

Submission to the New South Wales Government – Better Regulation Division (‘BRD’) on the 2016/2017 Statutory Review of the Work Health and Safety Act 2011 (NSW)

December 2016

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Opening

Local Government New South Wales (**LGNSW**) is the peak body for local government in NSW, representing the interests of New South Wales general-purpose councils, associate members including special-purpose county councils, and the New South Wales Aboriginal Land Council.

LGNSW is registered as an industrial organisation of employers under the *Industrial Relations Act 1996* (NSW) and separately under the *Fair Work (Registered Organisations) Act 2009* (Cth).

We thank the New South Wales Government – BRD, for the opportunity to provide a written submission on the 2016/2017 statutory review of the *Work Health and Safety Act 2011* (NSW) (**‘the WHS Act’**).

Executive Summary

In this submission, LGNSW responds to two (2) of the Focus Questions contained in the discussion paper entitled “Statutory review of the Work Health and Safety Act 2011” (**‘the discussion paper’**) emailed to LGNSW on 10 November 2016 by the New South Wales Government – BRD.

In preparing this submission, LGNSW has addressed those focus questions which have the greatest industrial impact on our membership. It is LGNSW’s position that the Industrial Relations Commission (‘IRC’) should retain its decision making functions in relation to deciding applications to disqualify a health and safety representative (‘HSR’) and reviewable decisions under the WHS Act.

Response to Focus Questions

Question 12

Do you have any comment regarding the IRC being the forum that can receive and decide whether to disqualify a HSR?

LGNSW response

The provisions of the WHS Act designate that the IRC is the relevant forum to receive and determine applications to disqualify a HSR for certain reasons which are set out in s.65 of the WHS Act:

s.65 Disqualification of health and safety representatives

(1) An application may be made to the Industrial Relations Commission to disqualify a health and safety representative on the ground that the representative has:

- (a) exercised a power or performed a function as a health and safety representative for an improper purpose, or*
- (b) used or disclosed any information he or she acquired as a health and safety representative for a purpose other than in connection with the role of health and safety representative.*

(2) The following persons may make an application under this section:

- (a) any person adversely affected by:*
 - (i) the exercise of a power or the performance of a function referred to in subsection (1) (a), or*
 - (ii) the use or disclosure of information referred to in subsection (1) (b),*
- (b) the regulator.*

(3) If the Industrial Relations Commission is satisfied that a ground in subsection (1) is made out, the Commission may disqualify the health and safety representative for a specified period or indefinitely.

An application to disqualify a HSR may be made on the ground that the HSR has exercised a power or performed a function as a HSR for an improper purpose. The IRC may disqualify the HSR (either for a specific period or indefinitely) if it is satisfied that an improper purpose has been made out.

An improper purpose might include, for example, where a HSR exercises the power to inspect a workplace (s. 68(2)(a) of the WHS Act), but that power is exercised in connection with a current industrial dispute as opposed to one of the prescribed purposes set out in ss. 68 and 69 of the WHS Act. In this example, any person adversely affected by the exercise of the power for an improper purpose may make an application under s.65 of the WHS Act to disqualify the HSR.

In LGNSW's opinion, the IRC is the appropriate forum to hear these applications. There are often industrial underpinnings to these applications which the IRC is aware of through its role in assisting the parties to resolve an industrial dispute. The below case study demonstrates this point.

LGNSW had a member council with an ongoing industrial dispute before the IRC. One of the local government unions had filed a dispute notification pursuant to s.130 of the *Industrial Relations Act 1996* (NSW) notifying the IRC of a dispute between the parties. In the interim, a HSR of the union exercised the power afforded under s.68 of the WHS Act to inspect the workplace of the member council. The member council alleged that the HSR of the union had exercised the right of inspection for the improper purpose of obtaining additional information in relation to the industrial dispute.

In this case, the member council made an application to have the union official disqualified as a HSR. The IRC heard the application. The IRC had some background knowledge pertaining to the substantive industrial dispute which was considered in the context of the application to have the union official disqualified as a HSR.

LGNSW submits that as the IRC often has knowledge of the industrial issues underpinning an application under the WHS Act to disqualify a HSR, it is the appropriate forum to receive and decide these applications.

Question 30

Do you wish to make a comment about the IRC being the nominated external body to receive and decide an application for review of a reviewable decision made by the regulator?

LGNSW response

Decisions that are made under the WHS Act are able to be reviewed by the provisions in Part 12 of the WHS Act. Decisions made by Inspectors are mostly reviewable by the Regulator (that is, internal review) before the decision is able to be reviewed by the IRC (that is, external review).

