

INTERNAL REVIEW**DECISION MAKING – CONSIDERING & DECIDING INTERNAL REVIEW APPLICATIONS**

1. Purpose

The purpose of this guidance principle is to:

- a) Set out the decision making process used by the Authority to deal with applications for internal review, and
- b) Provide guidance for the Internal Review Officer (“IRO”) when considering and deciding an application for internal review of an inspector’s decision.

This Guidance Principle should be read in conjunction with other Guidance Principles relating to Internal Review, including:

- IRU Guidance Principle 02- “Late applications” (Dealing with Applications made more than 14 days after the decision came to the notice of the person seeking review) and
- IRU Guidance Principle 03 -“Requests for stay of the operation of notices pending review outcome”
- IRU Guidance Principle 04 -“Deciding whether to extend the compliance date on an Improvement Notice”
- IRU Guidance Principle 05 “Reasons for decision“

2. Background

Section 128 of the *Occupational Health and Safety Act 2004* (“the Act”)¹ enables an eligible person to apply to the Authority for internal review of a reviewable decision. Section 127 identifies which inspector’s decisions are “reviewable decisions” and who is an “eligible person” in relation to each reviewable decision².

Applications must be on the approved form, and must usually be lodged within 14 days of the date on which the reviewable decision came to the notice of an eligible person. The Authority has a discretion to accept late lodgement, and the circumstances under which that discretion might be exercised are covered by the associated IRU Guidance Principle 02 “Late applications” (Dealing with Applications made more than 14 days after the decision came to the notice of the person seeking review).”

The Authority has an Internal Review Unit (“IRU”) with the core function of dealing with applications for internal review of inspector’s decisions. The IRU is not part of the health and Safety business unit to which inspectors belong, and its head (The Senior Internal Review Officer) reports directly to the Chief Executive of the Authority.

The IRO’s who deal with review applications are senior officers within the Authority, and whilst they will have regard to operational policies issued by WorkSafe, their decision making is not dictated by or confined to such policies.

On an internal review, an IRO may:

- affirm the original decision; or
- vary the original decision;
- set aside the original decision and substitute another decision that the IRO considers appropriate.

¹ See also similar provisions in the *Dangerous Goods Act 1985* (section 20A) and the *Equipment (Public Safety) Act 1994* (section 24A)

² See also similar provisions in the *Dangerous Goods Act 1985* (section 20) and the *Equipment (Public Safety) Act 1994* (section 24)

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3. Policy

Whilst each internal review will be determined by an IRO on its merits, the Authority as part of its commitment to being a consistent, accountable and transparent decision maker, seeks to provide guidance as to the manner in which an IRO will approach internal reviews.

The Act does not contain specific grounds for review, or the way in which a review is to be conducted. The material set out below however is intended to guide and assist the IRO when conducting an internal review and making a decision.

The IRO will primarily have regard to the internal review provisions set out in the Act and any specific provisions relevant to the particular case. Subject to those provisions however, the IRO will also have regard to the purpose and objects of the Act which in summary are:

- to secure the health and safety of persons at the workplace;
- to eliminate risks to health and safety of persons at the workplace;
- to ensure the health and safety of the public is not placed at risk; and
- to provide for involvement of employees and their representatives in the formulation and implementation of health and safety standards.

4. General decision making principles applicable to internal review

Internal review provides a quick, informal and free of charge mechanism to review specified reviewable decisions, and operates within very strict statutory time limits. Whilst the Act does not specify the nature of internal review, the Victorian Court of Appeal and the Victorian Civil and Administrative Tribunal (“VCAT”) in dealing with the review provisions have indicated the Authority is required to conduct a “merits review”. This means the IRO must essentially “stand in the shoes of the inspector” and re-exercise the functions of the inspector. This requires the IRO to take into account not only material available to the inspector at the time he or she made the original decision, but any new and relevant information available at the time of the internal review. The IRO is then required to decide whether in the light of that material, the reviewable decision is the correct or preferable decision.

In conducting a review the IRO is not bound by legal technicalities or rules of evidence. There is no statutory requirement for a hearing or face to face meeting with an applicant to be conducted, and the strict time lines within which a decision must be reached and communicated to an applicant will often make such meetings impracticable. An IRO may however, in a particular case consider a meeting would be useful and seek to arrange one.

As internal review is the statutory right of an eligible person, an application for review can be withdrawn by the eligible person at any time up to the time a decision is made.

5. Preliminary issues arising in applications

An IRO may need to consider the following preliminary issues in an internal review:

5.1 Multiple applications

There will often be more than one “eligible person” in respect to a particular reviewable decision. If more than one eligible person applies for internal review, to ensure consistency all such applications will where possible be consolidated and considered by the same IRO. If however, an internal review application from one eligible person has already been decided by an IRO, that decision becomes the decision of the Authority, and there is no further right of internal review of that decision. In such cases however, any eligible person has a right to seek external merits review by VCAT, and will be advised of that right.

