



Authorisations

REGULATORY FUNCTION POLICY

March 2017

INTRODUCTION

The *Authorisations Policy* outlines the principles that inform WorkSafe's administration of the authorisation regimes established under health and safety regulations.

BACKGROUND

WorkSafe was established as a Crown entity under the WorkSafe New Zealand Act 2013 and is New Zealand's primary health and safety regulator. WorkSafe's main objective is to promote and contribute to a balanced framework for securing the health and safety of workers and workplaces. An enhanced risk management strategy is a key contributor to achieving this objective, and authorisations are a critical part of this strategy.

Authorisation regimes have been established where the intended activities involve a significant hazard or risk to the health and safety of workers and others in the workplace. They include a number of schemes for approving what would otherwise be prohibited, such as:

- > approval to sell a declared high risk article under the Electricity (Safety) Regulations 2010
- > approved method for managing the risk associated with asbestos in the workplace under the Health and Safety at Work (Asbestos) Regulations 2016
- > acceptance of safety cases under the Health and Safety at Work (Major Hazard Facilities) Regulations 2016.

Authorisation regimes require duty holders to meet health and safety-related criteria prior to commencing or continuing an activity. These criteria often include a requirement to demonstrate particular competencies. In this way, authorisation regimes reduce the likelihood of work-related health and safety incidents inherent in a particular activity. Authorisation regimes are a key element in WorkSafe's strategy to reduce work-related fatalities, injuries and illnesses.

DEFINITIONS

AUTHORISATION REGIME

'*Authorisation regime*' includes all administrative schemes established by regulation and administered by WorkSafe under which a licence, permit, registration, consent, certificate, recognition or other authority is required to:

- > authorise work, a workplace, plant or substance
- > commence, continue or discontinue an activity.

POLICY PURPOSE

The *Authorisations Policy* is for internal operational use and will guide WorkSafe's authorisation activities and the development of more detailed internal operational documentation. This policy is not intended to be prescriptive, but aims to provide WorkSafe staff exercising the authorisations function with a framework of principles within which individual decisions under various authorisation regimes can be made. It also outlines how authorisations are managed. Other related operational or regulatory function policies include the *Reviews Policy* and *Exemptions Regulatory Function Policy*.

POLICY SCOPE

IN SCOPE

The policy applies to:

- > authorisation regimes established by regulation and administered by WorkSafe
- > approval schemes for approving activities that would otherwise be prohibited.

OUT OF SCOPE

This policy does not cover the following:

- > exemptions under s220 of the Health and Safety at Work Act 2015 (HSWA) including exemptions from authorisations, which are addressed in the Exemptions Regulatory Function policy
- > the issue of certificates by third party approval agencies such as compliance certifiers.

OBJECTIVES OF AUTHORISATION REGIMES

Authorisation regimes are intended to reduce the risks of particular activities by:

- > regulating entry to the market – authorisation regimes may control entry into a market for specific activities. The applicant or document holder may only initiate or continue their business activities if they satisfy specific regulatory criteria
- > providing a level of assurance that good health and safety management practices are in place so that a high hazard or high risk activity that would otherwise be prohibited can continue without exposing people to avoidable risks to their health and safety.

The information obtained through authorisation applications will enable WorkSafe to better manage the allocation of limited inspection resources. This includes allocating inspectors to regular inspections of high risk activities (eg major hazard facilities) or to reactive ad hoc inspections of potentially more problematic activities.

WORKSAFE'S INTERVENTION APPROACH

The intervention approach sets out the approach that WorkSafe will take in fulfilling its regulatory functions, and describes how WorkSafe sees its role as government's primary regulator for workplace health and safety. The intervention approach shapes WorkSafe's decision-making both at the system level and at the level of individual firms or events. While the intervention approach is focussed on influencing and responding to behaviours, some of the intervention approach principles are also relevant to authorisation decisions.

PRINCIPLES GUIDING AUTHORISATION DECISION-MAKING

Context-specific and proportionate

Choices and decisions take account of the particular circumstances. The intervention chosen is in proportion to the scope and scale of the issue, or severity of the risk or harm.

This principle will be applied to authorisation decision-making where the regulations allow for the exercise of discretion by WorkSafe. For example, when making decisions to impose conditions on authorisations, or to suspend or cancel an authorisation, WorkSafe will consider the scope and scale of the activity for which authorisation is sought and the potential severity of risk inherent in the activity.

Consistent

A consistent approach will be used in the same or similar circumstances to achieve the same ends. This ensures a reliable and trustworthy regulator.

