

LEGISLATIVE APPLICATION

UNION RIGHT OF ENTRY

BACKGROUND

Industrial officers from employee organisations have traditionally had powers of entry to workplaces on a number of grounds under the *Industrial Relations Act 1999*. Often the exercise of these powers has overlapped with workplace health and safety issues.

However, on 27 March 2006, the Federal Government amended the *Workplace Relations Act 1996 (Cth) (WRA)* with the *Workplace Relations Amendment (Work Choices) Act 2005*. As a consequence, from that date, the WRA overrides all union rights of entry under State industrial laws with respect to constitutional corporations with the exception of right of entry provisions under state workplace health and safety laws.

From 17 May 2006, the *Workplace Health and Safety and Other Acts Amendment Act 2006* (the Amendment Act) introduced provisions into the *Workplace Health and Safety Act 1995 (WHSA)* which give authorised representatives of unions (employee organisations) certain powers to allow them to make contributions to workplace health and safety outcomes in workplaces.

The Amendment Act does this through inserting a new Part 7A which provides a transparent and accountable process to allow authorised representatives entry to certain workplaces and relevant workplace areas on workplace health and safety grounds while also providing appropriate safeguards for other parties at the workplace.

However, the *WRA* does not allow the *WHSA* to operate independently. In workplaces that a corporation occupies, otherwise controls, exercises a right, or has a right effected at, then the requirements of Part 7A of the *WHSA* work along side the requirements of the *WRA*. WHSQ inspectors have no power to monitor or enforce compliance with any requirement in the *WRA*.

HOW IS AN AUTHORISED REPRESENTATIVE (AREO) APPOINTED?

An authorised representative (AREO) is an employee or office holder of an employee organisation that has been appointed by the Industrial Registrar after providing evidence to the Registrar that an approved training course has been undertaken (ss 90C and 90D).

On appointment a representative is issued with a photographic identity card that details appointment under the *WHSA* and notes whether there is any other conditions imposed that limit the representative's powers (ss 90E and 90H).

WHAT POWERS DOES AN AUTHORISED REPRESENTATIVE HAVE?

A representative can only exercise (or purport to exercise) a power under the Act for a purpose relating to the workplace health and safety of an eligible member of the representative's employee organisation (s 90N). An eligible member is either a member of the employee organisation or a person eligible to be a member of the employee organisation.

Further a representative only has the power to enter workplaces or relevant workplace areas:

1. if a worker working at the place is an eligible member of the representative's employee organisation; and
2. if the representative:
 - A. reasonably suspects that a contravention of the WHSA involving WHS has happened or is happening at the place that relates to or affects an eligible member at the place (a 90I); or
 - B. is to discuss matters relating to workplace health and safety at the place with an eligible member(s 90J).

Entry to enquire into a suspected contravention of the Act (s 90I)

To enter under section 90I of the Act a representative must have a reasonable suspicion that:

1. a contravention of the Act involving WHS has happened or is happening at the place. *For example there is a suspicion that eligible members are working unprotected at height; and*
2. this contravention relates to or affects an eligible member at the place. *For example: a worker (who is an eligible member) is directed by their employer to do work in an area where the fall protection control measure does not comply with the Workplace Health and Safety Regulation 1997.*

Examples of suspected contraventions can be found in Attachment 1. This list is not comprehensive and only attempts to provide guidance on the type of issues that could be acceptable as suspected contraventions if the AREO came to that conclusion.

Note:

- The term "reasonable suspicion" is to have its ordinary meaning. To have a "reasonable suspicion" a representative must have information that would create a suspicion in the mind of an ordinary person that some provision of the Act may have been contravened. This is an objective test that will be determined on a case by case basis. A reasonable suspicion will usually arise if there has been a complaint by a person, the representative has made an observation, or they are aware that an incident has occurred at a workplace. A known track record of behaviour is usually not sufficient to create such a suspicion.

