holders.

Under the WCRA, the liability for compensation for an injury sustained by an employee under the Act is incurred by the “employer”.¹⁶ “Employer” is defined in the WCRA as “a person who employs a worker”.¹⁷ Therefore, unless a volunteer or volunteer office holder can be classed as an “employer” under this definition, they will not incur a liability for compensation for an “injury” under the WCRA. In most circumstances, the employer will be the body engaging the volunteer rather than an individual.

However, as discussed at [5.1.0], a volunteer or volunteer office holder will not be able to claim the protection afforded by the Act (and will remain personally liable unless another form of protection applies) where an injured worker, whose injury satisfies the definition under s 32 of the WCRA, makes a claim for common law damages against them as a non-employer. The language of the paragraph does not suggest that an application for statutory compensation needs to be made, or if made adjudicated favourably, for the exception to operate.¹⁸

The circumstances in which an injured worker may proceed against a volunteer for common law damages is dependent upon the volunteer owing a duty to take reasonable care to the injured worker. For example, a volunteer mechanic who worked on a fleet of vehicles for an organisation that delivered food to the homeless would owe a duty of care to the driver(s) of that vehicle. If an employer driver was injured as a result of the negligence of the volunteer mechanic whilst they were driving in the course of employment, they would have suffered an injury within the meaning of section 34 of the WCRA. In such a situation, the volunteer would be unable to claim the protection afforded by the Act as the injury of the driver would be covered by the exception.

¹⁵ Examples of reasonable management actions taken in a reasonable way include: an action to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker’s employment.
¹⁶ Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 46. Note that an employer’s legal liability under the Act is only for compensation. The Act does not place any legal liability on an employer for damages, although Chapter 5 of the Act regulates access to damages by an employee.
¹⁷ Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 30.
[5.040] Where the protection will apply for a liability relating to a worker's injuries

The protection offered to volunteers by the Act will apply to an “injury” sustained by an employee where “employment is not a significant contributing factor to the injury”.19

There are a number of circumstances provided in the WCRA where employment will not be a significant contributing factor to the injury. These are where event causing the injury happens:

(a) on a day where the worker has attended employment as required under terms of employment and while temporarily absent from the place of employment during ordinary recess, provided the event is not due to the worker voluntarily subjecting himself or herself to abnormal risk;20

(b) while the worker is on a journey between the worker’s home and employment;

(c) while the worker is on a journey between a worker’s home or place of employment and a trade, technical or training school:

   o they are required to attend under terms of employment, or
   o that the employer expects the worker to attend;21

(d) while the worker is on a journey between the worker’s place of employment with one employer and the workers place of employment with another employer; or

(e) for an existing injury for which compensation is payable – while the worker is on a journey between the worker’s home or place of employment and a place:-

   o to obtain medical/hospital advice attention or treatment;
   o to undertake rehabilitation;
   o to submit to an examination by a registered person under the WCRA or to a requirement under the WCRA;
   o to receive a payment of compensation; or

(g) while the worker is attending a school in (c) of a place mentioned in (e) above.22

A worker will not be able to obtain compensation for an injury that is sustained while he or she is “on a journey” as described above, where:

- the injured worker is in charge of the vehicle whilst under the influence of alcohol or drugs;
- the injured worker is in breach of section 328A of the Criminal Code (dangerous operation of a vehicle);
- there is a substantial delay before the worker starts the journey; or
- there is a substantial interruption of, or deviation from, the journey.23

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19 This provision does not affect an employee’s right to obtain statutory benefits through the WCRA: Explanatory Notes, Civil Liability Bill 2003 (Qld) 5.
20 Workers Compensation and Rehabilitation Act 2003 (Qld), s 34.
21 Workers Compensation and Rehabilitation Act 2003 (Qld), s 35.
22 Workers Compensation and Rehabilitation Act 2003 (Qld), s 35.
23 Workers Compensation and Rehabilitation Act 2003 (Qld), s 36.
The possibility of volunteer’s incurring a liability in the circumstances where employment is not a significant contributing factor to the injury is unlikely.

Under the WCRA, the liability for an injury where employment is not a significant contributing factor is incurred by the “employer”. “Employer” is defined in the WCRA as “a person who employs a worker”.24 Unless the volunteer or volunteer office holder is an employer as defined, they will therefore not incur a liability for such an injury. An employee who suffers such an injury may make a claim for compensation to WorkCover (the employer’s insurer), who is then liable to pay compensation to the employee if the injury satisfies the statutory requirements.

Although unlikely, it is possible that a volunteer may incur a liability for an injury where employment is not a significant contributing factor. In such a case, the protection offered by the Act will be available to shield them from personal liability if they meet the requirements of protection. In the example referred to above in [5.030], if the employee was not a truck driver driving in the course of employment when they suffered the injury, but was driving home from work (as in situation (b)), the volunteer mechanic who performed work on the employee’s vehicle could claim the protection offered by the Act if they were the subject of a claim for damages by the employee for negligence.

Refer:  [44.010] liabilities covered by compulsory motor vehicle insurance.

[5.050] Community organisations may enter into a contract of insurance with WorkCover that covers injuries to their volunteers

WorkCover may enter into a contract of insurance with an organisation that covers personal injuries to its volunteers, as well as its employees. The types of organisation included are:

- a church, nonprofit charitable organisation or benevolent institution;25 or
- a nonprofit organisation.26

A volunteer covered by such a contract of insurance will only be entitled to compensation for an injury that is sustained while performing an activity for the organisation.

This provision is very rarely used by organisations who engage volunteers.

[5.060] Liability for an injury that is a “dust related condition” is excluded from protection

The protection offered by the Act will not be available for a liability for a personal injury that is a “dust related condition”. This exclusion maintains a national consistency on the law applicable to dust diseases.27 Volunteers incurring such a liability will remain personally liable unless another form of protection outside of the Act applies to their situation.

24 Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 30.
25 Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 18.
26 Workers’ Compensation and Rehabilitation Act 2003 (Qld), 19.
“Dust related condition” is defined exhaustively in the Act to mean:

- aluminosis;
- asbestosis;
- asbestos induced carcinoma;
- asbestos related pleural diseases;
- bagassosis;
- berylliosis;
- byssinosis;
- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;
- silicosis;
- silico-tuberculosis;
- talcosis; or
- any other pathological condition of the lung, pleura or peritoneum that is attributable to dust.

It is unlikely that a volunteer or volunteer office holder will incur a liability for an injury that is a “dust related condition”. In most circumstances, a liability for such an injury will be incurred by the “employer” of a worker or volunteer for a breach of their duty at common law to ensure a safe system of work, or a breach of some similar statutory duty.

In the case of an incorporated entity, the employer will not be the volunteer or volunteer office holder, but the entity itself, as it will have a separate legal identity from those who control it.

However, where a community organisation is not incorporated, it is possible that a volunteer or volunteer office holder may incur a liability for a dust related condition through either common law negligence or breach of a statutory duty. The liability of a volunteer office holder in those circumstances will arise from the fact that there is no separate legal identity of the organisation from its members and, as such, the members of its managing committee may be held legally responsible for the actions of the organisation. For example, a volunteer office holder in an unincorporated church or religious organisation may be in breach of their duty of care to provide a safe system of work if they fail to provide adequate safety equipment to volunteers who help to remove asbestos from a church site, and as a result of that failure, contract a dust disease.

Refer: [38.010] – [38.100] definition of “community organisation”.

[5.070] Liability for a tobacco related injury is excluded from protection

A liability for any injury resulting from smoking or other use of tobacco products, or exposure to tobacco smoke is excluded from the operation of the volunteer protection provisions. Volunteers incurring such liabilities will remain personally liable unless another form of protection outside of the Act applies to their situation.

This type of injury is not defined in the Act. It is likely that it will be interpreted by a court in accordance with its technical or scientific meaning, rather than its ordinary

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meaning. This meaning may be obtained by the court through the use of a standard medical textbook in the area.

[5.080] Definitions for section 5

“Personal injury” is defined in Schedule 2 of the Act as including a:

- fatal injury;
- pre-natal injury;
- psychological or psychiatric injury; and
- a disease.

“Duty” is defined in Schedule 2 of the Act to mean:

- a duty of care in tort; or
- a duty of care in contract; or
- another duty in statute or otherwise, that is concurrent with a duty of care in tort or contract.

“Duty of care” is defined in Schedule 2 of the Act to mean a duty to take reasonable care, or to exercise reasonable skill (or both). This definition necessarily calls up the tortious duty of care. The duty of care in tort is the obligation owed by a person to avoid the risk of harm, and arises when it is reasonably foreseeable that harm may occur to another person if due care is not taken. A person will not breach the duty to take precautions against a risk of harm unless:

- the risk was foreseeable;
- the risk was not insignificant; and
- in the circumstances, a reasonable person in the position of the person would have taken the precautions.

A community organisation owes a duty of care to its engaged volunteers. Similarly, a volunteer has the same duty of care as an ordinary person when dealing with the public, fellow volunteers, or employees of a community organisation.