Consistent decision-making is vital to applicants and document holders, as this enables them to make informed business decisions. WorkSafe is responsible for authorisation regimes of varying types, and with differing criteria for decision-making and levels of prescription. WorkSafe's decision-making approach will be available so that applicants and document holders can be reasonably certain that similar decisions will be made in similar circumstances. In some circumstances WorkSafe may need to do things differently. If so the justification for any difference in process will be provided to the applicant or document holder upon request.

Fair, just and impartial

Applicants and document holders are given the opportunity to contribute to a common understanding of a situation or issue (where possible), devise solutions and ask questions about the regulator's decisions. This includes the principles of natural justice.

Natural justice (or 'procedural fairness') is the duty to act fairly when exercising statutory powers that may affect a person's rights, interests or legitimate expectations. When making authorisation decisions, WorkSafe will endeavour to ensure that:

- > the applicant or document holder is given:
 - a reasonable opportunity to be heard
 - sufficient notice of any upcoming deadlines
 - an opportunity to respond and make submissions on a proposed adverse decision
 - a statement of reasons with every notification of a refusal decision
- > any submissions from the applicant or document holder are considered before finalising its decision
- > any credible, relevant and significant information upon which the decision-maker proposes to rely in making a decision will be disclosed in full.

In situations where any or all of these principles cannot be followed, WorkSafe will provide the rationale for that decision on request.

Transparent

The basis for the regulator's decisions and reasons for its actions will be clear, both before and after decisions are made. WorkSafe is open about what it does and stands by its actions.

To make informed business decisions, the regulated community need to understand WorkSafe's decision-making processes and the basis on which decisions are made. To ensure that authorisation decisions are transparent, WorkSafe will publish information about how decisions are made and the basis for them. In this way, applicants and document holders will know how to apply, what their obligations are and what to expect as a result of the application.

This information will also be freely available to promote accountability and to support public awareness and understanding of authorisation decisions.

Informed decision-making

WorkSafe's authorisation decisions will be supported by the best information available at the time.

When making authorisation decisions, WorkSafe will ensure that:

- > there is appropriate information to support the decision
- > the decision can be clearly explained and justified
- > the decision is based on a balanced use of relevant precedents (if available)
- > any information that is provided by the applicant but is excluded from the decision-making process is identified and reasons provided for the exclusion.

Responsive

WorkSafe will be timely and responsive to the needs of an applicant in making an authorisation decision.

Where regulations specify a decision-making or processing timeframe, WorkSafe will meet this standard. Where no timeframe is stipulated in the regulations, WorkSafe will endeavour to provide a decision as soon as it is practical in the circumstances.

Prescribed fees

WorkSafe will generally not process applications submitted without the prescribed fee.

Under HSWA, some regulations prescribe levies and fees for applications. Excluding waivers of fees, applications submitted without the prescribed fee may not be processed. WorkSafe may, in specific circumstances, exercise its discretion and accept an application pending receipt of the fee.

MANAGEMENT OF AUTHORISATIONS

APPLICATION AND RENEWAL DECISION-MAKING

The applicant or document holder has a right to know what information WorkSafe relied on in making an application or renewal decision prejudicial to the applicant or document holder. Subject to the provisions of the Privacy Act 1993 and the Official Information Act 1982, WorkSafe will disclose any information relied on in making the decision.

When proposing an application or renewal decision prejudicial to the applicant or document holder, WorkSafe will give the applicant or document holder a reasonable opportunity to make submissions and will consider those submissions. To ensure this, WorkSafe will provide sufficient notice to the applicant or document holder of the proposed decision. What is considered

sufficient notice will depend on the complexity and urgency of the matter. WorkSafe will ensure that the applicant or document holder is given adequate time to provide additional information, which may include written submissions and/or an oral presentation if the applicant or document holder is to be heard in person.

If an applicant or document holder has already responded to some material, and the decision-maker proposes to take into account further information that has come to their attention, then WorkSafe will give the applicant or document holder an opportunity to respond to the additional information before an application or renewal decision is made.

Some authorisation regimes expressly require that the decision-maker provide reasons for their decision when notifying applicants and document holders of a proposed or final application or renewal decision. WorkSafe will always provide a statement of reasons with every notification of a prejudicial decision, regardless of whether or not this is specified in regulations.

CHARACTER TESTS

Some authorisation regimes specifically state that applicants and document holders must be fit and proper persons to hold, or continue to hold, their authorisation document. In other regimes, the expression 'fit and proper' is not used, but the specified criteria can include an inquiry into the person's character, their criminal history and their fitness to hold an authorisation document. The term 'character test' is used in this document to refer to both of these types of tests.

In all cases when undertaking a character test, WorkSafe will disregard irrelevant matters, and have regard only to the prescribed matters (if any) and any other potentially relevant matters. WorkSafe will assess information related to those matters in light of the responsibilities associated with the authorisation sought and to the extent that they are relevant to the applicant's ability to undertake the authorised work in an appropriate, safe, and lawful manner.

