

GUIDE | WORK HEALTH AND SAFETY LAWS

Application for internal review of certain WHS decisions in relation to mines or petroleum sites

September 2016

Overview

An internal review allows an eligible person to seek a formal review of a decision made by:

- a WHS inspector in relation to a mine or petroleum sites; or
- the WHS regulator in relation to a mine or petroleum sites (or his or her delegate).

The internal review may confirm the original decision, overturn or modify in some way the original decision. The right to internal review is established in the work health and safety legislation. The service is free.

This guidance explains the principles of internal review and how internal reviewers will conduct reviews and make their decisions. Internal review is designed to be a quick, transparent and consistent review process that promotes accountability and is independent of the original decision maker.

A right to internal review of certain decisions is imbedded in the:

- *Work Health and Safety Act 2011* (WHS Act) - sections 223 and 224
- *Work Health and Safety Regulations 2011* (WHS Regulation) - clauses 676 and 677
- *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (WHS (Mines and Petroleum Sites) Regulation) - clause 175

Decisions made under the WHS Act that are subject to internal review are listed in Appendix A. Decisions made under the WHS Regulation that are subject to internal review are listed in Appendix B. Decisions made under the WHS (Mines and Petroleum Sites) Regulation that are subject to internal review are listed in Appendix C.

If the decision was made by SafeWork NSW or a SafeWork NSW Inspector, the application must be made on the SafeWork NSW approved form and lodged with SafeWork NSW. The relevant [form](#) and [guide](#) are available on the SafeWork NSW website.

A person who is dissatisfied with the decision from an internal review, may also apply for external review of that decision to the appropriate external body for that decision – either the Industrial Relations Commission or the Civil and Administrative Tribunal.

Some decisions made under WHS laws that are not open to internal review may be subject to external review. These are set out in Appendix D.

An external review of relevant decision made under the WHS Act is conducted by the Industrial Relations Commission, on application by an eligible person.

Who conducts an internal review?

Internal reviews will be conducted by someone, or a body, other than the Department of Industry officer who made the original decision. The internal reviewer will be appointed by the regulator or his or her delegate.

What is internal review?

An internal review is a form of merits review. A reviewer will 'stand in the shoes' of the original decision maker and independently remake the decision by reference to the relevant legislation, the relevant facts or evidence (including new relevant facts or evidence), and the relevant policies and procedures, accepted technical standards or guidance material. Reviewers must exercise their own judgment in reviewing the decision.

Who is eligible to apply for an internal review?

An application for an internal review of a decision can only be made by an 'eligible person'.

The WHS legislation prescribes the category of 'eligible person' entitled to seek review of each reviewable decision. Eligible persons for each specific category of reviewable decision are listed in Appendix A, B and C. When applying for a review, you will need to identify which category of 'eligible person' you fall within.

By way of example, in relation to a decision to issue an improvement notice under s 191 of the WHS Act, the categories of 'eligible persons' who can apply for internal review are:

- the person to whom the improvement notice was issued
- a worker whose interests are affected by the decision
- a person conducting a business or undertaking whose interests are affected by the decision
- a health and safety representative, or in relation to a coal mine a mine safety and health representative or industry safety and health representative, who represents a worker whose interests are affected by the decision.

Applying for a review of decision

An application for internal review must be made in writing using the *Application for internal review* form available through the mine safety website at www.resourcesandenergy.nsw.gov.au/miners-and-explorers/safety-and-health

You can withdraw your application at any time before a decision is made by the internal reviewer.

Incomplete applications

It is your responsibility to ensure you have completed the required fields and submitted all required documents. If the form is incomplete, you may be contacted to provide the relevant information or the application may be returned to you to be completed.

The review timeframes only apply from the date when all required information is received.

Invalid applications

Internal review is not available in respect of an invalid application. An internal review application can be invalid for a number of reasons such as:

- the applicant is not an eligible person
- the application seeks review of a decision which is not reviewable
- your application for internal review has been determined previously— you can only lodge one application in relation to a decision

You will be advised if your application is invalid and, if appropriate, be advised of alternative avenues you could use to follow up your concerns.

Multiple applications

At times, more than one 'eligible person' may apply for an internal review of the same decision. These applications will be considered by the same reviewer wherever possible.

Lodgment timeframes

You must lodge your application for internal review within strict timeframes set out in the WHS laws. For example:

- An application relating to an 'improvement notice' must be lodged before the compliance date on the improvement notice or within 14 days of the date on which you became aware of the notice, whichever is the earlier.
- Applications for review of other notices and decisions made under the WHS Act must be lodged within 14 days of the date on which you became aware of the notice or decision.
- An application relating to a decision made under either the WHS Regulation or WHS (Mines and Petroleum Sites) Regulation must be lodged within 28 days of the day on which the decision first came to your notice (in relation to some decisions this is qualified as being 28 days after the 120 day period specified in relation to the decision expires). The WHS regulator at mining workplaces may, at his or her discretion, permit lodgement outside the 28 day timeframes. In making this decision to accept late lodgement, the regulator may consider a number of factors including your explanation for the late lodgement, whether it would adversely affect anyone else if the late application for internal review were to be accepted, and the views of the original decision maker.