If a representative's suspicion is found to have been based (in good faith) on a mistake of fact, their entry will be considered lawful. For example, if a representative enters a workplace as a result of a complaint received by a member (or other person) and upon investigation the representative determines that the Act has been complied with, the representative will have acted within their powers of entry under the Act.

- Due to the operation of s3A of the WHSA, an AREO is unable to enter for a suspected contravention of the *Electrical Safety Act 2002* (ESA). However there may be instances where a breach of ESA may influence an employer's ability to meet workplace health and safety obligations as evidenced in Section 29A of WHSA. Eg:
 - incorrect wiring may create the potential for plant to operate incorrectly and expose workers to a risk to their workplace health and safety
 - electrical leads not inspected and tested appropriately is an indication of unsafe plant and equipment
 - working around energised electrical installations may constitute unsafe systems of work

On entry a representative must, as soon as practicable, tell the occupier of his or her presence, and give the occupier a written notice of the entry and reasons for the entry [s90K(2) and (3)]. The written notice should include a brief description of the suspected contravention (Ref: Attachment 1). A representative is not required to disclose the name of an eligible member in this notice.

What is "as soon as practicable"?

Representatives are given a range of powers to enable them to make positive contributions to workplace health and safety within workplaces. In undertaking this role there is an expectation that representatives adopt a cooperative approach and work with employers to resolve workplace health and safety issues. Consequently, the Act provides that the occupier must be made aware of the workplace health and safety issue and be given the opportunity to be involved in the issue's resolution as early as possible.

The term "as soon as practicable" is used to describe the ability of the representative to talk to, or access the occupier (or their representative) in order to tell them that they are at the workplace and, if required, give them the written notice of their reasons for entry. What is considered to be "as soon as practicable" is determined on a case by case basis.

Generally "as soon as practicable" means immediately after the AREO has entered the place; and before any powers are exercised after entry. However, it is recognised that in some circumstances immediate notification will not be possible and exceptions can be made.

Where immediate notification is not possible, notifying the occupier should occur at the earliest opportunity after entry. For example, if the site office is not at the place that the representative entered, it is practicable for the representative to proceed directly to the site office before giving the notice.

Note:

- It will be considered "practicable" to make a telephone call to the occupier (or their representative, eg. supervisor; administrative assistant) after entry to tell them that the representative is at the workplace.
- Generally only after a representative has made reasonable attempts to notify the occupier is it "practicable" to delay notification for the purpose of allowing the representative to exercise their powers after entry. For example, it will also be considered practicable if the representative has left a message on the occupier's (or their agent's) telephone.

In the event of an emergency / serious incident it may be "practicable" to delay notification for a period of time and for the representative to exercise their other powers prior to giving this notification.

It is not considered "practicable" to delay notifying the occupier merely because the representative finds it inconvenient.

What is required to "tell" or "give written notice to" an occupier?

Written notice can be given to an occupier (or their representative) personally, by fax or by email. This does not have to be given at the workplace and can be given to the occupier's head office.

An occupier (or their representative) can be told of the AREO's presence either in person or by telephone. If the AREO is not able to speak to the person in charge at the site this could be done through the occupier's head office.

Under the Act an “occupier” includes a person who reasonably appears to be the occupier or in charge of the place of the workplace. In most instances this will either be the employer or the principal contractor and notification will be able to be given at the workplace. However, it is recognised that there will be occasions when it is not practicable for the AREO to give the occupier (or their representative) written notice or tell the occupier of their presence while they are at the workplace.

If only eligible members are at the workplace (other than the occupier or their representative) then it may be acceptable to give the written notice to the person who currently appears to be in charge of the place, or if necessary, with the receptionist or a person on the gate who receives documents. If these persons refuse to take the written notice it may be “practicable” to arrange to give this notice to the occupier/head office as soon as possible after leaving the site, or alternatively to have the written notice faxed as soon as possible to the occupier/head office, or to leave it at the workplace. In any of these circumstances, it is “practicable” for the AREO to attempt to contact the occupier by telephone to tell them of the AREO’s presence at the workplace.

