

## **Fire Brigade Employee's Union of New South Wales (FBEU) Submission to the Independent Review of SafeWork NSW (SWNSW) By the Hon. Robert Mc Dougall KC.**

### **Summary of FBEU recommendations**

1. That the current Customer Service Standard Raising a Work Health And Safety Concern Safework NSW May 2017 (the Standard) and any other internal policies and procedures SWNSW Inspectors use to deal with Requests for Service, become a public document negotiated in a tripartite manner between; SWNSW, peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions.
2. That the current Customer Service Standard Raising A Work Health And Safety Concern Safework NSW May 2017 (the Standard), be withdrawn and replaced with a document that follows the following recommendations.
3. That the Standard and any internal policies and procedures SWNSW Inspectors use to deal with Requests for Service, comply with the stated position in S.4 of the WHS Act and the SWNSW Worker Representation and Participation Guide, that Unions are Representatives of Workers.
4. That the new model Standard, internal policies and procedures SWNSW Inspectors use to deal with Requests for Service, set out an agreed standard method of inspection and investigation, consequential to the proper acknowledgement of the role of Unions as representatives of Workers.
5. That the agreed new model Standard method of inspection and investigation, includes Unions and HSRs being informed as soon as possible of a workplace visit and, 'non-field response by requesting information relating to the issues from a PCBU', is no longer used, as it prevents consultation and participation of Workers and their Representatives.
6. That the Industrial Relations Commission of New South Wales, be given jurisdiction to hear disputes about SWNSW inspection and investigation modality.
7. That SWNSW emulate WorkSafe NZ's model of HSR engagement and development. With the addition of an industry focused section tackling common hazards and risks. To be negotiated in a tripartite manner between; SWNSW, peak employer groups public and private sector and Unions NSW and affiliated Unions.
8. That SWNSW negotiates in a tripartite manner between; peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions, to produce S.72 compliant HSR training on all the Codes of Practice and the Regulations, that sit above them.
9. That SWNSW fund and convene an annual conference of HSRs, organised in concert with Unions NSW on behalf of affiliate unions.

10. That SWNSW and the NSW Centre for WHS negotiates in a tripartite manner between; peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions, to produce a research programme focusing on HSRs; HSR formation, the use of HSR functions and powers, what HSRs experience in the workplace when using their functions and powers etc.
11. That SWNSW negotiates in a tripartite manner between; peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions, to review the current training packages applying to SWNSW Inspectors and SWNSW Internal Reviewers.
12. That SWNSW establish a permanent tripartite council, with equal representation from SWNSW, Employers and Unions NSW. It is noted in this respect that, the *Work Health and Safety Act 2011 Statutory Review Report - June 2017*, contained the following recommendation;

*undertaking a review of the manner and form of stakeholder consultative mechanisms and in consultation with key stakeholder organisations, develop a model for tripartite consultation.*

---

## Introduction

The FBEU's membership of approximately 6500 Firefighters, represents around 99% of the Firefighters employed by Fire and Rescue NSW (FRNSW). The FBEU is pleased to have the opportunity to make our Submission to this important Review.

This submission will focus on two elements of the overall Review;

1. The performance and effectiveness of SafeWork NSW's (SWNSW) compliance and enforcement functions following Requests for Service (RFS) by the FBEU.
4. Appropriate measures to ensure that Workers and their Representatives (including Health and Safety Representatives)...have a genuine voice in the complaints, investigation and enforcement processes.

As will be clear below, these elements are often intertwined.

## Problems & Recommendations

i. There is a common thread running through all of SWNSW RFS Issues, that the FBEU has dealt with. That relates to S.4 of the WHS Act and paragraph 3 of page 36 of the SWNSW Worker Representation and Participation Guide (the Guide), as follows;

### *Worker Representatives*

*Under the WHS Act, 'representative' in relation to a worker means the worker's HSR, a union representing the worker or any other person the worker authorises to represent them.*

Through 2022 and 2023, with the WHS Issues that the FBEU needed the Service of SWNSW with, the FBEU was always treated as a customer and not the Representative of Workers / FBEU Members. In any of the matters, there was never an initial discussion with the FBEU as the representative of our members, as to how the Issues were to be investigated. That is there was never a discussion where the FBEU was given the opportunity to contribute to the inspection and investigation processes relating to the matter.