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29 Holt & Co. v Colyer (1881) 16 Ch D 718 at 720 per Fry J.
30 Peart v Stewart [1983] 2 AC 109 at 114 per Lord Diplock.
32 Civil Liability Act 2003 (Qld), Sch 2.
34 Civil Liability Act 2003 (Qld), s 9.
6  Act binds all persons

This Act binds all persons including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States.

[6.010] Government is bound by the Act

This section specifies that “the State” is bound by the Act. “The State” refers to the State of Queensland. 35 Any action commenced by, or against, the State of Queensland must therefore respect the volunteer protection provisions.

The other States and the Commonwealth are also bound by the Act to the extent of the legislative power of the Queensland Parliament.

The legislative power of the Queensland Parliament permits it to make laws for the “peace, welfare and good government of Queensland”. 36 This is what is known as a plenary or full power. The plenary power extends to making legislation that has extraterritorial effect (in another state or overseas) where there is a sufficient connection with Queensland. 37 The governments of other States will therefore be bound if this requirement can be satisfied. If it cannot, the legislation will not apply to their activities.

The legislative power of the Queensland Parliament is subject to the Commonwealth Constitution. Under the Commonwealth Constitution, the Commonwealth Parliament may make laws only about particular matters. 39 Where a State law and a Commonwealth law are inconsistent or conflict, the Commonwealth will prevail to the extent of the inconsistency between the two laws. 40 The Commonwealth government will therefore not be bound by the Civil Liability Act 2003 (Qld) where its provisions are in the conflict with Commonwealth legislation. A further effect of this inconsistency provision in the Commonwealth Constitution is that where a volunteer or volunteer office holder incurs a liability under a Commonwealth law, they will not be able to claim protection as the two laws will be in conflict - the State law offering protection from liability and the Commonwealth law imposing a liability.

Refer:  [4.010] meaning of “claim"

A “public or other authority” is considered to be a community organisation under the Act. Volunteers engaged by a “public or other authority” will be entitled to protection if they meet the other criteria.

Refer:  [34.010] – [34.040] definition of “public or other authority”; [38.010] – [38.100] definition of “community organisation”.

35 Acts Interpretation Act 1954 (Qld), s 36
36 Constitution Act 1897 (Qld), s 2.
37 Australia Act 1986 (Cth), s 2 (1).
39 Commonwealth of Australia Constitution Act 1900 (Imp), s 51.
40 Commonwealth of Australia Constitution Act 1900 (Imp), s 109.
7 Provisions relating to operation of Act

(1) This Act does not create or confer any cause of civil action for the recovery of damages.

(2) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.

(3) This Act, other than chapter 3\textsuperscript{41} does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the ‘express provision’) in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of the express provision.

(4) Subsection (3) extends to any provision of this Act even if the provision applies to liability in contract.

(5) This Act is not a codification of the law relating to civil claims for damages for harm.

[7.010] Effect of the Act on other laws and contractual agreements

This section sets out the effect the Act has on other legislation and the common law that relates to:

- civil claims for damages for harm (refer [7.020] – [7.030]);
- protection from civil liability (refer [7.040]); and
- contractual agreements (refer [7.050]- [7.080]).

[7.020] No new civil action is created by the Act

No new civil action for the recovery of damages is created or conferred by the Act. The Act only operates to modify the common law principles regarding civil actions for the recovery of damages. A cause of action for damages will therefore only lie where such a cause of action would have been successfully bought prior to the commencement of the Act.

Refer: [4.010] definition of “damages”.

[7.030] The Act does not codify of the law of negligence

The Act does not codify the law relating to civil claims for damages for harm arising from negligence. A code seeks to state the whole of the law governing a certain issue, the Act only operates to state the law on the areas within its field. Accordingly, the development of the law of negligence (by either common law or statute) in the areas not covered by the Act can continue.

Refer: [4.010] definition of “damages”, “claim” and “harm”.

\textsuperscript{41} Assessment of damages for personal injury.
[7.040] Volunteer protection does not limit other legal forms of protection

The provisions in the Act giving protection to volunteers from incurring personal civil liability do not operate to limit protection from civil liability given by other parts of the Act, by other Acts, or by law generally. This allows the Act to interact with other Queensland and federal legislation or other law that provides protection from civil liability. The effect of the section is that if the volunteer protection provisions apply to a particular situation and another provision of an Act or principle of law limiting liability also applies to the particular situation then both apply to limit the liability of the individual concerned.

Examples of other Queensland legislation that provides protection from civil liability includes:

- Fire and Rescue Service Act 1990 (Qld);\(^{42}\)
- Public Safety Preservation Act 1986 (Qld);\(^{43}\) and
- Disaster Management Act 2003 (Qld).\(^{44}\)

[7.050] The protection afforded by the Act may be waived through the volunteer entering a contract

The Act does not prevent a volunteer and a community organisation from making a contract that expressly provides for each other’s rights, obligations and liabilities in relation to any matter to which the Act applies (except the assessment of personal injuries in Chapter 3). This applies to any provision of the Act, even if the provision applies to a liability in contract.

There is nothing remarkable about this provision. Subject to certain statutory remedies which are not lightly displaced, such as those provided for in the Trade Practices Act 1975 (Cth) (TPA) or the Fair Trading Act 1989 (Qld)\(^{45}\) (which largely mirrors the TPA), parties have always been able to contractually modify or curtail remedies that might otherwise have existed between them apart from contract.\(^{46}\) Prime examples include contractual indemnity or exemption.

The Act thus allows a contract to be made that excludes the volunteer’s right to rely on some or all of the protection provisions – making them personally liable for their acts and omissions – despite the Act giving them protection.

This may be done by the community organisation and the volunteer entering a contract of indemnity. Such a contract may involve the volunteer agreeing to compensate any loss sustained by the community organisation in proceedings against it related to acts and omissions of the volunteer. In an employer/employee situation, an indemnity would normally be included in the contract of employment. As volunteers do not have such contracts, a separate contract of indemnity would be required.

It is also possible for the volunteer to make a contract of indemnity with persons who may be affected by their actions. For example, a volunteer professional may not give

\(^{42}\) Fire and Rescue Service Act 1990 (Qld), s 129.
\(^{43}\) Public Safety Preservation Act 1986 (Qld), s 47.
\(^{44}\) Disaster Management Act 2003 (Qld), s 144.
\(^{45}\) Similar legislation is found in every state and territory in Australia.
advice on a service unless the recipient first entered into a contract of indemnity with the volunteer relating to any civil liability imposed on the volunteer as a result of the volunteered advice or service.

A similar provision allowing parties to contract out of the Act is found in the New South Wales Civil Liability Act 2002 (NSW). All other states and territories (apart from South Australia and the Australian Capital Territory which are silent) in contrast, provide that any indemnity agreement made between a volunteer and a community organisation is of no effect and unenforceable.

Special attention would have to be given in entering into any such indemnity agreement as to whether:

- the agreement indicates a clear intention to exclude the volunteer protection provisions (refer [7.060]);
- genuine consent was given by the volunteer and the unconscionability of the terms (refer [7.060]);
- consideration was provided, unless the agreement is a deed under seal (refer [7.070]).

[7.060] Contract attempting to exclude volunteer protection may be strictly construed

Given the overall purpose of the Act is to reform civil liability for negligent acts, it is likely any contract attempting to exclude or modify a volunteer’s or client’s right to protection will be strictly construed in favour of the volunteer or client by a court interpreting it. There must therefore be a clear intention by both parties to exclude the operation of the protection provisions in the event of negligence of the volunteer.

It is also likely a court would also inquire into whether volunteers or clients were properly informed as to the nature of the contract and aware of its effect. That is, did they understand the effect of signing the contract was the removal of the ability to rely on their statutory right to protection? If volunteers or clients are not properly informed, the contract may be regarded as unfair or unconscionable and incapable of enforcement.

[7.070] Contract attempting to exclude volunteer protection may fail for lack of consideration unless a deed under seal

To make a legally binding contract, such as an agreement by a volunteer to indemnify the supervising community organisation, three elements must be present:

- offer and acceptance;
- an intention to create legal relations; and
- consideration.

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47 Civil Liability Act 2002 (NSW), s 3A (2).
48 Volunteers (Protection from Liability) Act 2002 (WA), s 8; Wrongs Act 1958 (Vic), s 40; Civil Liability Act 2002 (Tas), s 49; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 7 (5); Commonwealth Volunteers Protection Act 2003 (Cth), s 9.
49 Civil Liability Act 2003 (Qld), Long title.
Generally, a person is only legally bound to perform a promise if these three elements are present. Consideration is, however, not required if the agreement is a deed under seal.

Consideration is ‘compensation’ for something promised or done and it must be *valuable* in the eyes of the law. For example, if a person made a contract with his or her neighbour to paint his or her neighbour’s house for $1000, the person’s consideration would be the painting of the house, and neighbour’s consideration would be payment of $1000 to the person for his or her services in painting the house.