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5.2 Invalid applications

The legislation specifies an application for internal review must be made in writing on the approved form. If the applicant does not submit a valid application, the IRU will inform the applicant their application is invalid and that the subject matter cannot be determined by the internal review process. In such cases an explanation will be provided as to why this is the case. Other examples of invalid applications include, but are not limited to the following:

- an application by someone who is not an eligible person,
- an application that seeks to review a decision which is not a reviewable decision,
- an application which does not sufficiently identify what decision is being challenged or who is actually making the application, or,
- an application relating solely to complaints about behaviour of an Inspector. Such matters will be referred to the relevant WorkSafe area for follow up.

Where the only issue raised in an application to have a decision set aside or varied is that the applicant has subsequently complied with the requirements of a notice issued by an inspector, the IRO will advise the applicant that compliance alone is not a valid basis for internal review. Such matters will be referred to the WorkSafe operational area to follow up.

Sometimes non reviewable issues are raised in an application which also identifies a valid basis for review. This may arise, for example, where a valid application for review includes a complaint about the behaviour of an inspector. In such cases the IRO will advise the applicant that the non reviewable aspect cannot be dealt with in the review process, and will provide information as to the options available to the applicant to follow up non reviewable issues through other processes. This may also involve referring non reviewable aspects to the relevant WorkSafe operational area for action.

6. Investigating and considering an internal review

Prior to reaching a decision the IRO will have regard to all relevant information and the grounds relied upon by the applicant. Subject to statutory time limitations the IRO may seek out and obtain additional relevant information to assist in reaching a decision. The IRO will then, in the light of all the information available at the time of review, decide whether the reviewable decision is the correct or preferable decision.

If the IRO decides the reviewable decision does not reflect the correct or preferable decision, the IRO must decide whether to set aside the decision entirely and substitute some other decision, or to vary the decision in some way.

6.1 Information to be considered by IRO

The IRO is required to take into account all relevant information and material available, and to decide what weight to attribute to such information when reaching a decision.

6.2 Sources of information

The IRO can have regard to the following information when making a decision:

- information provided in the application for review and any supporting documentation provided by the applicant;
- information that was available to the inspector; and
- any additional relevant information provided to or obtained by the IRO.

INTERNAL REVIEW**DECISION MAKING – CONSIDERING & DECIDING INTERNAL REVIEW APPLICATIONS****6.3 Information provided by the applicant**

The IRO will consider any information provided by or on behalf of the applicant. As there is no discretion under the Act to extend the time within which a decision on a review must be made, the time requirements will often be critical, and it is preferable for as much relevant information as possible to be provided at the time of the initial application. If however the applicant has not provided sufficient information the IRO may, having regard to the statutory time limits, seek further information from the applicant. This will often involve specifying a deadline by which such information is to be supplied. If the applicant fails to provide the information requested by the specified time, or provides incomplete information, the IRO may decide the matter on the available information.

When new or additional information is obtained from an applicant, the IRO will determine whether the information is relevant to the review. If relevant new information is submitted in support of an application but was not provided to the inspector whose decision is under review, the IRO, if he or she considers it necessary, may provide that information to the inspector, and give the inspector an opportunity to comment on the information. The IRO may also provide that information to other persons for the purposes of seeking an opinion. Any such comment or opinion will be subject to the process set out in paragraph 6.5 below.

6.4 Information available to the Authority

In addition to information in the application or provided by or on behalf of the applicant, the other main source is information held by the Authority. This includes Entry Reports, notices and photographs, as well as additional information provided by the inspector who made the reviewable decision, including information contained in any notes taken at the time. This information allows the IRO to identify:

- Reasons for the inspector attending the relevant workplace or other place;
- Previous visits to the workplace or other place considered relevant (and why);
- Description of the workplace or operating environment;
- Description of the risk to health and safety (eg, a description of the geography, location and/or physical subject matter as relevant);
- The particular factual circumstances in which the reviewable decision was made (eg, was there material available that was not considered by the Inspector and if so why not, time restrictions, level of risk etc);
- Any other relevant information (eg. Codes of Practice, Australian Standards or other guidance material).

In addition the IRO will discuss the review and any assertions made in the review with the inspector directly to obtain his or her comments on such assertions. Such comments may provide further information relevant to the review, and any such comment will be subject to the process set out in paragraph 6.5 below

6.5 Additional information

In addition to information provided by the applicant or the Authority and the inspector, the IRO may decide it is appropriate to obtain additional information, and may as part of the review process seek such information from within the Authority or from outside sources. In particular an IRO may seek advice from persons who have particular experience, knowledge or expertise in a relevant area which could assist in reaching a sound decision.