A notice will usually be considered given or the occupier told of a AREO’s presence if a written notice has been attached to an unattended site office door, or left at an unattended site office if other supporting action has been taken (i.e. advice to workers on site, a telephone call to the occupier, and a diary note of where the notice was left and action taken)

After entry an AREO has a number of powers under s 90I to enable the AREO to enquire into the suspected contravention of the Act. This includes the power to:

- inspect plant, substances or other things relevant to the suspected contravention outlined in their written notice;
- observe work being carried on;
- speak to eligible members with their consent;
- speak to the occupier about matters relevant to the suspected contravention outlined in the written notice;
- require documents (including employment records) to be produced or copied only if the documents are relevant to the suspected contravention outlined in the written notice; and
- require the person to give reasonable help to exercise these powers, for example providing assistance in having documents copied, facilitating discussions between workers and the AREO, and answering questions an AREO may have about the suspected contravention.

Note:

- While plant and machinery maintenance records, risk assessment forms, work method statements, occupational license information and training records have a clear relevance to an AREO’s enquiries, certain employment records may also be a key source of information relevant to a contravention. *For example, timesheets, rosters and overtime records may be very relevant to a complaint about worker fatigue, or vaccination records may be relevant to a complaint about Q-Fever.*
- The Act defines employment records broadly (and in a manner consistent with the definition used in the *WRA* for right of entry on WHS grounds) to ensure that AREOs substantiate the reason for accessing these records.
- The Act does this through requiring a AREO proposing to exercise a power to access or copy employment records relevant to the contravention to give at least 24 hours notice before exercising this power [s90K(4)]. This notice must detail the reasons for the exercise of this power including a brief description on why the employment records are relevant to the suspected contravention.

- If an AREO makes a request of an inspector to assist in the exercising of powers (section 173A of the Act) then the Regional Management Team (RMT) will:
 - gather information from the AREO
 - contact the occupier to gather additional information
 - evaluate the information and make a determination whether the action will be taken under s.173A(3)(c)
 - keep the AREO informed of the status of the request on an ongoing basis
 - Advise the occupier and the AREO of the outcome of the request
- Notwithstanding other restrictions on accessing personal information, it would be rare that an AREO would be able to find relevance between a suspected contravention and an eligible member's workers' compensation claims history. *For example: return to work or suitable duties requirements may be relevant where they prescribe requirements to ensure an eligible member's safety after an injury.*
- A worker's consent is advisable before an AREO accesses any personal information (e.g. next of kin, date of birth, bank account details, home contact details and medical records) of an eligible member.

An AREO has no power to undertake an inspection of any kind of any plant, substances, documents or other things in relation to a workplace health and safety matter unless it relates to the matters outlined in the written notice of entry.

If an AREO, in the course of exercising powers, observes another suspected contravention of the Act, then the AREO must give the occupier a further written notice for the entry (and reasons for the entry), for the new contravention, before exercising any powers in relation to this new contravention.

An occupier is required to give reasonable help to the AREO in exercising these powers (unless the occupier has a reasonable excuse such as it would tend to cause self-incrimination). *For example: the employer (who is an individual) has conducted an investigation into an incident and it revealed potential contraventions of the WHSA, then this document would potentially be self-incriminating, and the employer may refuse access to that report.* However, where an AREO requests assistance the AREO is prohibited from unreasonably hindering or obstructing a worker or another person at the place [s 90N (1)].

The Act does not prevent an occupier requesting that the AREO be accompanied during this visit (eg, a workplace health and safety officer) as long as the person does not obstruct the AREO in the exercise of their powers (s173A). It would be considered unreasonable for the occupier to refuse a request of the AREO that any conversation between a worker and an AREO be private.

After entering a place and exercising powers an AREO may discuss the matters raised with the occupier/employer or Workplace Health and Safety Queensland. However, the AREO is not required to report to any person their findings.