There is a problem in relation to volunteers and consideration as they are not paid for their services. In normal employment contracts, the employee agrees to work for an employer in return for some benefit or remuneration. This benefit or remuneration is the consideration and moves from the employer to the employee for their services rendered under the contract (the employee’s consideration is the rendering of the employee’s services). The relationship between the volunteer and a community organisation is different as there is no consideration flowing from the organisation to the volunteer. Hence, a contract purporting to make an express provision for the rights, obligations and liabilities of a volunteer in relation to his or her personal liability may not be enforceable in law for lack of consideration.

If the agreement between the volunteer and community organisation is a deed under seal, it will not fail for lack of consideration. Important requirements of a deed under seal are that:

- it be described as a deed;
- the signature is attested to by a witness; and
- it contain an execution clause.

A community organisation may use this form of agreement to overcome the problems of consideration encountered by the relationship between the parties.

[7.080] **Court may ‘read down’ the Act to limit the ability to contract out of volunteer protection**

Despite the problems of construction of the contract, in interpreting this provision the courts may be willing to read down its otherwise wide effect. ‘Reading down’ is a technique used by the courts to limit the meaning of the words used in an Act.

A general principle of interpretation of a provision in an Act is that the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.\(^{51}\) The explanatory notes to the Act state the main purpose of the legislation is to “further facilitate the ongoing affordability of insurance thorough clarification of some basic principles within the substantive law and sustainable awards of damages for personal injury”.\(^{52}\) The Ministers’ second reading speech accompanying the introduction of the Bill further explains the reforms brought about by the legislation “provide a commonsense approach to negligence” and “ensure all parties involved, including an injured person, must take personal responsibility for their own conduct and safety”.\(^{53}\)

\(^{51}\) *Acts Interpretation Act 1954* (Qld), s 14A.

\(^{52}\) Explanatory Notes, *Civil Liability Bill 2003* (Qld), p 1.

To achieve these purposes, the Act makes fundamental changes to the law of negligence, including giving protection to volunteers from personal liability in negligence for their own actions. Given that volunteers are usually in a less powerful position to those directing or organising their activities, the section may therefore be interpreted strictly and ‘read down’ to limit the ability of parties to a contract to modify the protection afforded by the Act.

PART 3—INTERPRETATION

8 Definitions

The dictionary in schedule 2 defines particular words used in this Act.

[8.010] Dictionary

This section provides the dictionary in Schedule 2 defines particular words used in the Act. Where words defined in the dictionary are used in the Act, they have the special meaning ascribed to them by the Act, and not their natural meaning.

Where words defined in the dictionary have been used in the annotations, the definition of these words has been explained under the relevant section.

Refer: [s2.010] dictionary.
CHAPTER 2 – CIVIL LIABILITY FOR HARM

PART 3 – LIABILITY OF PUBLIC AND OTHER AUTHORITIES AND VOLUNTEERS

Division 1—Public and other authorities

34 Definitions for div 1

In this division—

‘function’ includes power.

‘public or other authority’ means—

(a) the Crown (within the meaning of the Crown Proceedings Act 1980); or
(b) a local government; or
(c) any public authority constituted under an Act.

[34.010] Public or other authority

This section provides the definition for “public or other authority” for the purposes of what is a “community organisation” under the volunteer protection provisions.

Refer: [38.010] – [38.0100] definition of “community organisation”.

A volunteer engaged by any of the following organisations listed below in [34.020] – [34.040] may qualify for protection under the Act. The definition is an exhaustive statement of what can be considered a “public or other authority”. Entities that do not come within the categories listed below cannot be considered a community organisation under the heading of public or other authority.

[34.020] The Crown

The Crown in simple terms is the administrative edifice of the executive government. “The Crown” is defined in section 7 of the Crown Proceedings Act 1980 (Qld) as meaning:

the Crown in right of the State of Queensland and includes a corporation representing the Crown, constituted by or under any Act or incorporated or registered under the Corporations Act.

The Crown in right of the State of Queensland would include State departments and other government bodies such as agencies, boards and commissions.

For a full list of Queensland government bodies see:
A corporation representing the Crown is called a “Government Owned Corporation” (GOC). GOCs are publicly-owned trading enterprises which conduct activities and provide services in a commercially-oriented environment. Examples of Queensland GOCs include:

- Gladstone Port Authority;
- CS Energy Ltd; and
- Queensland Investment Corporation.

A GOC can come into existence under the Government Owned Corporation Act 1993 (Qld), or under its own enabling legislation.

A list of current Queensland GOCs can be found at: http://www.ogoc.qld.gov.au/current_gocs.htm

[34.030] Local government

Local government is a creation of the delegation of rights and powers by the Queensland government to administer local affairs. Examples of local government include:

- Toowoomba City Council;
- Beaudesert Shire Council; and
- Bundaberg City Council.

A list of local government councils in Queensland can be found at: http://www.lgp.qld.gov.au/applications/lgdirectory/Summary/

[34.040] Public authority

A public authority is a body that has been given powers by the State to perform a public purpose. Usually, but not always, they implement and administer a particular piece of legislation. Examples of Queensland public authorities include:

- Queensland Building Services Authority; and
- Wet Tropics Management Authority.

A list of current Queensland public authorities can be found at: http://www.qld.gov.au/departments/more_qld_government_websites.html
Division 2 – Volunteers

38 Interpretation

(1) In this division—

‘community organisation’ means any of the following that organises the doing of community work by volunteers—

(a) a corporation;
(b) a trustee acting in the capacity of trustee;
(c) a church or other religious group;
(d) a registered political party as defined under the Electoral Act 1992 or the Commonwealth Electoral Act 1918 (Cth);
(e) a public or other authority as defined under section 34.

[38.010] The organisational test: community organisation

Only a “volunteer” performing “community work” for a “community organisation” can gain protection under the Act.

Refer: [38.220] meaning of “volunteer”
[38.110] – [38.210] meaning of “community work”
[39.010] the protection conferred on volunteers.

The requirement that the work be performed for a “community organisation” is referred to as the ‘organisational test’. The test focuses on the characteristics of the body, rather than its purpose. To be considered a community organisation a body must:

1. Organise the doing of community work by volunteers; and
2. Be able to be identified as a:

   • corporation (refer [38.020] – [38.040]);
   • trustee acting in the capacity of trustee (refer [38.050]);
   • church or other religious group (refer [38.060]);
   • registered political party as defined under the Electoral Act 1992 (Qld) or the Commonwealth Electoral Act 1918 (Cth) (refer [38.070] – [38.090]) ; or
   • a public or other authority (refer [34.010] – [34.040]).

The requirement that the entity “organise the doing of community work by volunteers” is not a form that requires such activity to be the sole activity of the entity. Therefore, the actual organising of volunteers can be a minor, and even an activity adjunct to the entity’s normal activities. For example, a ‘for profit’ organisation that arranged community work on a one-off basis would fall within the definition.54

[38.020] Corporation

“Corporation” is not defined in the Act. Pursuant to section 36 of the Acts Interpretation Act 1954 (Qld) a “corporation” will include a “body politic or corporate”.

[38.030] Body corporate

Body corporate at common law has the same meaning as corporation. A corporation is an artificial person to which the legal system has given the capacity to have legal rights and duties as a fictional legal person. Examples of corporations include companies limited by guarantee and incorporated associations. An organisation or office can become incorporated through:

- royal charter
- letters of patent; or
- statute.

Many non-profit organisations in Queensland hold letters of patent and a number are established by royal charter. More common forms of body corporate are created by statute. For example, a company becomes a corporation through registration under the Corporations Act 2001 (Cth). Once registered, it is a new legal entity separate from its members, can own property in its own right, owe money and be owed money, and sue and be sued.\(^55\) Associations may also seek incorporation through the Associations Incorporation Act 1981 (Qld).

The definition of body corporate would include ‘for profit’ companies such as proprietary limited and publicly listed corporations. Such bodies, to come within the definition, must also show that they “organise the doing of community work by volunteers” which is perhaps uncommon. However, such a situation may arise where a business manages a function or event involving volunteers.

In Australia, the Commonwealth and State Parliaments have wide powers to create corporations. The Commonwealth has the power to create corporations for implementing any of its legislative powers expressly granted to it by the Constitution.\(^56\) It has used this power to create public corporations to conduct public activity which calls for some independence from direct ministerial control. An example of this is the Australian Securities and Investments Commission (ASIC). The States have also created statutory corporations for the conduct of public utilities and other public purposes. These statutory corporations would be considered to be independent legal entities from the body politic (refer [38.030]). In Queensland, such government owned corporations are considered to come within the definition of “public or other authority” for the purposes of what is a community organisation under the Act.

Refer: [34.0.1] meaning of “government owned corporation”.