AUTHORISATION OF ORGANISATIONS AND BODIES CORPORATES

A number of regimes provide for the authorisation of organisations or bodies corporate as certifiers, or inspection bodies, registrars, and safety auditors. In these regimes, in addition to the general requirements for authorisation, the regulations will, as a rule, require WorkSafe to be satisfied the applicant organisation has no reasonably foreseeable conflict of interest between the work they will be authorised to do, and any other work they do. A conflict of interest is 'reasonably foreseeable' if it could be ordinarily, properly or fairly capable of foresight.

It may be that conflicts of interest are inevitable in some contexts and where that is the case, the regulations may require WorkSafe to be satisfied that the applicant can appropriately manage the conflict.

If the applicant organisation is required by the regulations to have workers that are appropriately qualified, or have appropriate background and experience, then the applicant organisation may need to demonstrate that such workers are appropriately qualified.

The regulations may require WorkSafe to be satisfied that the applicant organisation is likely to carry out the work it wishes to be authorised for in an objective fashion that promotes safety and the public interest. In these circumstances, the applicant organisation may be asked to explain how it will ensure this and provide additional information to support this.

CONDITIONS ON AUTHORISATIONS

Imposing conditions on an authorisation can enable a work activity, workplace, plant or substance to be authorised where it would otherwise have been declined. Conditions may be imposed only to the extent they are authorised by the relevant regulations. WorkSafe will not impose conditions on an authorisation unless there is a specific power set by regulations to do so.

WorkSafe may impose conditions in circumstances where:

- > conditions are necessary to address administrative or health and safety issues that would otherwise result in the application being declined
- > setting conditions would provide additional benefits such as improved health and safety and environmental outcomes, to the extent that this is permissible by regulations.

SUSPENSION, CANCELLATION, REVOCATION AND WITHDRAWAL

Most authorisation regimes include the power to suspend, cancel, withdraw or revoke an authorisation document.¹ The grounds upon which WorkSafe may suspend and/or cancel an authorisation will vary according to the regulations, and range from the very specific to more general grounds (such as where WorkSafe is satisfied that it is appropriate or in the interests of safety to do so).

Consideration of suspension and/or cancellation may be triggered by a wide range of factors, including:

- > concerns about the document holder's fitness and character
- > negligence by the document holder
- > health and safety concerns about a type of work, a workplace, plant or a substance
- > breach of the conditions imposed on an authorisation
- > non-compliance by the document holder with particular regulations, a safety case or equipment standards
- > the provision of false or misleading information by the document holder.

When considering suspending and/or cancelling an authorisation, WorkSafe will ensure that:

- > the decision is made in accordance with the grounds set out in the regulations applying to the particular authorisation regime
- > the principles of procedural fairness are applied
- > the suspension and/or cancellation decision will be supported by clear, justifiable reasons and be consistent with other suspension and/or cancellation decisions in similar circumstances.

Although regulations may provide for suspension or withdrawal in specific circumstances, WorkSafe may exercise its discretion and take a less punitive action if appropriate and accommodated by the regulations. For example, depending on the severity of risk and the extent to which a document holder has deviated from their authorisation, WorkSafe may choose to vary the authorisation to place conditions on the document holder rather than suspending or cancelling the authorisation where this is permissible under the relevant regulations.

¹ For brevity, 'suspension and/or cancellation' in this document refers to 'suspension, cancellation, withdrawal or revocation' as the case requires.

The provision of materially false or misleading information in support of an application for the grant or renewal of an authorisation document will often be grounds for the suspension, cancellation or non-renewal of that document in accordance with the regulations.

If the applicant provides incorrect information that does not materially impact on the assessment of the application, WorkSafe will generally give the applicant the opportunity to provide the correct information and re-submit their application.

REVIEWS OF AUTHORISATIONS

Few authorisation regimes specify review rights. Where these are specified, WorkSafe will conduct reviews in accordance with the relevant legislation and regulations and the Reviews Policy.

Where no review rights are specified, WorkSafe may agree to carry out a review at the request of the applicant or document holder where:

- > the circumstances warrant this
- > it is administratively practical to offer and conduct such a review and
- > offering a review would not affect any other rights the person could have (such as adversely affect their ability to appeal).

RENEWALS OF AUTHORISATIONS

Most authorisations have an expiry date specified either in the regulations or set by WorkSafe when approving the authorisation. If an application for renewal is made prior to the expiry date, and the regulations so provide, the authorisation remains in place until a decision has been made. Otherwise, on the expiry date the authorisation ceases to have effect, and an application for a renewal or a new authorisation is required.

Where there is an expiry date, but no statutory power to renew an authorisation, WorkSafe will treat any application to renew an authorisation as a new application.

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