Review process

An internal review is a form of merits review. A reviewer will 'stand in the shoes' of the original decision maker and independently remake the decision by reference to the relevant legislation, the relevant facts or evidence (including new relevant facts or evidence), and the relevant policies and procedures, codes of practice, accepted technical standards and/or guidance material.

A reviewer will remain independent and exercise their own judgment in reviewing the decision. This does not mean that that the reviewer must remain distant or disengaged. For example, the reviewer may choose to:

- arrange a meeting with you or a visit to the workplace if they think it is necessary to help them make their decision and if it can be achieved within the review timeframe, and/or
- discuss the decision with the original decision maker and other relevant people such as technical experts.

If a reviewer asks you for more information, you will need to provide it within the timeframe specified by the reviewer. The review remains suspended until the requested information is provided. If you fail to provide the additional information within the specified timeframe, the original decision will be taken to have been confirmed by the reviewer.

The reviewer must determine an application for internal review by either:

- confirming the original decision,
- varying the original decision, or
- setting aside the original decision and substituting it with another decision that the Reviewer considers appropriate.

Notification of reasons for decision

The reviewer is required to advise you in writing of the decision and the reasons for the decision within:

- WHS Act decisions which are subject to internal review- 14 days of receiving your request for internal review (or longer if the clock was stopped because you were asked for additional information);
- WHS Regulation or WHS (Mines and Petroleum Sites) Regulation decisions which are subject to internal review - 21 days of receiving your request for internal review (or longer if the clock was stopped because you were asked for additional information).

If a decision is complex, a reviewer may contact you by phone to help explain the reasons, in addition to providing written reasons for the decision.

Stays of reviewable decisions

The provisions regarding whether or not a decision is 'stayed' (or suspended), or can be stayed, when an application for internal review is made differs depending on whether the reviewable decision was made under the WHS Act or the WHS Regulation or the WHS (Mines and Petroleum Sites) Regulation.

The general rule in relation to decisions made under the WHS Act is that when an application for internal review is made it will automatically stay the operation of the decision. However, a decision to issue a prohibition notice or a non-disturbance notice *will not* automatically be stayed if an application for internal review is made. If you are applying for internal review of the issuance of a prohibition notice or a non-disturbance notice you may request that the decision be stayed pending the outcome of the request for internal review. A decision in relation to such a request will be made by the reviewer within one day.

By contrast, the general rule in relation to decisions made under the WHS Regulation and the WHS (Mines and Petroleum Sites) Regulation is that making an application for internal review does not affect the operation of the decision or prevent the taking of any lawful action to implement or enforce that decision.

External review

If you are not satisfied with the decision made at internal review or your application has been refused, you can apply to:

- the NSW Industrial Relations Commission for a review of a decision made pursuant to the WHS Act, or
- the Civil and Administrative Tribunal for a review of a decision made pursuant to the WHS Regulation.

As well, certain decisions made by the regulator, while not available for internal review, can be the subject of external review. The decisions for which external review is directly available are listed in Appendix D.

The NSW Industrial Relations Commission and the Civil and Administrative Tribunal have information and advice on the criteria and process for applying for an external review. Further information on the NSW Industrial Relations Commission is available at industrialrelations.nsw.gov.au or by telephoning 13 16 28.

Further information on the Administrative Decisions Tribunal is available at <http://www.ncat.nsw.gov.au/> or by telephoning 1300 006 228.

Who can seek review

Who is an eligible person and can make an application for review of a reviewable decision is set out in:

- Appendix A - Decisions made under the WHS Act that are subject to internal review
- Appendix B - Decisions made under the WHS Regulation that are subject to internal review
- Appendix C - Decisions made under the WHS (Mines and Petroleum Sites) Regulation that are subject to internal review

Appendix A

A list of decisions which can be internally reviewed under the WHS Act - sections 223 and 224