Unincorporated associations are not covered by the Act. However, it is possible some unincorporated associations may come under the other headings of community organisation, such as “church or other religious organisation” or “political party”. If an unincorporated association does not come under any of the other headings of


\(^{56}\) Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309.
community organisation (refer [38.050] – [38.100]) its volunteers will remain personally liable for their actions unless another form of protection outside of the Act applies.

[38.040] Body politic

A body politic refers to people constituting a political unit within a government. A prime example is the State, such as the Crown in right of the State of Queensland.

Refer: [34.020] meaning of “Crown in right of the State of Queensland”.

[38.050] Trustee acting in the capacity of trustee

A trustee is a person to whom property is conveyed, devised, or bequeathed ‘in trust’ for another person (the beneficiary) or for a charitable purpose.

To hold property ‘in trust’ means that the trustee holds the legal title to property, and the beneficiary holds the equitable title. These two types of title are distinct, and carry with them different rights and obligations.

The trustee owes a personal duty of loyalty to the beneficiary to deal with the property for the benefit of the beneficiary (if a person), or the charitable object of the trust. That is to say, even though the trustee legally owns the property, their ownership is subject to the rights of others that are enforceable in equity.

A person can be appointed or constituted a trustee by:

- an act of the parties concerned;
- order or declaration of a court; or
- operation of law.

A trustee may be a natural person or a body corporate. Some organisations, often known as foundations, are charitable trusts. An example is the Queensland Community Foundation whose trustee is the Public Trustee in Queensland.

In the context of nonprofit organisations, common situations attracting the volunteer protection provisions will be a charitable trust. These are express trusts in favour of purposes recognised as charitable at law.

Refer: [38.120] – [38.140] meaning of “charitable purpose” at law.

It is important to note that in order for the volunteer to gain protection, a trustee must be organising the community work the volunteer is performing in their capacity as trustee and not in another capacity. For example, a person who arranges work, who

58 Morice v Bishop of Durham (1805) 32 ER 656.
59 Legal title is more than just possession.
60 Express trusts are trusts arising from an express declaration, which can be effected by some agreement or common intention held by parties to the trust.
also happens to be a trustee of a family trust, will not be within the definition unless the work is undertaken on behalf of the family trust.62

[38.060] Church or other religious group

A “church” in the context of the Act would not refer to a building, but to a “quasi-corporate institution which carries on the religious work of the denomination whose name it bears.”63 It is possible that unincorporated associations, who do not fall within the definition of a corporation, may be able to achieve community organisation status under this head.64

Refer: [38.020] – [38.040] meaning of “corporation”.

To be able to achieve the status of a “church or religious group”, the group’s purpose must come within the legal definition of religion. The generally accepted legal definition of religion involves belief in a supernatural being, thing or principle and acceptance of canons of conduct which give effect to that belief.65 Acceptance of canons of conduct that violate laws to preserve and protect society will not, however, fall within religion.

Australian courts have approved of an indicia approach to defining ‘religion’ rather than a simple legal characteristic. These indicia include:

- the particular collection of ideas/practices involves belief in the supernatural;
- the ideas relate to human’s nature and place in the universe and relation to things supernatural;
- the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance;
- the adherents constitute an identifiable group or groups; and
- the adherents themselves see the collection of ideas and/or practices as constituting a religion.66

It is important to note that the legal concept of religion is not confined to major religions such as Christianity, Islam and Judaism.67 It also extends to Buddhism, Taoism, Jehovah’s Witnesses,68 the Free Daist Communion of Australia69 and Scientology.70

The categories of religion are not closed.71

63 MacLaughlin v Campbell [1906] 1 IrR 597.
65 The Church of the New Faith v. Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120 at 136 per Mason ACJ and Brennan J.
66 The Church of the New Faith v. Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120 at 173-4 per Wilson and Deane JJ.
68 Appeal of Frank Gundy (1944) 61 WN (NSW) 102.
70 Church of the New Faith v. Commissioner of Pay-roll Tax (Victoria) (1983) 154 CLR 120.
71 Church of the New Faith v. Commissioner of Pay-roll Tax (Victoria) (1983) 154 CLR 120 at 151 per Murphy J.
[38.070] Registered political party

Under the Act, a “registered political party” as defined under either the Electoral Act 1992 (Qld), or the Commonwealth Electoral Act 1918 (Cth) is a community organisation.

[38.080] Queensland

A “registered political party” under the Electoral Act 1992 (Qld) means “a political party that is registered in the register of political parties”. 72

“Political party” is further defined to mean “an organisation whose object, or one of whose objects, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part.”

A list of registered political parties in Queensland can be found at: http://www.ecq.qld.gov.au/asp/index.asp?pgid=184

[38.090] Commonwealth

A “registered political party” under the Commonwealth Electoral Act 1918 (Cth) means “a political party that is registered under Part XI” 73 (Registration of Political Parties).

A “political party” is further defined in the Act to mean “an organisation the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it”. 74

A list of registered Commonwealth political parties can be found at: http://www.aec.gov.au/_content/who/party_reg/index.htm

[38.100] Public or other authority

Refer: [34.010] – [34.040] definition of “public or other authority”.

38 Interpretation

(1) In this division

‘community work’ means work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, recreational, political, educational or cultural purpose.

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72 Electoral Act 1992 (Qld), s 4.
73 Commonwealth Electoral Act 1918 (Cth), s 4.
74 Commonwealth Electoral Act 1918 (Cth), s 4.
[38.110] The activity test: community work

To qualify for protection, the volunteer must be performing “community work” organised by a “community organisation”, or as an office holder of a community organisation.

Refer: [38.010] – [38.100] definition of “community organisation”; [38.220] definition of “organised”.

This is referred to as the activity test. Work is defined widely to include “any activity”, so most activity will be considered work (refer [38.250]). The limiting factor is “community”.

For work to be considered “community” work, two elements must be present:

1. The work must not be performed for direct private financial gain; and
2. It must be done for one of the stated purposes.

Whether an activity meets these two requirements of “community work” will be assessed objectively. 75

First, the requirement of “not for private financial gain” limits the application of the volunteer protection provisions to work performed for nonprofit purposes. Work will not be considered community work if people receive a direct private financial benefit from the work undertaken.

For example, if a cook is paid for preparing meals by the meals on wheels service, or a vet is paid to treat sick animals by a community organisation, this would be work for the direct financial gain of the person. Similarly, where a community organisation organises work to be performed which results in profit being distributed to members of the organisation, the work would be performed for the direct financial gain of the members.

Work will not be for private financial gain where any profit made from its activity goes back into the operation of the organisation to carry out its purpose (if a nonprofit organisation), or is distributed to another organisation for carrying out a particular nonprofit purpose (if a ‘for profit’ organisation). For example, a ‘for profit’ organisation that ‘organised’ its workers to volunteer their services outside work hours to raise funds to be distributed to a nonprofit organisation that educated the public about skin cancer would be “organising the doing of community work”. In such a case, the work would have been performed to generate funds to be distributed to a nonprofit organisation to carry out a charitable purpose and not for the direct private financial gain of the organisation, its members, workers or volunteers.

Refer: [38.120] – [38.140] meaning of “charitable purpose” at law.

Second, the work organised by the community organisation must be performed one of the listed purposes (refer [38.120] – [38.220]). The list of purposes included in the definition of community work is broad and it is likely that most work that is undertaken by volunteers would be able to fall within the one of the purposes. Work undertaken by volunteers that is not found to come within the listed purposes will fall outside the protection provisions.

There are two issues of general note in the interpretation of the activity test:

- the definition focuses on the purpose of the activity, not the overall purpose of the organisation; and
- the permitted purposes are lists of overlapping words and meanings which are likely to be construed by a court in a wide rather than a narrow sense.

Nonprofit organisations usually have an identifiable purpose or mission such as “to provide a ‘meals on wheels’ service in the suburb of …” or “to provide care to sick and injured native animals.” These purposes may be achieved by organising a vast number of activities, including fundraising events, cooking, transport delivery, running a vet clinic and advocacy. The requirement of community work is primarily directed to the nature of the activity the volunteer is organised to perform, rather than the purpose, primary mission or character of the organisation.76 Therefore, whether a volunteer is performing community work will depend on what work the volunteer is actually doing, rather than the object of the organisation.

It should be noted that to determine whether a volunteer is performing community work, the activity of the volunteer to be assessed is the general activity the being organised, not the specific conduct that caused the incident.77

[38.120] Charitable purpose

Charitable purpose is not defined in the Act. The word ‘charity’ has several meanings in law and in general usage. In the context of these provisions, it will take its technical legal meaning which can be quite different from its common usage. However, because the term ‘benevolent’ is also used in the list of purposes, in the vast majority of instances, the general meaning of ‘charity’ in common usage will also be covered.

[38.130] What is included as a charitable purpose?

