



New South Wales

# Local Government Amendment (Councillor Misconduct and Poor Performance) Act 2015 No 37

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New South Wales

# **Local Government Amendment (Councillor Misconduct and Poor Performance) Act 2015 No 37**

Act No 37, 2015

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An Act to amend the *Local Government Act 1993* to modify the legislative scheme for dealing with councillor misconduct and poor performance and council maladministration, and for law revision purposes; and to make consequential amendments to the *Local Government (General) Regulation 2005*. [Assented to 2 November 2015]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Local Government Amendment (Councillor Misconduct and Poor Performance) Act 2015*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

## **Schedule 1 Amendment of Local Government Act 1993 No 30**

**[1] Section 234 When does a vacancy occur in a civic office?**

Insert “or as a consequence of a compliance order under section 438HA” after “suspended under this Act” in section 234 (1) (d).

**[2] Section 275 Who is disqualified from holding civic office?**

Insert after section 275 (1):

(1A) If:

- (a) an order for suspension from civic office for misconduct is made (after the commencement of this subsection) against a person under this Act by the Departmental Chief Executive or the Civil and Administrative Tribunal on a referral from the Departmental Chief Executive, and
- (b) it is the third or subsequent such order that has been made against the person (including orders made before the commencement of this subsection),

the person is disqualified from holding civic office for 5 years after the date the order takes effect.

**[3] Section 434 Council’s response to report**

Omit “40 days” from section 434 (1). Insert instead “28 days”.

**[4] Section 434 (2) (b)**

Omit “40-day”. Insert instead “28-day”.

**[5] Section 438A Performance improvement order**

Insert after section 438A (6):

- (6A) The Minister may vary a performance improvement order (and, if an order is varied, a reference in this Act to the order is a reference to the order as varied).

**[6] Section 438A (7)**

Insert “, or the variation of a performance improvement order,” after “order”.

**[7] Section 438A (7A)**

Insert after section 438A (7):

- (7A) The making of a performance improvement order, or the fact that such an order is in force, does not derogate from a power of the Minister or any other person to make any other order or take any other action under this Act.

**[8] Section 438C Minister to give notice of intention to issue or vary performance improvement order**

Insert “or vary” after “issue” in section 438C (1).

**[9] Section 438C (2)**

Omit “The”.

Insert instead “If it is proposed to issue a performance improvement order, the”.

**[10] Section 438C (2A)**

Insert after section 438C (2):

(2A) If it is proposed to vary a performance improvement order, the notice is to specify the following:

- (a) the terms of the proposed variation,
- (b) the reasons why it is proposed to vary the order.

**[11] Section 438C (3)**

Insert “or variation” after “order”.

**[12] Section 438C (4)**

Omit the subsection. Insert instead:

(4) The notice is to specify a consultation period of not less than 7 days from the date the notice is served on the council.

**[13] Section 438C (5) (a)**

Insert “or proposed variation” after “order”.

**[14] Section 438C (5) (b)**

Insert “or proposed variation” after “order”.

**[15] Section 438C (6)**

Insert “or vary” after “issue”.

**[16] Section 438C (6) (b)**

Insert “or varied” after “issued”.

**[17] Section 438F Compliance report**

Omit section 438F (1). Insert instead:

(1) A council must provide the Minister with written reports on its compliance with a performance improvement order as required by the order.

**[18] Section 438G Appointment of temporary adviser**

Insert after section 438G (4):

(4A) If a council fails to give a temporary adviser an opportunity to comment on a compliance report as required by section 438H, the temporary adviser is to inform the Minister of that fact and give the Minister a report on the council’s compliance with the performance improvement order.

(4B) If a council fails to give the Minister a compliance report as required by section 438F, the temporary adviser is to give the Minister a report on the council’s compliance with the performance improvement order.