What to expect if an AREO seeks the assistance of a Workplace Health and Safety Queensland inspector.

Requests for assistance by an AREO are normally referred to a member of the Workplace Health and Safety Queensland Regional management team (RMT).

The RMT will:

- gather information from the AREO
- contact the occupier to gather additional information

- evaluate the information and make a determination whether the action will be taken under s.173A(3)(c)
- keep the AREO informed of the status of the request on an ongoing basis
- Advise the occupier and the AREO of the outcome of the request

It should be noted that a response from the RMT may not automatically mean that an inspector will be sent to the workplace. Any action taken to obtain information to assist in making a determination will be dependant on the discretion of the RMT.

It would be expected that the RMT will action the request for assistance within 24 hours of being asked. No timeframe can be given for reaching a resolution but it is expected that an outcome will be delivered promptly. It is also expected that any delays in response will be communicated to the parties involved.

Should any party be dissatisfied with the outcome of the assistance sought, they may request, from the RMT, a written rationale of how the outcome was determined.

Entry to discuss workplace health and safety matters (s 90J)

An AREO may enter under s 90J only to hold discussions on workplace health and safety matters with eligible members who wish to take part in the discussions. These discussions can only take place on a work break (for example: a meal break, periods immediately before a worker commences, or immediately after a worker finishes, work).

On entry an AREO must, as soon as practicable, tell the occupier of his or her presence, and have given the occupier 24 hours written notice of the entry and reasons for the entry.

An occupier is not able to obstruct an AREO in the exercise of this power. By way of example, an occupier may be seen to be hindering the exercise of an AREO's power by restricting access to hold discussions in an impracticable area and by failing to notify eligible members of the AREOs' presence and location.

What is obstruction and what is not obstruction

The word *obstruct*, in the context of the legislation means to *hinder or resist or prevent the progress or accomplishment of* the action of exercising a power given to the AREO by the Act. Obstruction is the purposeful act of making it more difficult for an inspector or AREO, to do that which they are empowered to do, providing the inspector or AREO is acting in good faith.

WHEN POWERS MAY NOT BE EXERCISED?

The Act specifies that an AREO must not:

- exercise (or purport to exercise) a power for a purpose not relating to the workplace health and safety of an eligible member [s90N (2)]. *For example: a AREO cannot exercise a power for the purpose of recruiting membership to their employee organisation;*
- enter a part of a place used as domestic premises without consent of the occupier (s90M(1)(a));

- enter a part of a place or exercise a power, if this is not permitted under another Act [s90M (1) (b)]. *For example an Act which places restrictions around persons who can access detention centres and correctional facilities, or an Act which restricts access to the personal information of third parties (e.g. children, persons with disabilities) who have a relationship with the business or undertaking being conducted at the workplace;*
- enter or remain at a place if the AREO does not comply with a reasonable request of the occupier to comply with a workplace health and safety requirement at the place (s90M (2)). In determining whether a workplace health and safety request is reasonable consideration should be given to alternative ways that workplace health and safety can be achieved. *For example requiring an AREO to undertake a site specific induction on a construction site if the AREO is to be accompanied on the site by a person who has undertaken the induction would not be a reasonable request. It would also not be reasonable for an AREO to be expected to have general induction evidence as the person is not performing construction work;*
- remain at a place if the AREO does not produce their identity card for inspection if asked by the occupier (s90L); or
- use or disclose information for a purpose not relating to the workplace health and safety of an eligible member or without consent of the person who the information relates to [s90N (3)]. Disclosure of information, like an AREO's other powers, is subject to any prohibition placed on the AREO under another Act [s90M (1) (b)].

WHAT CONDUCT IS EXPECTED OF A REPRESENTATIVE

AREOs are given a range of powers to enable them to make positive contributions to workplace health and safety in workplaces. In undertaking this role there is an expectation that AREOs and employers will work together by adopting a cooperative approach to discussing and resolving workplace health and safety issues.