For a purpose to fall within the technical legal meaning of ‘charitable’ at common law, it must be:

- within the spirit and intendment of the Statute of Charitable Uses 1601; and
- beneficial to the community (public benefit test).78

To fall in the spirit and intendment of the Statute of Charitable Uses 1601 the purpose must be within, or analogous to, the purposes set out in the preamble to that Statute, or purposes that the courts have found to be charitable within the technical legal meaning.79

The four main groups of charitable purposes are:

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76 The ‘organisational test’ determining whether a body is a community organisation looks at the character of the body. Refer [38.0.0]
79 Australian Taxation Office, Draft Taxation Ruling, TR 1999/D21 at [33].
relief of poverty or sickness or the needs of the aged;
advancement of religion;
advancement of education; and
other purposes beneficial to the community.\textsuperscript{80}

A statutory extension to the meaning of ‘charitable purpose” is contained in section 103 of the \textit{Trusts Act 1973} (Qld).\textsuperscript{81} Under section 103, it is deemed charitable to “provide, or to assist in the provision of, facilities for recreation or other leisure time occupation, if the facilities are provided in the interests of social welfare.” It is unlikely, however, that this statutory extension does much to extend the definition of community work, as both “sporting” and “recreational” purposes are included in the definition of community work.

Refer: \[38.170\] meaning of sporting purpose;
\[38.180\] meaning of recreational purpose.

To be a charitable purpose it must also be beneficial to the community. This is often referred to as the ‘public benefit test’. The public benefits intended by charitable purposes are of worth, advantage, utility, importance or significance. They can be tangible, like the accommodation provided by a hostel for the homeless, or intangible like the moral benefits derived from prevention of cruelty to animals.\textsuperscript{82} The benefit must, however, be real or substantial, it cannot be negligible.\textsuperscript{83}

Importantly, to be for the public benefit the benefit does not have to be for the whole community and may be for an appreciable section of the public.\textsuperscript{84} Some limits are therefore acceptable as to who can benefit from the activities of community work, such as:

- residents of a particular geographic area;
- people who practice a particular religion; or
- sufferers of a particular disability or condition.\textsuperscript{85}

However, a purpose will not be for the public benefit if the community organisation limits access to benefits on the basis of circumstances such as:

- family ties;
- employment with a particular employer; or
- membership of a particular association.\textsuperscript{86}

The only exception to the requirement of public benefit is if the purpose is for relief of poverty. Where this is the case, the benefit does not need to be for the community or a section of the community.\textsuperscript{87}

Some examples of charitable purposes at common law are:

\textsuperscript{80} \textit{Income Tax Special Commissioners v. Pemsel} [1891] AC 531.
\textsuperscript{81} Similar extensions are also found in other States and Territories. For example, see \textit{Trustee Act 1936} (SA), s 69 C.
\textsuperscript{82} \textit{Re Pinion} [1965] Ch 85; [1964] 1 All ER 890.
\textsuperscript{83} Australian Taxation Office, \textit{Draft Taxation Ruling TR 1999/D21 at [30].}
\textsuperscript{84} Australian Taxation Office, Draft Taxation Ruling, TR 1999/D21 at [9].
\textsuperscript{87} \textit{Dingle v. Turner} [1972] 1 All ER 878.
providing drug rehabilitation services;
providing youth and women’s refuges;
providing refugee welfare centres;
building or repairing religious buildings;
spreading religious doctrine and practice;
promoting health, for example, through educating the public about a particular disease;
protecting animals;
preserving historic buildings.  

[38.140] What is not included as a charitable purpose?

A number of purposes have been found not to be charitable. These purposes include:

1. To confer private benefit

For example, to gain or profit for private persons, promoting the common interests of persons in their private capacities, providing mutual benefits for persons in their private capacities, and conferring benefits on persons in their private capacities are purposes not regarded as charitable.

2. Sporting, recreational or social

These purposes are not usually considered charitable at common law. However, the statutory extension of charitable purpose in the Trusts Act 1973 (Qld) would be likely to make work carried for these purposes be considered “charitable”. Work performed for such purposes would, however, have to meet the statutory requirements of being provided in the interest of social welfare, as well as the requirement of being for the public benefit, to be considered charitable.

Refer: [38.120] statutory extension of charitable purpose in the Trusts Act 1973 (Qld).

3. Illegal or against public policy

Any purpose that is illegal or against public policy will not be considered a charitable purpose. For example, work performed by a society for the purpose of encouraging and funding terrorism in Australia would not be considered to be for a charitable purpose as it is illegal.

4. Political, lobbying or merely promotional

Purposes such as advocating a political party or cause, attempting to change the law or government policy, or promoting a particular point of view are not considered charitable. This is so even if the subject matter of the change may be beneficial to the

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88 Australian Taxation Office, Charities: new endorsement measures from 1 July 2005 (2005, Canberra), p 4
90 Trusts Act 1973 (Qld), s 103.
91 Trusts Act 1973 (Qld) , s 103 (3).
community or is of particular concern to the community. For example, the National Anti-Vivisection Society was held not to be charitable in part because one of the main objects of the Society was to seek to repeal the *Cruelty to Animals Act 1876* and to institute a new law prohibiting vivisection.

However, if the political, lobbying or promotional purposes are merely incidental to a purpose that is otherwise charitable, it is possible that the purpose can be considered charitable.

5. Governmental

The purposes of government in carrying out its functions are not charitable. This is so even the activities are such that if carried on by private people they would be charitable. Funding by government and establishment of an entity by statute can, however, be consistent with a charitable purpose.

6. Vague or insufficient value for the community

If the value or benefit of a purpose cannot be clearly identified or is insufficient, the purpose will not be considered charitable.

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**Further reference on the meaning of charitable purpose**

For further reference on the technical definition of ‘charitable’ refer to the ATO publications:

- Tax Ruling TR 1999/D21;
- Income Tax Guide for Non-profit Organisations, NAT 7967-5.2003; and

These publications are accessible from the ATO website: [www.ato.gov.au](http://www.ato.gov.au)

It should be noted that the recent federal statutory extension of the common law meaning of charitable purpose by the *Extension of Charitable Purpose Act 2004* (Cth) will *not* apply to the determination of whether particular community work is for a charitable purpose under the New South Wales legislation.

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**Benevolent purpose**

Benevolent purpose is not defined in the Act. The word benevolent in its ordinary meaning is "desirous of doing good, charitable". However, in relation to what is ‘charitable’ it is not synonymous. Benevolence goes beyond charity as it is understood

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95 Section 4 of the *Extension of Charitable Purpose Act 2004* (Cth) extends the common law meaning of charitable purpose to include “the provision of childcare services on a nonprofit basis”. This provision is to take effect from the 1 July 2005.
in law. For example, sending a particular child abroad for a medical operation may be for a benevolent purpose, rather than a charitable purpose.\textsuperscript{97}

Australian courts have defined needs requiring benevolent relief, in respect of “public benevolent institution”, (PBI) as conditions or misfortunes that arouse pity or compassion in the community.\textsuperscript{98} Needs may be caused by factors such as poverty, lack of financial resources, disability or sickness. These needs, however, are limited to human needs only. An organisation for the relief of suffering animals will not be a public benevolent institution.\textsuperscript{99}

It is important to note that for federal tax purposes, PBIs activities are required to be conducted directly towards people in need of relief and not just towards social welfare in the community generally.\textsuperscript{100}

Examples of work that may be considered to be for a benevolent purpose, depending on its particular circumstance, include operating:

- an aged persons’ club to alleviate the misfortune flowing from loneliness suffered by aged people who are unable to readily mix in society;
- an aged persons’ hostel for the relief of persons suffering sickness or incapacity who are unable to otherwise afford reasonable accommodation;
- a counselling organisation to provide help and relief for alcoholics or recently discharged prisoners;
- a youth club for youths from poor and disadvantaged backgrounds that is directed towards providing services to relieve their condition;
- a women’s shelter for women who experience domestic violence.\textsuperscript{101}

Needs that are to be met by education, training and promotion of cultural or social objectives will not normally arouse community compassion and call for benevolence relief. They may, however, do so where the needs arise from poverty or helplessness.\textsuperscript{102}

\section*{[38.170] Philanthropic purpose}

Philanthropic purpose is not defined in the Act. ‘Philanthropic’ is a word of narrower meaning than ‘benevolent’ but wide enough to encompass purposes not technically charitable.\textsuperscript{103} A philanthropic purpose is one that is concerned with goodwill towards humankind at large, rather than to a particular individual only.\textsuperscript{104}

For example, a nonprofit organisation which does preventative work and funds other organisations would be considered to be performing work for a philanthropic purpose.