If additional information is obtained by the IRO (from the inspector or any other person) and is likely to adversely affect the applicant or another person whose interests are affected by the decision, the IRO should make the applicant or such person aware of the substance of the information or advice, and provide an opportunity to comment on that information. Any such comments may be taken into account by the IRO. Because of the strict statutory time lines

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within which a decision must be reached, the IRO in providing that opportunity may specify a deadline by which such comment is to be supplied. If such comment is not received, or is not received by the deadline specified, the IRO may decide the matter on the available information.

6.6 Site visits/Inspections

After reviewing documentary and other information, the IRO may consider that in order to make a sound decision, it is necessary to conduct a site visit or inspection. Given the time constraints, such visits or inspections would not routinely occur. In a situation where the IRO decides a site visit or inspection is appropriate, the IRO will usually arrange this with the applicant (if this involves a workplace or premises controlled by the applicant) or at least advise the applicant that a visit or inspection is proposed. The IRO would also usually invite the applicant (or representative) and the inspector whose decision is under review to attend that visit or inspection. In the event the inspector whose decision is under review is unable to attend, the IRO may ask that another inspector or a more senior WorkSafe officer to attend.

Any relevant comments or observations made by the applicant, the inspector, or any other person during a site visit may be taken into account by the IRO when reaching a decision.

In the unusual situation where an IRO conducts a site visit or inspection without the applicant being first advised, the fact such visit has occurred should be communicated to the applicant, along with any preliminary conclusions reached by the IRO as a result of the visit. Where, as a result of conducting a site visit, information is obtained which could adversely affect the applicants case, the IRO should make the applicant aware of such information and provide an opportunity to comment on this information. Because of the strict statutory time lines within which a decision must be made the IRO in providing that opportunity, may specify a deadline by which such comment is to be received. If such comment is not received, or is not received by the deadline specified, the IRO may decide the matter on the available information.

7. General Principles for Decision Making

Internal reviews are conducted under the provisions of the Occupational Health and Safety Act, Dangerous Goods Act and Equipment Safety Act. In conducting a review, an IRO will take into account the subject matter, purpose and objectives of the particular legislation involved. In addition the following factors will assist the IRO in determining reviews.

7.1 Consistency

An IRO must be consistent in the performance of his or her decision making functions, and will have regard to any relevant precedents, judicial interpretations and authoritative references when reaching a decision.

7.2 Relevance

An IRO should not take into account irrelevant matters, or fail to take into account relevant matters in making his or her decision.

The Act does not specifically set out what are relevant considerations, and it is largely for the IRO in the light of the available information to determine which matters are relevant, their importance and their merit. Notwithstanding this, the IRO is bound to take into consideration those matters that go to the subject matter, scope and purpose of the Act, and the existence or absence of any statutory requirement relevant to the specific reviewable decision.

An IRO may have regard to WorkSafe documents (such as policies and procedures), but such documents will not be conclusive, or exhaustive of all relevant considerations. Placing undue weight on, or inflexibly applying such policies etc may lead to administrative error (eg,

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a failure to take into account other relevant considerations). This is particularly important as the IRO is required to conduct a merits review.

7.3 Bias and conflict of interest

An IRO must conduct reviews in an unbiased manner. Bias may be either actual or apprehended. The test to be applied is whether the IRO was actually biased, or whether a fair minded person might reasonably apprehend or suspect the IRO had or might prejudge the matter or not have an open mind when conducting the review. In a case where an applicant or other person alleges an IRO is or may be biased, the IRO will refer the matter to the Senior Internal Review Officer who may consider it appropriate to reallocate the review to another authorised IRO.

In a case where an individual IRO considers there is some conflict of interest which makes it inappropriate for him or her to deal with a specific review, or where there may be a perception he or she could be in conflict, the matter should be discussed with the Senior Internal Review Officer, who may consider it appropriate to reallocate the review to another authorised IRO.

7.4 Independence of decision making

Whilst an IRO exercises the power of the Authority to conduct an internal review, they must act independently and exercise their own judgment according to law. This means whilst an IRO can have regard to WorkSafe policies and procedures, they are not bound by them in cases where there is perceived to be some inconsistency between such policies and legislative requirements. Given the scrutiny to which such policies are subjected however it is considered such inconsistency would be rare.

An IRO cannot be directed by officers of the Authority or any person as to what decision to make in a particular case, although in reaching a decision an IRO can have regard to the views and opinions of other persons in reaching their decision.

8. Reasons for Decision

Once a decision is reached on an internal review, the Authority is required to notify the applicant in writing within the statutory time period. The written notification (“reasons for decision”) must meet specific requirements in the Act. That document also demonstrates accountability and transparency, and represents the formal explanation of the decision and the reasoning behind it. The form and content of the written notification should generally conform to the principles set out in IRU Guidance Principle 05 “Reasons for decision”.