To support this expectation, an AREO must not, in exercising (or purporting to exercise) their powers at a workplace or relevant workplace area:

- unreasonably hinder or obstruct a worker or other person [s90N(1)(a)];
- intimidate or threaten a worker or other person [s90N(1)(b)]; or

WHAT HAPPENS IF A REPRESENTATIVE DOES NOT COMPLY WITH PART 7A?

Where an AREO has contravened a provision of Part 7A or a condition of appointment the appointment may be suspended, cancelled or a condition of appointment amended by the Queensland Industrial Relations Commission (QIRC).

An application for this disciplinary action may only be made by either the Director-General of the Department of Employment and Industrial Relations or an occupier (or a representative of the occupier) (s 90O). The QIRC may determine this application either by written submissions or by a hearing (ss 90P and 90R).

A decision of the QIRC is appealable to the Industrial Court (s 147A).

The Act also provides that a AREO commits an offence only if the AREO's identity card is not returned within 21 days after the AREO stops being an AREO or the appointment is suspended [s90H(3)]. The maximum penalty is 10 penalty units.

WHAT CONDUCT IS EXPECTED OF OCCUPIERS, EMPLOYERS AND OTHERS?

- An occupier (including an employer) must not obstruct an AREO exercising (or purporting to exercise) a power under the Act without a reasonable excuse [s173A (1)].
- Where a AREO suspects a contravention of the Act, an occupier is also expected to provide reasonable help to a AREO in exercising the AREO's powers, unless the occupier has a reasonable excuse such as self-incrimination [s90I(3)]. Mere inconvenience should not be considered a reasonable excuse.
- There is an expectation that the occupier will not provide false or misleading statements or documents to an AREO (ss 171 and 172).
- An employer must not discriminate against or victimise a worker for contacting or assisting a AREO, or discourage or influence a worker from answering questions put to the worker by a AREO [ss174(1), 175(1) and 175(2)].

WHAT HAPPENS IF AN OCCUPIER OR OTHER PARTY DOES NOT COMPLY WITH PART 7A?

If the occupier or other party does not comply with Part 7A, the following penalties may apply:

Section	Offence	Penalty
90C(2)	Employee organisation applies for appointment of a person as an authorised representative who is not an employee of or who does not hold office with the organisation ¹	40 penalty units
90G(2)	Employee organisation does not give notice within 14 days after an authorised representative stops being an employee or holding office with the organisation ¹	40 penalty units
90I(3)	An occupier does not give reasonable help to a representative in exercising their powers under s 90I (without reasonable excuse)	40 penalty units
171(1)	A person states, or omits from a statement, to a representative anything the person knows is false or misleading in a material particular	30 penalty units
172(2A)	A person gives a representative a document the person knows is false or misleading in a material particular	30 penalty units
173A(1)	A person obstructs a representative in the exercise of a power (without reasonable excuse)	40 penalty units
174 (1)	An employer dismisses, or otherwise acts to the detriment of a worker in the worker's employment for the dominant or substantial reason that the worker has contacted or given help to a representative	40 penalty units
175(1)	An employer encourages or influences, or attempts to encourage or influence, by general direction, promise of advantage, threat of dismissal or otherwise a worker to refuse to answer questions put to the worker by a representative.	40 penalty units
175(2)	A principal contractor encourages or influences, or attempts	40 penalty units

¹ WHSQ will be advised of a contravention by an employee organisation on this ground by the QIRC for enforcement action.

Section	Offence	Penalty
	to encourage or influence, by general direction, promise of advantage, threat of dismissal or otherwise a worker to refuse to answer questions put to the worker by a representative.	
176	A person pretends to be a representative.	40 penalty units

MANAGING ISSUES BETWEEN REPRESENTATIVES AND OCCUPIERS

Part 7A of the Act does not restrict or alter the powers of an inspector to monitor and enforce compliance with the Act.

The Act does not prevent an occupier or AREO, who has concerns about compliance with these provisions, raising these with WHSQ.

