

REQUESTS FOR A STAY OF THE OPERATION OF A DECISION PENDING THE OUTCOME OF A REVIEW

1. Purpose

The purpose of this guidance principle is to:

- a) Set out the decision making process used by the Authority to deal with requests for a stay of the operation of a reviewable pending the outcome of the review of that decision, and
- b) Provide guidance for the Internal Review Officer (“IRO”) who exercises the power of the Authority, when considering and deciding a request for a stay.

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

- IRU Guidance Principle 01- “Decision making- Considering and deciding internal review applications”.
- 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 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. 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.

Subsection 128(6) makes it clear that applying for an internal review itself does not affect the operation of the reviewable decision, or prevent the Authority taking any action to implement a decision. That provision does however allow a person making a review application to also request the operation of the decision be stayed pending the determination of the review. Even if an applicant does not request a stay, the Authority on its own initiative may stay the operation of a decision pending the review determination.

A stay request must be made at the time of lodging a review application or relate to an existing review application, and can be made at any time prior to the final decision being made in relation to the merits of the review application.

Where a review applicant requests a stay of the operation of the decision pending the determination of the review, the IRO can refuse to grant a stay, or grant a stay. If the IRO decides it is appropriate to grant a stay, that stay can be subject to any conditions the IRO considers appropriate.

The decision whether to grant or not to grant a stay is essentially a preliminary decision, and must be made within 24 hours of the request being made. If a decision on the stay request is not made within that time, the Authority is taken to have made a decision to grant the stay.

If granted, a stay lasts only as long as the review continues, and once a review is determined, any stay ceases to have effect.

3. Principles

Whilst each stay request 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 such requests.

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

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The Act does not identify the circumstances in which a stay may be sought, grounds on which a stay might be granted or the way in which a stay request will be decided. The material set out below therefore is intended to guide and assist the IRO when dealing with a stay request.

3.1 The relevance of a stay

The rationale for the stay provision in s128(6) is to avoid undue adverse impact on a person because of the operation of a reviewable decision, whilst the decision is being internally reviewed by the Authority. Whilst the Act does not specify circumstances in which a stay might be granted, there needs to be some relationship or nexus between the 'operation' of the reviewable decision and the need for that operation to be stayed.

Examples:

- An inspector issues a Prohibition notice which immediately prohibits the applicant from carrying out a specified activity, which is said to be critical to the operation of the applicant's business. The applicant seeks an internal review of that decision, and also seeks a stay of its operation. The inspector's decision to issue a Prohibition notice is a reviewable decision, and it is apparent the ongoing operation of the notice creates an immediate impact on the applicant who may be adversely affected if the decision was not stayed.
- An inspector issues an Improvement notice which requires the applicant to remedy an identified contravention by a specified date. One day prior to that date the applicant lodges an application for internal review and also seeks a stay of its operation. On receipt of that application it is apparent the merits of the review will not be determined by the compliance date. In this case unless the operation of the decision is "stayed" the compliance date will occur and the applicant would potentially be in breach of the notice even though the Authority is reviewing the decision to issue that notice. In such a case there is an impact on the applicant who may be adversely affected if the decision was not stayed.
- An inspector issues an Improvement notice which requires the applicant to remedy an identified contravention by a specified date. A month prior to that date, the applicant lodges an application for internal review and also seeks a stay of its operation. As the Authority must determine the merits of that application within 14 days of receiving it, the review will be fully completed well prior to the future compliance date. In this case there is no purpose in "staying" the operation of the decision as there will be no impact of the decision until well after the review is concluded. In such a case there is no adverse impact on the applicant if the decision is not stayed.

3.2 Justification for granting a stay

If the IRO determines there is a nexus between the operation or impact of the decision and the need for a stay, the IRO has to consider whether it is appropriate in the circumstances of the case to grant a stay (with or without conditions).

In deciding whether to grant a stay or not, the IRO will be primarily guided by whether granting a stay would create a risk to health and safety of persons at the workplace or to members of the public. The IRO in determining a stay request will be guided by the stated intention of the Parliament that in the administration of the Act, regard should be had to the principles of health and safety set out in section 4. The IRO will also have regard to the stated objects of the Act which include:

- Securing the health and safety of persons at the workplace;
- Eliminating risks to health and safety of persons at the workplace; and
- Ensuring the health and safety of the public is not placed at risk.

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Whilst not intended to be exhaustive, the following factors may be relevant in deciding if to grant a stay of the operation of a reviewable decision pending outcome of an internal review:

- Would the grant or refusal of a stay result in an adverse impact on the health and safety of any person affected by the reviewable decision?
- Would granting a stay act to defeat or substantially negate the purpose of the decision itself?
- What impact does the operation of the reviewable decision have on the applicant, or any other person?
- Will the operation of the reviewable decision have a significant impact on the ordinary business operations of the workplace? (i.e. will there be irreparable harm to the business if a stay is not granted?).
- Will a failure to grant a stay result in changes which are not capable of being reversed at a later stage?
- Who would suffer the greater prejudice or harm if the stay was not granted (i.e. the person seeking the stay or persons who may gain some benefit from the operation of the reviewable decision)?
- What (if any) measures are proposed by the applicant to reduce any risk to health and safety of persons at the workplace if the stay was granted?

Whilst in theory stay requests may relate to the operation of any “reviewable decision”, in practice the overwhelming majority of requests for stays have related to decisions to issue Improvement and Prohibition Notices. Because Prohibition Notices are based on the assertion of an “immediate risk” to health and safety, stays will not ordinarily be granted the operation of such notices unless the IRO is satisfied there are compelling circumstances. For example, where it is immediately evident from examination of the notice itself and/or the accompanying application for internal review, that the notice should not have been issued. It is expected such occasions will be unusual.

3.3 Duration of a stay

A stay (if granted) can continue until the Authority determines the merits of the internal review of the decision concerned, but must end automatically once the review determination is made. An IRO may however consider it appropriate to grant a stay for a lesser or more specific period of time. This may be relevant where, for instance, the applicant satisfies the IRO that the need for a stay is warranted to allow a specific activity to occur, and that some short term relief on the operation of the decision is appropriate. It is anticipated such situations would not be common, and if granted could be subject to specific conditions.

3.4 Granting a stay subject to specified conditions

An IRO may decide to grant a stay subject to specific conditions. The nature of any such conditions will depend on the circumstances of the case, and would usually be the subject of discussion between the IRO, the applicant and the inspector. Any conditions need to be clear and unambiguous.

4. Reasons for Decision

There is no statutory obligation for the Authority to provide written notification as to the outcome of the request for a stay. Such notification is however an important aspect of transparency and accountability in the review process, and as such it is preferable the IRO provide some written explanation for the outcome. Because of the 24 hour time frame within which a stay request must be decided, it may however not always be possible to provide such reasons at the time the decision is made. In such cases, an explanation as to the reason for granting or not granting a stay should be included in the mandatory written notification which sets out the reasons for decision on the review itself. The form of that notification should conform to the general requirements for written reasons set out in the associated IRU Guidance Principle 05 “Reasons for decision” .