Provision of the WHSA under which reviewable decision is made	Eligible person in relation to reviewable decision
Section 54(2) decision following failure to commence negotiations	<ol style="list-style-type: none"> 1. A worker whose interests are affected by the decision or his or her representative appointed for the purpose of section 52(1)(b) 2. A person conducting a business or undertaking whose interests are affected by the decision 3. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision
Section 72(6) decision in relation to training of health and safety representative	<ol style="list-style-type: none"> 1. A person conducting a business or undertaking whose interests are affected by the decision 2. A health and safety representative, mine safety and health representative or industry safety and health representative whose interests are affected by the decision
Section 76(6) decision relating to health and safety committee	<ol style="list-style-type: none"> 1. A worker whose interests are affected by the decision 2. A person conducting a business or undertaking whose interests are affected by the decision 3. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision
Section 102 decision on review of provisional improvement notice	<ol style="list-style-type: none"> 1. The person to whom the provisional improvement notice was issued 2. The health and safety representative, mine safety and health representative or industry safety and health representative who issued the provisional improvement notice 3. A worker whose interests are affected by the decision 4. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision 5. A person conducting a business or undertaking whose interests are affected by the decision
Section 179 forfeiture of seized things	The person entitled to the item, property or evidence that was forfeited
Section 180 return of seized things	The person entitled to the item, property or evidence that was seized
Section 191 issue of improvement notice	<ol style="list-style-type: none"> 1. The person to whom the notice was issued 2. A person conducting a business or undertaking whose interests are affected by the decision 3. A worker whose interests are affected by the decision 4. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision
Section 194 extension of time for compliance with improvement notice	<ol style="list-style-type: none"> 1. The person to whom the notice was issued 2. A person conducting a business or undertaking whose interests are affected by the decision 3. A worker whose interests are affected by the decision 4. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision
Section 195 issue of prohibition notice	<ol style="list-style-type: none"> 1. The person to whom the notice was issued 2. The person with management or control of the workplace, plant or substance 3. A person conducting a business or undertaking whose interests are affected by the decision 4. A worker whose interests are affected by the decision

	<ol style="list-style-type: none"> 5. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision 6. A health and safety representative mine safety and health representative or industry safety and health representative who gave a direction under section 85 to cease work, that is relevant to the prohibition notice
<p>Section 198 issue of non-disturbance notice</p>	<ol style="list-style-type: none"> 1. The person to whom the notice was issued 2. The person with management or control of the workplace 3. A person conducting a business or undertaking whose interests are affected by the decision 4. A worker whose interests are affected by the decision 5. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision
<p>Section 201 issue of subsequent notice</p>	<ol style="list-style-type: none"> 1. The person to whom the notice was issued 2. The person with management or control of the workplace 3. A person conducting a business or undertaking whose interests are affected by the decision 4. A worker whose interests are affected by the decision 5. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision
<p>Section 207 decision of regulator to vary or cancel notice</p>	<ol style="list-style-type: none"> 1. The person to whom the notice was issued 2. The person with management or control of the workplace 3. A person conducting a business or undertaking whose interests are affected by the decision 4. A worker whose interests are affected by the decision 5. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision 6. In the case of a prohibition notice, a health and safety representative mine safety and health representative or industry safety and health representative whose direction under section 85 to cease work gave rise to the notice

Appendix B

A list of decisions which can be internally reviewed under the WHS Regulation - clauses 676 and 677

Note that a number of other decisions made under the WHS Regulation can be subject to internal review but have not been included in this table because it is considered unlikely the relevant decisions would be made by the WHS regulator at mining workplaces and would normally be made by SafeWork NSW. For example, in relation to major hazard facilities and licenses for high risk work like asbestos removal. For a full list go to the WHS regulation, the SafeWork NSW:

If a reviewable decision made by the WHS regulator at mining workplaces is not listed in the table below but is listed in cl 676 of the WHS Regulation, then an application for internal review can be made and it will be reviewed.

Provision of the WHS Regulation under which a reviewable decision is made	Eligible person in relation to reviewable decision
Plant registration	
256 – Refusal to register plant design	Applicant
257 – Refusal to register plant design	Applicant
258 – Imposition of a condition when granting registration of plant design	Applicant
269 – Refusal to register item of plant	<ol style="list-style-type: none"> 1. Applicant 2. The person with management or control of the item of plant
270 – Refusal to register item of plant	<ol style="list-style-type: none"> 1. Applicant 2. The person with management or control of the item of plant
271 – Imposition of a condition when granting registration of item of plant	<ol style="list-style-type: none"> 1. Applicant 2. The person with management or control of the item of plant
271 – Imposition of a condition when renewing registration of item of plant	<ol style="list-style-type: none"> 1. Registration holder 2. The person with management or control of the item of plant
279 – Refusal to renew registration of item of plant	<ol style="list-style-type: none"> 1. Registration holder 2. The person with management or control of the item of plant
283 – Amendment of registration, on regulator's initiative	<ol style="list-style-type: none"> 1. Registration holder 2. The person with management or control of the item of plant
284 – Refusal to amend registration on application (or a decision to make a different amendment)	<ol style="list-style-type: none"> 1. Registration holder 2. The person with management or control of the item of plant
288 – Refusal to issue replacement registration document	<ol style="list-style-type: none"> 1. Registration holder 2. The person with management or control of the item of plant
Hazardous chemicals and lead	
384—Refusal to grant authorisation to use, handle or store a prohibited or restricted carcinogen	Applicant
386—Cancellation of authorisation to use, handle or store a prohibited or restricted carcinogen	Authorisation holder
393—Deciding a process to be a lead process	<ol style="list-style-type: none"> 1. A person conducting a business or undertaking