**[19] Section 438HA**

Insert after section 438H:

**438HA Enforcement of performance improvement order against councillor**

(1) The Departmental Chief Executive may (and must at the request of the Minister) arrange for a departmental report to be prepared as to whether a

- councillor has failed to take action as required by a performance improvement order.
- (2) The Minister may, on receipt of a departmental report finding that a councillor has failed to take action as required by a performance improvement order, issue a compliance order to the councillor.
- (3) A compliance order:
- (a) must identify the action that the councillor is required to take by a performance improvement order but has failed to take, and
  - (b) must, if the councillor is to be allowed to use council facilities, or be paid any amount, for the purposes of the councillor taking that action, specify the extent to which the councillor may use council facilities or the amount that may be paid (as the case requires), and
  - (c) must specify the period (not exceeding 3 months) for which it is to remain in force.
- (4) The Minister may, by written notice to the councillor, extend the period for which a compliance order remains in force, but not so that the order remains in force for a total period of more than 6 months.
- (5) Before issuing a compliance order to a councillor, the Minister is to:
- (a) give the councillor written notice:
    - (i) specifying the action that the councillor has failed to take as required by a performance improvement order, and
    - (ii) specifying that the Minister proposes to issue a compliance order to the councillor, and
    - (iii) inviting the councillor to make submissions within a specified period (of not less than 7 days) about why the order should not be made, and
  - (b) consider any submissions made by the councillor in accordance with the notice.
- (6) The Minister is to withdraw a compliance order if satisfied that the councillor has taken the action specified in the compliance order.
- (7) While a compliance order is in force against a councillor, the councillor:
- (a) is not entitled to exercise any of the functions of the councillor other than as necessary to take the action specified in the compliance order, and
  - (b) is not entitled to any fee or other remuneration, or to the payment of expenses or to the use of council facilities, to which he or she would otherwise be entitled as a councillor, except as specified in the compliance order.
- (8) The Minister may:
- (a) instead of taking action under this section against a councillor, or
  - (b) after taking action under this section against a councillor, or
  - (c) while a compliance order is in force against a councillor,
- request the Departmental Chief Executive to refer the matter to the Civil and Administrative Tribunal for consideration.
- (9) A matter is referred to the Tribunal under this section by means of a report presented to the Tribunal by the Departmental Chief Executive and containing

or accompanied by such material and observations as the Departmental Chief Executive thinks fit.

- (10) The Departmental Chief Executive is to notify the councillor concerned of any request to refer the matter to the Tribunal.
- (11) For the purposes of this section and Part 3 of Chapter 14, failure by a councillor to take action as required by a performance improvement order is to be taken to be misconduct.
- (12) The regulations may make provision for or with respect to the reference of matters to the Tribunal under this section.

**[20] Section 440B Dismissal and disqualification from civic office for serious corrupt conduct**

Insert after section 440B (1):

- (1A) If:
  - (a) a recommendation has been made as referred to in subsection (1) (a) about a person, and
  - (b) the person has since ceased to hold civic office, and
  - (c) the Minister advises the Governor that disqualification of the person from holding civic office is necessary in order to protect the public standing of councils and the proper exercise of their functions,the Governor may disqualify the person from holding civic office for a period not exceeding 5 years.

**[21] Section 440B (2)**

Insert “or disqualification” after “dismissal”.

**[22] Section 440B (2)**

Insert “or disqualified” after “dismissed”.

**[23] Section 440C Temporary suspension from civic office for serious corrupt conduct**

Insert after section 440C (4):

- (4A) However, if the suspension is based on a recommendation made by the Independent Commission Against Corruption or an admission made by the person and the person commences proceedings relating to the recommendation or admission:
  - (a) the suspension remains in effect while those proceedings and any related proceedings for review or appeal are dealt with, and
  - (b) subsection (4) (a) applies as if the reference to 6 months after the suspension were a reference to 6 months after those proceedings and any related proceedings for review or appeal are finally dealt with or withdrawn.

**[24] Section 440D Temporary suspension of staff in connection with serious corrupt conduct**

Insert after section 440D (4):

- (4A) However, if the suspension is based on a recommendation made by the Independent Commission Against Corruption or an admission made by the

person and the person commences proceedings relating to the recommendation or admission:

- (a) the suspension remains in effect while those proceedings and any related proceedings for review or appeal are dealt with, and
- (b) subsection (4) (a) applies as if the reference to 6 months after the suspension were a reference to 6 months after those proceedings and any related proceedings for review or appeal are finally dealt with or withdrawn.