Specific reviewable decisions are set out in s.223 of the WHS Act:

Item	Provision under which reviewable decision is made	Eligible person in relation to reviewable decision
1	Section 54 (2) (decision following failure to commence negotiations)	(1) A worker whose interests are affected by the decision or his or her representative appointed for the purpose of section 52 (1) (b). (2) A person conducting a business or undertaking whose interests are affected by the decision. (3) A health and safety representative who represents a worker whose interests are affected by the decision.
2	Section 72 (6) (decision in relation to training of health and safety representative)	(1) A person conducting a business or undertaking whose interests are affected by the decision. (2) A health and safety representative whose interests are affected by the decision.
3	Section 76 (6) (decision relating to health and safety committee)	(1) A worker whose interests are affected by the decision. (2) A person conducting a business or undertaking whose interests are affected by the decision. (3) A health and safety representative who represents a worker whose interests are affected by the decision.
4	Section 102 (decision on review of provisional improvement notice)	(1) The person to whom the provisional improvement notice was issued. (2) The health and safety representative who issued the provisional improvement notice. (3) A worker whose interests are affected by the decision. (4) A health and safety representative who represents a worker whose interests are affected by the decision. (5) A person conducting a business or undertaking whose interests are affected by the decision.
5	Section 179 (forfeiture of seized thing)	The person entitled to the thing.
6	Section 180 (return of seized things)	The person entitled to the thing.
7	Section 191 (issue of improvement notice)	(1) The person to whom the notice was issued. (2) A person conducting a business or undertaking whose interests are affected by the decision. (3) A worker whose interests are affected by the decision. (4) A health and safety representative who represents a worker whose interests are affected by the decision.

Item	Provision under which reviewable decision is made	Eligible person in relation to reviewable decision
8	Section 194 (extension of time for compliance with improvement notice)	(1) The person to whom the notice was issued.(2) A person conducting a business or undertaking whose interests are affected by the decision.(3) A worker whose interests are affected by the decision.(4) A health and safety representative who represents a worker whose interests are affected by the decision.
9	Section 195 (issue of prohibition notice)	(1) The person to whom the notice was issued.(2) The person with management or control of the workplace, plant or substance.(3) A person conducting a business or undertaking whose interests are affected by the decision.(4) A worker whose interests are affected by the decision.(5) A health and safety representative who represents a worker whose interests are affected by the decision.(6) A health and safety representative who gave a direction under section 85 to cease work, that is relevant to the prohibition notice.
10	Section 198 (issue of non-disturbance notice)	(1) The person to whom the notice was issued.(2) The person with management or control of the workplace.(3) A person conducting a business or undertaking whose interests are affected by the decision.(4) A worker whose interests are affected by the decision.(5) A health and safety representative who represents a worker whose interests are affected by the decision.
11	Section 201 (issue of subsequent notice)	(1) The person to whom the notice was issued.(2) The person with management or control of the workplace.(3) A person conducting a business or undertaking whose interests are affected by the decision.(4) A worker whose interests are affected by the decision.(5) A health and safety representative who represents a worker whose interests are affected by the decision.
12	Section 207 (decision of regulator to vary or cancel notice)	(1) The person to whom the notice was issued.(2) The person with management or control of the workplace.(3) A person conducting a business or undertaking whose interests are affected by the decision.(4) A worker whose interests are affected by the decision.(5) A health and safety representative who represents a worker whose interests are affected by the decision.(6) In the case of a prohibition notice, a health and safety representative whose direction under section 85 to cease work gave rise to the notice.
13	A prescribed provision of the regulations	A person prescribed by the regulations as eligible to apply for review of the reviewable decision.

There are often industrial issues which have led to, or had a bearing on, the development of those matters which are subject to external review. For instance, reviewable decisions relating to the failure to commence negotiations (s.54 of the WHS Act) and the constitution of the health and safety committee (s.76 of the WHS Act), are often underpinned by industrial disputation.

The following example demonstrates this point. Section 54(1) of the WHS Act states that a “failure of negotiations” includes “negotiations concerning the variation of an agreement”. LGNSW has observed occasions whereby unsuccessful negotiations relating to one council policy or procedure can lead to unwillingness by the parties to partake in fruitful negotiations in relation to other areas.

LGNSW submits that the IRC often has knowledge of the industrial issues associated with these reviewable decisions and is therefore the most appropriate body to review these decisions.

Concluding Comments

In summary, LGNSW’s position is that the IRC is the appropriate body to decide whether to disqualify a HSR under s.65 of the WHS Act and review a reviewable decision of the Regulator as tabled in s.223 of the WHS Act.