Provision of the WHS Regulation under which a reviewable decision is made	Eligible person in relation to reviewable decision
	<p>that carries out the lead process</p> <p>2. A worker whose interests are affected by the decision</p>
407—Determining a different frequency for biological monitoring of workers at a workplace, or a class of workers, carrying out lead risk work	<p>1. A person conducting a business or undertaking that carries out the lead process</p> <p>2. A worker whose interests are affected by the decision</p>
Exemptions	
684 – Refusal to exempt person (or a class of persons) from compliance with any of this Regulation	Applicant
686 – Refusal to exempt person from requirement to hold a high risk work licence	Applicant
691 – Imposing condition on an exemption granted on application under Part 11.2	Applicant
696 – Refusal to grant exemption	Applicant
697 – Amendment of an exemption granted on application under Part 11.2	Applicant
697 – Cancellation of an exemption granted on application under Part 11.2	Applicant

Appendix C

Decisions made under the WHS (Mines and Petroleum Sites) Regulation that are subject to internal review are listed in Appendix C

Provision of the WHS (Mines and Petroleum Sites) Regulation under which a reviewable decision is made	Eligible person in relation to reviewable decision
clause 8 (1) (a decision to give a notice)	the mine holder to whom the notice is given
clause 8C (1) (a decision to give a notice)	the petroleum site holder to whom the notice is given
clause 33 (4) (a decision of the regulator that a notice is inadequate)	the operator of the mine or petroleum site at which the high risk activity is to take place
clause 33 (7) (a decision of the regulator to extend the waiting period)	the operator of the mine or petroleum site at which the high risk activity is to take place
clause 109 (2) (a decision of the regulator to give a direction to provide health monitoring to a worker)	the mine operator to whom the direction is given
clause 122 (3) (d) (a decision of the regulator that a mine survey plan is required for a mine)	the mine operator of the mine
clause 141 (a decision of the regulator to refuse to grant a practising certificate or to grant a practising certificate subject to conditions)	the applicant for the practising certificate
clause 143 (a decision of the regulator to impose a condition on a practising certificate or to vary or revoke a condition of a practising certificate)	the holder of the practising certificate
clause 144 (a decision of the regulator to suspend or cancel a practising certificate)	the holder of the practising certificate
clause 148 (a decision of the regulator to refuse to grant a certificate of competence or to grant a certificate of competence subject to conditions)	the applicant for the certificate of competence
clause 150 (a decision of the regulator to cancel a certificate of competence)	the holder of the certificate of competence
clause 156 (a decision of the regulator to refuse to grant a licence or to grant a licence subject to conditions)	the applicant for the licence
clause 157 (a decision of the regulator to impose a condition on a licence or to vary or revoke a condition of a licence)	the holder of the licence
clause 158 (a decision of the regulator to suspend or cancel a licence)	the holder of the licence

Appendix D

Decisions that are subject to external review (but not internal review) under the WHS Act. All internal review decisions in relation to the matters in appendix A, B or C are subject to external review.

Provision under which reviewable decision is made	Eligible person in relation to reviewable decision
Section 179 forfeiture of seized things	The person entitled to the item, property or evidence that was forfeited
Section 180 return of seized things	The person entitled to the item, property or evidence that was seized
Section 207 decision of regulator to vary or cancel notice	<ol style="list-style-type: none"> 1. The person to whom the notice was issued 2. The person with management or control of the workplace 3. A person conducting a business or undertaking whose interests are affected by the decision 4. A worker whose interests are affected by the decision 5. A health and safety representative, mine safety and health representative or industry safety and health representative who represents a worker whose interests are affected by the decision 6. In the case of a prohibition notice, a health and safety representative, mine safety and health representative or industry safety and health representative whose direction under section 85 to cease work gave rise to the notice

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This publication provides a general summary of some of the provisions under the *Work Health and Safety Act 2011*, *Work Health and Safety Regulation 2011*, *Work Health and Safety (Mines and Petroleum Sites) Act 2013* and *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (WHS laws) as interpreted by the Department of Industry, Skills and Regional Development at the time of writing (November 2016). Compliance with the WHS laws is a legal requirement. This publication does not provide or purport to provide legal advice. Users are reminded of the need to ensure that the information upon which they rely is up to date by checking the currency of the information at the Department of Industry, Skills and Regional Development website or with the user's independent legal advisor.