**[25] Section 440F Definitions**

Insert after paragraph (d) of the definition of *misconduct* in section 440F (1):

- (e) an act or omission of the councillor intended by the councillor to prevent the proper or effective functioning of the council or a committee of the council.

**[26] Section 440G Formal censure of councillor for misconduct**

Omit section 440G (2).

**[27] Section 440H Departmental Chief Executive may investigate or seek report on misconduct of councillor**

Omit “relevant” from section 440H (3).

**[28] Section 440H (3A)**

Insert after section 440H (3):

- (3A) However, the Departmental Chief Executive is to withdraw the direction if it appears to the Departmental Chief Executive that:
  - (a) the person does not consent to compliance with the direction, and
  - (b) the person would not, in court proceedings, be required to comply with a similar direction on grounds of privilege against self-incrimination or legal professional privilege, and
  - (c) the privilege is not a privilege in favour of a public authority or former public authority,(and, if the direction is required to be withdrawn, the person is not guilty of an offence against section 661).

**[29] Section 440H (5A)**

Insert after section 440H (5):

- (5A) The Departmental Chief Executive may arrange for a departmental report to be prepared about whether a councillor has engaged in misconduct without an investigation being carried out under this section if:
  - (a) the matter has been referred to the Departmental Chief Executive by the council and the Departmental Chief Executive is of the opinion that the report may be based on the findings of an investigation conducted by or on behalf of the council, or
  - (b) the Departmental Chief Executive is of the opinion that the alleged misconduct, if proven, would be minor in nature and, were it to warrant disciplinary action, the disciplinary action would be comprised only of counselling or reprimanding the councillor, or
  - (c) the Departmental Chief Executive otherwise considers it appropriate to do so.



**[30] Section 440H (9), definition of “relevant person”**

Omit the definition.

**[31] Section 440I Departmental Chief Executive may take disciplinary action for misconduct**

Insert after section 440I (3):

- (3A) Before taking disciplinary action against a councillor, the Departmental Chief Executive is to:
- (a) give the councillor written notice:
    - (i) specifying the grounds on which it is proposed to take disciplinary action against the councillor, and
    - (ii) specifying the disciplinary action that the Departmental Chief Executive proposes to take against the councillor, and
    - (iii) inviting the councillor to make submissions within a specified period (of not less than 14 days) about the proposal, and
  - (b) consider any submissions made by the councillor in accordance with the notice.

**[32] Section 440L Appeals against disciplinary action**

Insert “(other than disciplinary action comprised only of counselling or reprimanding)” after “disciplinary action” where firstly occurring in section 440L (1).

**[33] Section 440L (3A)**

Insert after section 440L (3):

- (3A) If the Tribunal stays a decision for suspension of a councillor for misconduct that has resulted or will result in disqualification from civic office under section 275 (1A), the disqualification ceases to have effect or does not take effect (as the case requires) until such time as the appeal is finally determined or withdrawn.

**[34] Section 440L (6)**

Insert “and any disqualification that resulted from the suspension ceases to have effect” after “the councillor”.

**[35] Section 451 Disclosure and presence in meetings**

Insert after section 451 (4) (a):

- (a1) the pecuniary interest arises only because of an interest of the councillor in the councillor’s principal place of residence or an interest of another person (whose interests are relevant under section 443) in that person’s principal place of residence, and

**[36] Chapter 14, Part 3, heading**

Insert “and proceedings before NCAT” after “non-disclosure”.

**[37] Section 470A NCAT to decide whether or not to conduct proceedings into a referred matter relating to misconduct**

Insert “438HA or” after “section” in section 470A (1).

**[38] Section 470B Circumstances in which NCAT may dispense with hearing**

Insert “438HA or” after “section” in section 470B (1).

**[39] Section 482A Decision of NCAT—misconduct matters**

Insert “438HA or” after “under section” in section 482A (1).