So SWNSW ignored S.4 of the WHS Act and their own Worker Representation and Participation Guide, every time the FBEU had dealings with them. Consequentially the FBEU was excluded when the relevant Inspector visited the relevant workplaces and met with FRNSW as the person conducting the business or undertaking (PCBU).

The FBEU has never been notified when the Inspector would be visiting relevant workplaces, so we could have been prepared for such a visit, be present on the day and inform our members in advance, as to what was happening to resolve their health and safety issues.

Even that sort of notice would have often been futile, as the Inspector would sometimes conduct their inquiry using a *'non-field response by requesting information relating to the*

*issues*, upon which the Inspector would then issue a report to the FBEU and FRNSW. Clearly this method of operation denies natural justice to the affected Workers and their Representative the FBEU, to respond to the information supplied by FRNSW.

So, the FBEU seeks a recommendation from this Review, that the new Standard and any internal policies and procedures SWNSW Inspectors use to deal with Requests for Service, comply with the stated position in S.4 of the WHS Act and in the Guide, that Unions are Representatives of Workers.

Further that the new Standard and any internal policies and procedures, set out an agreed method of inspection and investigation consequential to the proper acknowledgement of the role of Unions as Representatives of Workers.

The FBEU seeks a recommendation that the agreed Standard method of inspection and investigation, includes Unions and HSRs being informed as soon as possible of a workplace visit and, non-field response by requesting information relating to the issues from a PCBU, is no longer used, as it prevents consultation and participation of Workers and their Representatives.

The FBEU seeks a further recommendation that the new Standard and any relevant internal policies and procedures, become a public document negotiated in a tripartite manner between; SWNSW, peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions.

Finally here, the FBEU seeks a recommendation that the Industrial Relations Commission of New South Wales, be given jurisdiction to hear disputes about SWNSW inspection and investigation modality.

ii. The second systemic, long-term failing of SWNSW relates to Health and Safety Representatives (HSRs). Since 2012 when the WHS Act came into force, SWNSW have made no proactive efforts to engage with the HSRs to assist them in what can be a difficult work and role environment. To illustrate this point, WorkSafe New Zealand have a 'HSR Voice' section on their website, see <https://www.worksafe.govt.nz/managing-health-and-safety/health-and-safety-representatives/hsr-voice>, it is extracted below;

*Find information, guidance, and resources to help you in your role as an HSR.*

***Sign up to Connection Point***

*Sign up to Connection Point to receive our regular newsletter for HSRs, as well as resources and guidance on the role and how to be an effective HSR, updates on HSR events, and professional development opportunities. You can also connect directly to [REDACTED], our HSR Development Leads.*

***[Sign up to Connection Point](#)***

*By talking directly to you, we want to help you apply your skills and training at your workplace to make sure everyone gets home safe.*

## **Previous editions of Kanohi Kitea – HSR newsletter**

**Give us feedback** Tell us your ideas for what would help you in your HSR role – email us at [HSRsupport@worksafe.govt.nz](mailto:HSRsupport@worksafe.govt.nz)

### **Resources to help you in your role Hiki cards**

*As you grow into your role as an HSR, it will change as you see and learn more. We also recognise that it's a voluntary workplace role, and sometimes you may not have the time you need to dedicate to it.*

*The real purpose of the HSR role is to help in the ways that you can.*

*It all starts by caring about your mates at work, listening, and understanding them.*

*The Hiki cards can help you decide which parts of the HSR role are the best fit for you and will help you have conversations with your manager on how they can support you. You can also see how you might want to grow in the role. They were all written by HSRs, for HSRs.*

[PDF](#)

[HSR Hiki learning cards \(PDF 327 KB\)](#)

Comparing the NZ Model with SWNSW's HSR page, it offers nothing beyond a bare restatement of the WHS Act Sections applying to HSR elections, powers and functions, see <https://www.safework.nsw.gov.au/safety-starts-here/consultation@work/health-and-safety-representatives>.

The FBEU therefore calls for a recommendation that SWNSW emulate WorkSafe NZ's model of HSR engagement and development. With the addition of an industry focused section tackling common hazards and risks. To be negotiated in a tripartite manner between; SWNSW, peak employer groups public and private sector and Unions NSW and affiliated Unions.