\textsuperscript{98} Australian Taxation Office, Taxation Ruling TR2003/005 at [10].
\textsuperscript{100} Australian Taxation Office, Taxation Ruling TR2003/005 at [13].
\textsuperscript{101} Australian Taxation Office, Taxation Ruling TR2003/005 at [132]-[159].
\textsuperscript{102} Australian Taxation Office, Taxation Ruling TR2003/005 at [10].
\textsuperscript{103} Re Macduff[1896] 2 Ch 451 at 486 per Stirling J.
\textsuperscript{104} Re Macduff[1896] 2 Ch 451 at 457 per Stirling J.
[38.180] Sporting purpose

Sporting purpose is not defined in the Act. Sport has been defined as any game, exercise, past-time, fight or contest, including:

- any form of racing (such as bicycle, foot, or horse racing);
- cricket or football matches; and
- swimming carnivals.\(^{105}\)

For the purposes of taxation under the *Income Tax Assessment Act 1997* (Cth), it has been determined that the terms ‘game’ or ‘sport’ should generally be given their ordinary meaning.\(^{106}\) This includes all athletic and non-athletic games such as chess, hunting and motor racing.

Railway modelling\(^{107}\) and philately (stamp collecting)\(^{108}\) have been determined not to be a game or sport. This is because the ordinary meaning of sport involves an element of physical activity and competition\(^{109}\) (lacking in railway modelling and philately).\(^{110}\)

[38.190] Recreational purpose

Recreational purpose is not defined in the Act. Recreation is a pastime, amusement, or occupation that refreshes or enlivens the mind, the spirits or the person.\(^{111}\) Examples of recreational activities are fishing, ballroom dancing and reading.

[38.200] Political purpose

Political purpose is not defined in the Act. The ordinary meaning of a political purpose would include all matters concerned with the state, government or with public affairs generally.

In the law of trusts, a political purpose has been considered to be a purpose that can only be achieved by legislative action\(^{112}\) or government policy.\(^{113}\) For example, an attempt to change laws, to reverse current laws, or to keep the status quo would be a political purpose.\(^{114}\) Similarly, an attempt to change government policy or particular decisions of governmental authorities would be a political purpose.

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106 Australian Taxation Office, Taxation Ruling TR 97/22 at [12].
107 Case 10/93, 93 ATC 152.
108 Australian Taxation Office, Taxation Determination, TD 94/30 at [10].
110 Australian Taxation Office, Taxation Determination TD 94/30 at [10].
112 Royal North Shore Hospital of Sydney v A-G (NSW) (1938) 60 CLR 396.
Courts have determined the following purposes to be political:

- applying moral pressure to governments or authorities to secure the release of prisoners of conscience;\(^{115}\)
- campaigning to replace the existing law with legislation prohibiting medical experiments on animals altogether;\(^{116}\)
- a society set up to promote voluntary euthanasia;\(^{117}\)
- an aim to improve national and international relations through political means;\(^{118}\)
  and
- the promotion of education in and promulgation of the views of a political party.\(^{119}\)

For example, a volunteer handing out ‘how to vote’ cards on outside a polling booth on election day would be performing work for a political purpose. Also included would be a volunteer engaged by an organisation that aimed to improve political relations between Australia and Indonesia.

[38.210] Educational purpose

Educational purpose is not defined in the Act. Education has been given a wide judicial interpretation to mean a balanced and systematic process of instruction, training or practice containing spiritual, moral, mental and physical elements.\(^{120}\) It is the process of acquiring knowledge about the world and the skills and competencies required to participate effectively in that world. The process may be formal, that is, undertaken through structured courses of study at primary, secondary or tertiary level or informal, that is, acquired by experience of life generally or learning through experience in the workplace.\(^{121}\)

[38.220] Cultural purpose

Cultural purpose is not defined in the Act. The ordinary meaning of the word ‘culture’ includes “the arts and other manifestations of human intellectual achievement regarded collectively” and “the customs, civilisation, and achievements of a particular time or people”.\(^{122}\) Culture is generally associated with the encouragement of art, literature and music, as well as ethnic expression.

Activities conducted by groups of people with similar interests in arts, music and so on must go towards the advancement or encouragement of the interest for it to be considered cultural. The same consideration would apply to the ethnic expression of ethnic groups. For example, an ethnic group performing their ethnic dance would be considered cultural, but if they gathered to play gaming machines for leisure this would not be considered cultural.

\(^{115}\) McGovern v Attorney-General [1981] 3 All ER 493.
\(^{116}\) National Anti-Vivisection Society v. IRC [1948] 2 All ER 217.
\(^{117}\) Re Collier [1998] 1 NZLR 81.
\(^{118}\) Re Koeppler’s Will Trusts; Barclays Bank Trust Co Ltd v Slack [1984] 2 All ER 111.
\(^{119}\) Bacon v Planta (1966) 114 CLR 634.
\(^{120}\) Inland Revenue Commissioners v McMullen [1980] 1 All ER 884 at 893 per Haisham L.
Examples of cultural bodies include:

- societies that encourage and promote cultivation and appreciation of arts;
- ballet foundations; and
- public art galleries, public libraries and public museums.

38 Interpretation

(1) In this division -

‘organised’ includes directed or supervised.

[38.230] Organised

The definition of “organised” is expressed as including directed and supervised. As a general rule where “includes” is used in a definition in legislation, the definition has been inserted to give the word a wider meaning than it would otherwise have. The meaning of “organised” is therefore not limited by the words directed and supervised. Everything that falls within the ordinary meaning of “organised” falls within the meaning of organised for the purposes of the Act.

The words “organised, directed and supervised” suggest the need for an element of ‘control’ to be exercised by the community organisation over the volunteer when performing the community work. There is the notion that the volunteer has been instructed to perform a certain activity, or, at the very least, is recognised in some way by the organisation as performing a certain task.

It is likely that the requirement that community work be “organised” would exclude volunteers who act unilaterally to assist a community organisation without any prior recognition by the organisation. For example, a person who started collecting funds for an organisation without any prior notice to the organisation would probably be outside the definition. Similarly, a person who turned up at a bushfire and began to help the local fire brigade, but who received no recognition from the fire brigade and did not act under their instruction, would also probably be considered outside the definition. In these situations, the volunteer would be assisting without the instruction or knowledge of the organisation, and would have difficulty in seeking protection from liability under the volunteer protection provisions.

It should noted that the requirement that community work be “organised” by the community organisation is in line with widespread practice that requires volunteers to be formally identified before they begin an activity for a community organisation.

38 Interpretation

(1) In this division -

‘volunteer’ means a person who does community work on a voluntary basis.

124 *Robinson v Barton Eccles Board* (1883) 8 AC at 798.
A volunteer is defined as someone who performs work on a voluntary basis. Voluntary basis is not defined specifically in the Act, but indications are given of what will, and what will not, be considered work on a voluntary basis in section 38 (2).

Refer: [38.260] work done on a voluntary basis.

38 Interpretation

(1) In this division -

‘work’ includes any activity.

Work is defined widely to include “any activity”. Thus, the type of work performed by a volunteer may encompass any activity and, provided he or she meets the other criteria, they will be protected. Most importantly, the work must be community work: performed not for financial gain and for one of the stated purposes.

Refer: [38.110] – [38.220] definition of community work

38 Interpretation

(2) For the purposes of this division—

(a) community work done by a person under an order of a court is not to be regarded as work done on a voluntary basis; and

(b) community work for which a person receives remuneration by way of reimbursement of the person’s reasonable expenses in doing the work is to be regarded as work done on a voluntary basis.

Work done on a voluntary basis

This section provides a guide for the interpretation of when community work will be considered to be done on a “voluntary basis”.

Under the section, a person will be working on a “voluntary basis” where they either:

- provide their services without payment; or
- only receive reimbursement of their reasonable expenses in doing the work.

A person will not be considered to be working on a voluntary basis where they are performing community work under a court order.

Reasonable expenses are not defined in the Act. It is a phrase that in the future may be defined by judicial consideration. The interpretation of reasonable expenses may
involve a comparison of the amount received by volunteers in other organisations doing similar work. A court may also look to community expectations of what may be reasonable expenses for the particular activity the volunteer is involved in. For example, volunteers who receive travel and meal costs incurred while doing voluntary work would probably be considered to be working on a voluntary basis as this is a common practice.

39 Protection of volunteers

A volunteer does not incur any personal civil liability in relation to any act or omission done or made by the volunteer in good faith when doing community work—

(a) organised by a community organisation; or
(b) as an office holder of a community organisation.

[39.010] The protection conferred on volunteers

This section provides a volunteer with immunity from personal civil liability in relation to any act or omission done or made in good faith by them when doing community work:

• organised by a community organisation; or
• as an office holder of a community organisation.

Civil liability excluded from the operation of the Act will not be protected.


[39.020] Personal civil liability

Civil liability is liability for a wrong committed against another person. For example, a volunteer who carelessly causes another to suffer a physical injury, such as a broken leg, would incur civil liability. Civil liability includes the types of liability found in:

• tort (for example, negligence);
• contract (for example, breach of contract); and
• breaches of statutory duty (for example, discrimination).

Incurring personal civil liability renders an individual liable to court proceedings, legal costs and possibly to pay an award of damages depending on the result in the case.