## **Schedule 2 Law revision amendments of Local Government Act 1993 No 30**

- [1] **The whole Act (except Schedule 8 and where otherwise amended by this Act)**  
Omit “Director-General” and “Director-General’s” wherever occurring.  
Insert instead “Departmental Chief Executive” and “Departmental Chief Executive’s”, respectively.
- [2] **Sections 36A (1) (paragraph (a) of the definition of “relevant Director”) and (3) (a), 36B (1) (paragraph (a) of the definition of “relevant Director”) and 36D (3) (d)**  
Omit “Director-General of National Parks and Wildlife” wherever occurring.  
Insert instead “Chief Executive of the Office of Environment and Heritage”.
- [3] **Section 36A (1) (paragraph (b) of the definition of “relevant Director”) and 36B (1) (paragraph (b) of the definition of “relevant Director”)**  
Omit “Director of NSW Fisheries” wherever occurring.  
Insert instead “Secretary of the Department of Industry, Skills and Regional Development”.
- [4] **Section 36A (3) (a)**  
Omit “Director of Fisheries”.  
Insert instead “Secretary of the Department of Industry, Skills and Regional Development”.
- [5] **Section 54P (2)–(4)**  
Omit “Director-General of the Department of Environment, Climate Change and Water” wherever occurring.  
Insert instead “Chief Executive of the Office of Environment and Heritage”.
- [6] **Sections 261 (2) (b), 400J (2) (a), 400K (1) (b) and 614 (2) (b) and clause 5 (1) (g) of Schedule 2**  
Omit “an officer of” wherever occurring. Insert instead “a person employed in”.
- [7] **Section 400J (2) (b) and (c)**  
Omit the paragraphs. Insert instead:  
    (b) the Secretary of the Treasury (or a person employed in the Treasury nominated by the Secretary),  
    (c) the Secretary of the Department of Premier and Cabinet (or a person employed in that Department nominated by that Secretary),
- [8] **Section 400J (2) (e)**  
Omit the paragraph. Insert instead:  
    (e) the Secretary of the Department of Planning and Environment (or a person employed in that Department nominated by that Secretary),
- [9] **Section 606 (1)**  
Omit “Government Department”. Insert instead “Public Service agency”.

**[10] Section 639 (2) (b)**

Omit the paragraph. Insert instead:

- (b) that is a device or fitting of a type other than a type approved for such connection by the Secretary of the Department of Finance, Services and Innovation or by a person authorised by that Secretary to grant such an approval,

**[11] Section 684 (d)**

Omit the paragraph. Insert instead:

- (d) in any case by a person employed in the Ministry of Health appointed by the Secretary of the Ministry of Health, generally or in respect of any special proceedings, or

**[12] Section 694 (2)**

Omit “an officer of the Department of Health”.

Insert instead “a person employed in the Ministry of Health”.

**[13] Section 708 (2)**

Omit “a Department” and “the Department head”.

Insert instead “a Public Service agency” and “the head of the agency”, respectively.

**[14] Section 733 (7) (c)**

Omit the paragraph. Insert instead:

- (c) a Public Service employee, and

**[15] Sections 741 (2) (f) and 742 (7)**

Omit “Director-General of New South Wales Fire Brigades” wherever occurring.

Insert instead “Commissioner of Fire and Rescue NSW”.

**[16] Section 745 (2)**

Omit “member of staff of”. Insert instead “person employed in”.

**[17] Schedule 2, clause 2 (1) (b)**

Omit “who is an officer of”. Insert instead “employed in”.

**[18] Schedule 2, clause 5 (1) (g)**

Omit “or officer”. Insert instead “or employee”.

**[19] Dictionary, definition of “Department”**

Omit the definition. Insert instead:

*Department* or *Department of Local Government* means the Office of Local Government.

*Departmental Chief Executive* means the Chief Executive of the Office of Local Government.

**[20] Dictionary, definition of “Director-General”**

Omit the definition.

## **Schedule 3 Consequential amendment of Local Government (General) Regulation 2005**

### **Schedule 3A Form of special disclosure of pecuniary interest**

Insert “The special disclosure must relate to a pecuniary interest that arises only because of an interest of the councillor in the councillor’s principal place of residence or an interest of another person (whose interests are relevant under section 443 of the Act) in that person’s principal place of residence.” after the first sentence under the heading “**Important Information**”.

[Second reading speech made in—  
Legislative Assembly on 16 September 2015  
Legislative Council on 20 October 2015]