Similarly with the advent of the Managing Psychosocial Hazards Code of Practice in May 2021, SWNSW has done nothing to develop specific HSR Psychosocial Hazards training for HSRs, available under S.72 of the WHS Act. The same can be said about the lack of specific S.72 training in any of the other Codes of Practice.

The FBEU therefore calls for a recommendation that SWNSW negotiates in a tripartite manner between; peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions, to produce S.72 compliant HSR training on all the Codes of Practice and the Regulations, that sit above them.

As PCBU's must register their HSRs with SWNSW, it holds all the information necessary to properly engage with HSRs, both generally and within their industry sectors. That SWNSW and WorkCover NSW before them, have done nothing beyond developing the 5 Day HSR Training Course in the last decade, shows the lack of **institutional** interest in developing HSRs.

The FBEU therefore calls for a recommendation that SWNSW fund and convene an Annual Conference of HSRs, organised in concert with Unions NSW on behalf of affiliate Unions.

As well as the non-focus on developing HSRs themselves, both SWNSW and the NSW Centre for WHS have done no research into; HSR formation, the use of HSR functions and powers, what HSRs experience in the workplace when using their functions and powers etc.

The FBEU therefore calls for a recommendation that SWNSW and the NSW Centre for WHS negotiates in a tripartite manner between; peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions, to produce a research programme focusing on HSRs; HSR formation, the use of HSR functions and powers, what HSRs experience in the workplace when using their functions and powers etc.

iii. No. IRC 2023/00036553 - [REDACTED] v SafeWork NSW *Work Health and Safety Act 2011, external review, s229 (internal review decision)*. This is a matter that is currently before the Industrial Relations Commission of NSW. The matter is listed for hearing in person, before Commissioner Muir at Parramatta at 10.00am on 4 May 2023.

I will briefly set out how the HSR in question, [REDACTED], has been prevented and hindered in performing his functions and exercising his powers under the WHS Act S.68.

- a. Dot point 14 on page 2 of Inspector [REDACTED] Decision reads;  
*You have failed to demonstrate any evidence of a necessity as a HSR to exercise your authorities (sic) pursuant to Section 68 of the Act and return to duty against the directive of the PCBU.*
- b. This misinterprets the correct use of 'monitor', which is emphasised when looking at the *SafeWork NSW Worker Representation & Participation Guide*, see Page 13, Section 4, par 3 below:  
  
*Although an HSR has the right to exercise certain powers and perform certain functions, it is for the HSR to decide if, and when, they should be exercised. The WHS Act does not impose mandatory obligations or duties on HSRs to exercise the powers or perform the functions of an HSR.*
- c. The decision delivered in the Internal Review and contained in Inspector [REDACTED] Review, also saw SWNSW support the use of management prerogative to prevent the HSR from conducting duly notified workplace inspections, as per S.68 (2) (a) (i).
- d. The decision also enforced the Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2022, which effectively removed the independent S.68 Powers and Functions of all the PCBU's HSRs who are Retained Firefighters. (Retained Firefighters are ongoing, full-time employees, who respond to fires on an ad-hoc or on-call basis, from their home, or wherever they are, as opposed to Permanent Firefighters who are on-shift at a Fire Station).

- e. A SafeWork NSW Inspector operating under WHS Act, Part 9 – Division 2 Functions and Powers of Inspectors, has no power to enforce an Industrial Award, such as in this case. That is not their role.

It is hard at this point to ascertain exactly why the Inspector and the Internal Reviewer took the course of action they did. However, these clear errors in understanding S.68 & 70 of the WHS Act and enforcing an Industrial Award over the WHS Act, point to a fundamental failing in the training of both SWNSW Inspectors and SWNSW Internal Reviewers.

The FBEU therefore calls for a recommendation that SWNSW negotiates in a tripartite manner between; peak employer groups public and private sector and Unions NSW on behalf of affiliated Unions, to review the current training packages applying to SWNSW Inspectors and SWNSW Internal Reviewers.

## **Conclusion**

As is clear from the foregoing, tripartite negotiations are the bedrock of most of the recommendations set out above, so the final recommendation is that SWNSW establish a permanent tripartite council, with equal representation from SWNSW, Employers and Unions NSW. It is noted that the *Work Health and Safety Act 2011 Statutory Review Report - June 2017*, contained the following unrealised recommendation;

- *undertaking a review of the manner and form of stakeholder consultative mechanisms and in consultation with key stakeholder organisations, develop a model for tripartite consultation.*
-