Where an occupier has a complaint about the actions of an AREO, the occupier can contact WHSQ and lodge a complaint, or alternatively the occupier may make an application to the QIRC for disciplinary action to be taken against the AREO.

Where the AREO is being obstructed by the occupier, the AREO can call on WHSQ to have an inspector provide assistance.

In the case of a disagreement about the seriousness of an issue or whether there is a health and safety issue at all, either party can contact WHSQ. The role of WHSQ in these instances is no different to the role it normally plays in responding to other workplace health and safety complaints.

Resolution of disputes

The *Workplace Health and Safety Act 1995* provides authorised representatives of unions with powers to enter workplaces on prescribed workplace health and safety grounds. Workplace Health and Safety Queensland Inspectors play a key role enforcing compliance with the Act and can be called upon by representatives, or occupiers to provide advice or assistance where they have a concern regarding a representative's entry into a workplace; or where an AREO request assistance in exercising his/her powers.

Section 173A provides that an AREO must not be obstructed in exercising their power, unless there is a reasonable excuse for the obstruction. If the obstruction continues then the AREO may ask an Inspector to help the AREO exercise their power. Obstruction is the purposeful act of making it more difficult for an inspector or AREO, to do that which they are empowered to do, providing the inspector/AREO is acting in good faith.

The three key elements of obstruction are:

- That the obstruction resulted from an act or omission that was intended to obstruct;
- The power that is said to be obstructed must be lawfully exercised by the inspector/AREO; and
- The power must be exercised in good faith.

When called upon to help, an inspector must be satisfied that the steps taken by the person requesting the help meet the relevant requirements of the provisions that they are seeking to enforce.

Where an inspector determines not to help the AREO exercise their powers, then the Inspector should provide reasons for this decision. The reasons provided should be

sufficient to enable the AREO to fully understand the decision made by the Inspector. The AREO may apply for the decision to be reviewed, and if they wish to have the reviewed decision appealed through the Queensland Industrial Relations Commission (QIRC).

In the alternate, there may be occasions where issues remain unresolved between the AREO and the occupier, even after an inspector has provided advice or assistance. Where there are issues between an AREO and an occupier about an authorised representative's entry into a workplace, or a request for assistance in exercising the AREO's powers, either party may make an application, or an inspector may request, for the matter to be conciliated and/or arbitrated by the QIRC.

Examples of suspected contraventions

(The items on the list below are examples only and are provided as guidance. The list is not exhaustive or comprehensive.)

Inappropriate storage of chemicals
Unidentified fumes causing risk to workers
Exposure to hazardous substances
Inappropriate ventilation
Working unprotected at height
Risk of falling objects from height
Failure to conduct inductions
Risk to public from falling objects
Insufficient airflow creating a health risk
Inappropriate/unsafe working in a confined space
Excessive noise
Unsafe plant and equipment
Unregistered plant
Unguarded plant
Inadequate exclusion areas
Inadequate maintenance of plant
Unsafe plant and equipment due to poor testing and maintenance systems
Unsafe plant and equipment due to work performed by an unqualified person
No asbestos register
Inappropriate removal of asbestos
Working around material suspected of containing asbestos
Exposure to uncontrolled asbestos material
Dust creating a risk to worker's health
Unlicensed prescribed occupation workers
Hazardous traffic management on a construction site
Non-compliance with scaffolding regulation
Unsafe operation of cranes
Work related fatigue causing a health risk
Workplace harassment
Tripping hazards as a result of poor housekeeping
Tripping hazards due to poor access and egress
Slippery surfaces
Unsafe manual handling
Lifting and carrying heavy loads
Inadequate amenities
Blocked access to a fire door
Insufficient dining room facilities
Inadequate responses to first aid
Lack of access to drinking water
Inadequate emergency and evacuation procedures
Failure to ensure adequate emergency lighting and signage
Inappropriate and/or inadequate management of risks posed by inclement weather
(i.e. excessive cold; wet weather; excessive heat)