An immunity or protection from incurring personal civil liability means that a volunteer cannot be personally subjected to any claim for damages for harm within the meaning of the Act, for any act or omission performed by him or her while engaged in community work organised by a community organisation. No finding of a duty of care,
or breach of a duty of care, can be found against the volunteer who is protected by the Act.  

[39.030] Act or omission

The protection conferred by the Act is for both acts and omissions. That is, for a positive act and a failure to act. A positive act of a volunteer might be to carelessly place a dangerous object in a thoroughfare causing serious injury to a passer-by who was not aware of the danger. A failure to act may be where a volunteer cleaner fails to clean up an oil slick in an area they are responsible for cleaning which results in serious injury to a passer-by.

[39.040] Good faith

“Good faith” is not defined in the Act. Its general legal definition is acting honestly and without fraud, collusion, or participation in wrongdoing. Thus, a volunteer who performed an act dishonestly in pursuit of his or her activities would not be entitled to protection.

For example, a professional who volunteered his or her services to give advice, and who gave advice to a person that they honestly knew to be wrong, would not be able to claim the protection afforded by the Act if the person suffered damage as a result of following the advice as the act would not have been performed in good faith.

[39.050] Office holder

Office holder is not defined in the Act. “Office” is defined in of the Acts Interpretation Act 1954 (Qld) as “including a position”. This meaning would encompass the secretary and management committee members of an incorporated association. Directors and the secretary of a company limited by guarantee would also qualify. In a letters patent body, the corporators (usually identified by reference to an office such as Chair, General Secretary, Moderator Master of the College or Archbishop) mentioned in the letters patent would fall within the definition, as might other officers not on the face of the letters patent themselves, but included in the constitution of the organisation. In the case of organisations created by a private Act of Parliament similar considerations would apply.

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127 Acts Interpretation Act 1954 (Qld), s 36 (meaning of commonly used words and expressions).  
40 Liability not excluded for criminal acts

This division does not confer protection from personal liability on a volunteer in relation to an act or omission of the volunteer if it is established (on the balance of probabilities) that at the time of the act or omission the volunteer was engaged in conduct that constitutes an offence.

[40.010] No protection available where the volunteer was engaged in conduct that constitutes an offence

The volunteer protection provisions will not be available to a volunteer where at the time of the act or omission they were engaged in conduct that constitutes an offence. The standard of proof required is the balance of probabilities.

The section does not require that action of the volunteer need to be (or have been) considered by a court in its criminal jurisdiction. Further, the section does not require any need to show that the specific activity constituting an offence caused on contributed to the act or omission that gave rise to liability. All that is needed to be shown is that the volunteer was at the time engaged in such conduct.\textsuperscript{129}

A volunteer who is found to have been involved in an offence at the time of the act or omission is not automatically liable for any harm he or she causes. All other relevant sections of the Act, and other law, will continue to apply to establish a volunteer’s liability.

[40.020] Conduct that constitutes an offence

The wording of “conduct that constitutes an offence” is wide enough to include:

- criminal offences;
- regulatory offences; and
- offences under other legislation.

“Offence” is defined in the Criminal Code Act 1899 (Qld) as “an act or omission which renders the person doing the act or making the omission liable to punishment”,\textsuperscript{130} including both criminal offences and regulatory offences.\textsuperscript{131}

Criminal offences comprise crimes, misdemeanours (which are also indictable offences) and simple offences.\textsuperscript{132} An example of a criminal offence is stealing\textsuperscript{133} or fraud.\textsuperscript{134} A regulatory offence is a minor offence. An example of a regulatory offence is a wilful destruction of property casing loss of less than $250.\textsuperscript{135} “Offence” under the Act would also include an attempt to commit either a criminal or regulatory offence, as

\textsuperscript{130} Criminal Code 1899 (Qld), s 2
\textsuperscript{131} Criminal Code 1899 (Qld), s 3 (1).
\textsuperscript{132} Criminal Code 1899 (Qld), s 3 (2), (3).
\textsuperscript{133} Criminal Code 1899 (Qld), s 398.
\textsuperscript{134} Criminal Code 1899 (Qld), s 408C.
\textsuperscript{135} Regulatory Offences Act 1985 (Qld), s 7.
an attempt is, in itself, a punishable offence.\footnote{136} An attempt is where a person, with intent, begins to execute their intention by an overt act but fails to fulfil their intention so as to commit an offence.\footnote{137}

As the section uses the words “an offence”, offences under other legislation would also be included. These offences may be under either state or federal legislation. For example, a volunteer committee member (office holder) of an incorporated association who failed to ensure that the books of the incorporated association were audited within 6 months of the close of the financial year would be engaging in conduct that is an offence under the \textit{Associations Incorporation Act 1981} (Qld).\footnote{138} In such a case, the committee member would not be able to claim the protection under the Act where the incorporated association made a civil claim against them from breach of their fiduciary duty, as the time of the act or omission giving rise to the breach of fiduciary duty they were engaged in conduct that constitutes an offence under legislation.

\section*{[40.030] Balance of probabilities}

The standard of proof to be established is the civil standard only, the balance of probabilities. This differs from the normal criminal standard of beyond reasonable doubt, which is a more onerous standard of proof.

A fact is proved to be true on the balance of probabilities as it is shown that its existence is more probable than not.\footnote{139} It is not a mechanical standard and cannot be met by a mere mechanical comparison of possibilities independently of any belief in reality.\footnote{140}

\section*{41 Liability of intoxicated volunteer not excluded}

The protection from personal liability conferred on a volunteer by this division in connection with any community work does not apply if the volunteer—

(a) was intoxicated when doing the work; and
(b) failed to exercise due care and skill when doing the work.

\section*{[41.010] No protection available where volunteer was intoxicated and failed to exercise reasonable care and skill}

A volunteer may not be able to seek the protection afforded by the Act where they perform community work while intoxicated. Two requirements must be met in order to exclude them from protection. The volunteer must have:

\begin{itemize}
  \item been intoxicated when doing work; \textit{and}
  \item failed to exercise due skill and care when doing the work.
\end{itemize}
**[41.020] Intoxication**

“Intoxicated” is defined in Schedule 2 of the Act as meaning “the person is under the influence of alcohol or a drug to the extent that the person’s capacity to exercise proper care and skill is impaired.” There are two points to note about his definition.

Refer: Sch 2, definition of “intoxicated”.

First, the definition makes no explicit delineation made between drugs taken for medical and non-medical purposes. On this basis, it is possible that a drug taken for medical purposes that causes drowsiness may operate to exclude the volunteer protection provisions. It is therefore imperative to warns volunteers on medication to be aware of the effects of the medication.

Second, to satisfy “intoxication” the influence of the drug on the person must be such that his or her capacity to exercise proper care and skill is impaired. This phrasing imports a higher degree of impairment than simply ‘under the influence’. Whether a volunteer's capacity is impaired in such a way is a question of degree and a matter of fact for determination in each case.

The Act does not appear to provide for any ability of the volunteer to argue that the intoxication was involuntary.

**[41.030] Failure to exercise due skill and care**

In addition to intoxication, the failure of the volunteer to exercise due care and skill when doing the work must also be established. Whether a volunteer is intoxicated or not will be irrelevant to establishing this second limb.

The limb may be established by reference to a comparison of standards normally practised in the workplace while conducting that activity and the conduct of the volunteer. A court may also inquire into the standards that may have been exercised by a 'reasonable person' in the position of the volunteer (who was not intoxicated).

For example, a volunteer who consumed a number of beers over their lunch break would possibly come within the definition of intoxicated. However, if they still adhered to the appropriate safety standards when returning to work and did not fail to exercise due care and skill, they would not come within the exception.

**42 Liability of volunteer not excluded if acting outside scope of activities or contrary to instructions**

This division does not confer protection on a volunteer from personal liability in relation to an act or omission of a volunteer if the volunteer knew or ought reasonably to have known that he or she was acting—

(a) outside the scope of the activities authorised by the community organisation concerned; or
(b) contrary to instructions given by the community organisation.
[42.010] No protection available where volunteers knowingly act outside their scope of activities or contrary to instructions

A volunteer will remain personally liable if he or she knew, or ought reasonably to have known, he or she was acting:

- outside the scope of activities authorised by the community organisation; or
- contrary to instructions given by the community organisation.

[42.020] Volunteer knew: actual knowledge

"Knew" denotes actual knowledge of the volunteer that they were acting in one of stated ways. Actual knowledge is knowledge that a person consciously has with regard to a course of events or a particular situation. That is, they actually know a certain state of affairs to be the case. For example, a person has actual knowledge of the colour of their eyes. The test for actual knowledge is subjective and a question of fact.141

[42.030] Volunteer ought reasonably to have known: constructive knowledge

The phrase “ought to have known” is often described as constructive knowledge. Constructive knowledge is ‘notice’ amounting to knowledge that is imputed to a person by a court in circumstances where the presumption of knowledge is so strong that it cannot be rebutted.142 Constructive knowledge differs from actual knowledge in that it is imputed to the person, rather than the person actually knowing it or being consciously aware of it.

Constructive knowledge may be imputed to a person where they:

- wilfully shut their eyes to the obvious;
- wilfully and recklessly fail to make reasonable inquiries that an honest and reasonable person would make;
- have knowledge of circumstances which would indicate the facts to an honest and reasonable person; or
- have knowledge of circumstances that would put an honest and reasonable person on inquiry.143

The test is principally objective, but has a subjective element that allowance may be had for the social and professional background of the particular person in certain circumstances. For example, where the person has some special knowledge that would make them more aware of a particular fact than the ordinary person they may be found to have constructive knowledge where the ordinary person would not.

In the context of volunteers and community work, where a volunteer is performing work that is usually performed by people with experience and professional training, then if

141 Swinton v China Mutual Steam Navigation Co Ltd (1951) 83 CLR 553
142 Hewitt v Loosemore (1851) 68 ER 586.
the volunteer has no experience or little training in that area, they will not be required to carry out the work at the same standard as that of a volunteer with professional qualifications.

[42.040] Acting outside the scope of activities authorised by the community organisation

Where volunteers act with actual or constructive knowledge outside the scope of activities authorised by the organisation they will be unable to claim the protection afforded by the Act.

An example of where a volunteer would have actual knowledge of acting outside the scope of activities they had been authorised to perform would be where a volunteer was deliberately told not to do a certain activity, and then proceeded to do that activity. If the volunteer incurred liability by doing that activity, he or she would come within the exemption and remain personally liable unless a form of protection outside the Act applied to the situation.

Constructive knowledge of acting outside the scope of activities authorised may arise where a volunteer is trained, authorised and specifically asked to perform only certain activities as part of his or her work. In such a situation, the volunteer would have constructive knowledge that other activities unrelated to those expressly stated would be outside the scope of activities authorised by the community organisation.

For example, volunteers who are engaged to ‘check bags’ for prohibited items at the entrance to a festival would have constructive knowledge that they were not authorised to perform unrelated activities outside this specification, such as assisting with the administration of first aid. The knowledge they have about their specified role would indicate to an honest and reasonable person that this activity was not authorised. A volunteer who administered first aid in these circumstances would be unable to claim the protection afforded by the Act should he or she injure someone. The situation would be different, however, if the volunteer was asked help with the administration of first aid at the first aid tent by the community organisation because of short staffing. In this situation, the activity of the volunteer would be within the scope of activities authorised by the community organisation.

[42.050] Acting contrary to instructions given by the community organisation

Where volunteers act with actual or constructive knowledge contrary to the instructions given to them they will be unable to claim the protection afforded by the Act.

An example of where a volunteer would be acting with actual knowledge contrary to the instructions given by the community organisation would be where a person is instructed to perform one activity in a particular way and then does not follow those instructions in performing the activity, or proceeds to do another activity wholly unrelated. In both circumstances the volunteer would be acting with actual knowledge contrary to instructions given by the community organisation as they were instructed to only perform a certain activity in a certain way.
The question of a volunteer acting with constructive knowledge contrary to the instructions given by the community organisation may not be quite as clear cut as actual knowledge. The operation of the exception will depend on the amount of information given to a volunteer about how to perform the activity and whether they were instructed properly (if at all). In some circumstances, it may not be possible to say that a volunteer was acting contrary to instructions as they will have not have been provided with enough information on which to discern what their limits of their instructions actually were. Any liability incurred in such a situation may arguably be subject to the volunteer protection provisions and not come within the operation of the exception.

[42.060]  Practical Considerations

These exceptions to protection reinforce the need to be clear about the scope of a volunteer’s set activities and the instructions given to them. An accurate record should be maintained of:

- instructions about how to perform a certain task; and
- the exact scope of the authorised activities of the volunteer.

At first sight, it might be thought that giving volunteers a wide scope of authorised activities and limited instructions would benefit volunteers as the exception to their protection would be limited. Conversely, a documented scope of authorised activities and detailed instructions may result in the volunteer being more likely to be within the exception and thus unable to claim the protection afforded by the Act.

On reflection, the appropriate response is to properly train, manage and supervise the volunteer in order to avoid harm and injury to the volunteer and others. This is more appropriate behaviour for both volunteers and community organisations and accords with proactive risk management practices.

43  Liability not excluded if insurance required

This division does not confer protection from personal liability on a volunteer if the liability is a liability that is required under a written law of the State to be insured against.

[43.010]  No protection available where insurance is required under statute for the liability incurred by the volunteer

The protection is not afforded if a policy of insurance is required to be held by a written law of Queensland in relation to the work the volunteer is performing. It is irrelevant upon whom the compulsory obligation to insure is placed for the exception to operate.

The section is phrased in a way that the insurance cover must extend to, as insured, the volunteer for his or her liability, and not just cover some other person upon whom the obligation to insure is placed. For example, section 70 of the Associations Incorporation Act 1981 (Qld) requires an incorporated association to maintain insurance “in respect of damage to property, death or bodily injury occurring on the property of the incorporated association for a cover of at least $ 1,100,000”. The wording of the requirement does not refer to coverage of any person other than the
association. Accordingly, there is no legislative requirement for the volunteer’s individual liability to be covered by insurance and the exception would not be invoked by this provision.144

If the obligation to insure exists under a federal law, the exception will not apply.

44 Liability not excluded for motor accidents

The protection from personal liability conferred on a volunteer by this division does not apply if the liability would, apart from this division, be covered by a compulsory third party insurance policy under the Motor Accident Insurance Act 1994, or be recoverable from the Nominal Defendant under that Act.

[44.010] No protection available where the liability incurred by the volunteer is covered by compulsory third party motor vehicle insurance

Where a volunteer is involved in a motor accident that causes personal injury to a third party, the protection provisions will not apply to the liability incurred for personal injury. This exception to protection does not have a significant impact on the individual volunteer, or the community organisation, as the liability for the injury is covered by a statutory scheme.

Under Compulsory Third Party (CTP) insurance schemes (which occur upon registration of a vehicle), a person is covered for personal injury costs for people involved in motor vehicle accidents including drivers, passengers and pedestrians. CTP insurance schemes ensure that a person injured by the acts of another in a motor vehicle will be able to be compensated. The absence of mandatory insurance would mean that people injured in a motor accident would have to seek compensation through costly private legal action with the risk that they could be unsuccessful.

The Nominal Defendant is a statutory body set up under the Motor Accident Insurance Act 1994 (Qld) to pay out claims where a motor vehicle accident occurs and either the driver is uninsured,145 the insurer has become insolvent,146 or the driver or insurer cannot be identified.147 Therefore, even if a motor vehicle controlled by a volunteer while performing community work:

- is registered or unregistered, or
- the insurer has become insolvent; or
- the driver or insurer cannot be identified;

the volunteer protection provisions will still not apply as the motor accident statutory scheme will cover the field.

Any property damage or economic loss caused by the accident is not covered by the exception as only personal injury is covered by the CTP scheme. The volunteer

145 Motor Accident Insurance Act 1994 (Qld), ss 31 (1) (c), 33 (1).
146 Motor Accident Insurance Act 1994 (Qld), s 33 (2).
147 Motor Accident Insurance Act 1994 (Qld), ss 31 (1) (d), 33 (1).
protection provisions will thus apply to a claim for damages for either of these types of harm resulting from a volunteer’s involvement in a motor vehicle accident.

SCHEDULE 2: DICTIONARY

‘claim’ means a claim, however described, for damages based on a liability for personal injury, damage to property or economic loss, whether that liability is based in tort or contract or in or on another form of action, including breach of statutory duty and, for a fatal injury, includes a claim for the deceased’s dependants or estate.

‘community organisation’, for chapter 2, part 3, division 2, see section 38.

‘community work’, for chapter 2, part 3, division 2, see section 38.

‘damages’ includes any form of monetary compensation.

‘duty’ means—

(a) a duty of care in tort; or

(b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or

(c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b).

‘duty of care’ means a duty to take reasonable care or to exercise reasonable skill (or both duties).

‘harm’ means harm of any kind, including the following—

(a) personal injury;

(b) damage to property;

(c) economic loss.

‘intoxicated’, in relation to a person, means that the person is under the influence of alcohol or a drug to the extent that the person’s capacity to exercise proper care and skill is impaired.

‘organised’, for chapter 2, part 3, division 2, see section 38.

‘personal injury’ includes—

(a) fatal injury; and
(b) pre-natal injury; and

(c) psychological or psychiatric injury; and

(d) disease.

‘volunteer’, for chapter 2, part 3, division 2, see section 38.

‘work’, for chapter 2, part 3, division 2, see section 38.

[S2.010] Dictionary

The dictionary provides the "special" meanings of particular words used in the Act. Where the words listed in the dictionary are used in the Act, they have the meanings given to them by the dictionary and not their ordinary meanings.

Where words defined in the dictionary have been used in the annotations, the definition of these words has been explained under the relevant section.
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