

Policy

Review of Decisions

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Policy changes to version 2.0

- > Content clarified and updated to include Rights of Review for Eligible Persons/s, and
- > Aligned with ONRSR's governance arrangements

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1. Purpose

The purpose of this policy is to provide guidance to rail transport operators, and ONRSR staff on the legislative mechanisms available to appeal and review of certain decisions.

2. Background

The Office of the National Rail Safety Regulator (ONRSR) and the Regulator has been established under the *Rail Safety National Law (RSNL)* to administer a national system of rail safety regulation, including the effective management of rail safety risks through a national scheme for accreditation of rail transport operators in relation to rail operations.

3. Scope

This policy seeks to provide direction to potential applicants and ONRSR staff on the operation of the review and appeal mechanisms available under the RSNL only in relation to the 'decisions identified as "reviewable decisions" in section 215 of the RSNL.

Please note that this Policy is not intended to address any other potential legal rights and remedies under any other law (including common law) including that may arise as a consequence of the administration and enforcement of the RSNL.

This document is intended to be read in conjunction with the legislation and other relevant ONRSR policies. This policy imposes no legal duty and where actions or requirements are described as mandatory these reflect requirements in the RSNL or the National Regulations. It is not intended to replace the legislation, or to limit or expand the scope of the legislation. In the event of an inconsistency between this policy and the legislation, the legislation will prevail.

4. Definitions

Definitions provided by the RSNL and the National Regulations apply within this policy.

RSNL – means the *Rail Safety National Law* which has been enacted as a Schedule to the *Rail Safety National Law (South Australia) Act 2012 (SA)* as it applies in each state and territory. In Western Australia, 'RSNL' means the Rail Safety National Law which has been enacted as mirror legislation in the *Rail Safety National Law (WA) Act 2015*.

National Regulations – means the *Rail Safety National Regulations 2012*; or the *Rail Safety National Law (WA) Regulations 2015* in Western Australia.

Eligible person – means a person who is eligible to apply for review of a reviewable decision as defined in section 215 of the RSNL

Where terms are not defined within the legislation or regulation the Macquarie Dictionary definition applies.

Use of the word 'should' indicates a recommendation of the ONRSR. However, the rail transport operator is free to follow a different course of action provided it complies with the legislation. Use of the word 'must' indicates a legal requirement where compliance is necessary.

5. Legislative framework

Part 7 of the RSNL enables the review of certain decisions made under the legislation:

- > Section 215 specifies what decisions made under the RSNL are reviewable and persons who are eligible to apply for a review in relation to each decision.
- > Section 216 outlines the process for an application by an eligible person to the Regulator for review of a decision listed in section 215.
- > Section 217 provides an eligible person with the right to appeal to a court or tribunal against a reviewable decision made by the Regulator, or a decision made (or taken to have been made) by the Regulator under section 216 in its review of a decision.

6. Review by Regulator

The process for internal review by the Regulator of a reviewable decision is established under section 216 of the RSNL. It is a **merits review** process, whereby the material facts of the original decision are reconsidered from a fresh perspective.

Application by eligible person

An eligible person may apply for a review of a decision listed in section 215, subject to the following requirements:

- > the application is made in a form approved (in writing) by the Regulator – the application form is available for use on the ONRSR website;
- > where the reviewable decision was made by the Regulator, the application is made within 28 days of the decision being made; and
- > where the reviewable decision was not made by the Regulator, the application is made within 28 days of the decision first coming to the person's notice or such longer period as the Regulator allows.

Interim operation of reviewable decision

An application by an eligible person for review of a decision will not affect the operation of the reviewable decision or prevent the taking of any action to implement it.

However, the Regulator may, on their own discretion or on the application for review by the applicant, stay the operation of the decision in question (not being an immediate suspension of accreditation or registration, or a prohibition notice) pending the determination of the review. The Regulator may attach any conditions as considered fit to such a stay.

Where a stay is applied for as part of an application of review, the Regulator must make a decision on granting a stay by the end of the next business day following the day on which the application is made. Where this period of time has elapsed without a decision on the stay by the Regulator, the Regulator is taken to have made a decision to grant a stay.

Review of decisions made by Regulator

The Regulator is responsible for making a number of decisions that are reviewable under section 215 of the RSNL, including in relation to:

- > granting and varying the accreditation status of rail transport operators;
- > directing amendments of safety management systems implemented by rail transport operators; and

- > directing persons to stop, alter or not commence works near a railway that threaten or are likely to threaten its safety or operational integrity.

Under subsection 216(2), the Regulator must appoint a person other than themselves to review such decisions made by the Regulator. This person may be a suitably qualified senior ONRSR staff member or an external reviewer.

In all instances, the Regulator should be mindful of perceived or actual conflicts of interest in appointing a suitable person.

The Reviewer may engage with relevant ONRSR staff to ensure that a comprehensive brief is provided in a timely manner with a copy of the original decision and any other documents that may assist with material questions of fact in the review.

Review of decisions not made by Regulator

(e.g. Executive Director, National Operations making a decision under delegation)

The Regulator must review all decisions not made by the Regulator that are the subject of a review initiated under section 216. These include decisions by rail safety officers in relation to the issue of improvement notices, prohibition notices, non-disturbance notices

In undertaking such reviews, the Regulator should engage Corporate Counsel to provide procedural support. Relevant ONRSR staff should also be tasked in providing a comprehensive brief to the Regulator with the original decision and any other documents that may assist with material questions of fact in the review.

Decision on review by Regulator

The Regulator is responsible for determining appropriate review outcomes for all reviews conducted under section 216. Accordingly, following a review, the Regulator may decide to:

- > affirm or uphold the original decision;
- > vary the reviewable decision; or
- > set aside the reviewable decision and substitute another decision that the Regulator considers appropriate.

Response on review to applicant

The Regulator must give a written notice to the applicant setting out the Regulator's decision in relation to the reviewable decision. Such a notice must provide details of:

- > the reasons for the decision; and
- > the findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based.

This notice must be provided to the applicant:

- > within 7 days after the application is made for reviewable decisions made under Part 5 Divisions 1 to 3 of the RSNL relating to the improvement notices, prohibition notices and non-disturbance notices; and
- > within 14 days after the application is made for all other reviewable decisions.

In the event of the Regulator failing to notify an applicant within the time-frames outlined above, the Regulator is taken to have made a decision to affirm the reviewable decision.

7. Appeal to court or tribunal

An eligible person may also appeal to the court or tribunal under section 217 of the RSNL against:

- > a reviewable decision made by the Regulator; or
- > a decision made or taken to have been made, by the Regulator under section 216 in relation to a reviewable decision (under the internal review mechanism outlined above) including a decision concerning a stay of the operation of the reviewable decision.

Such an appeal must be instituted within 28 days of the relevant decision being appealed against.

Based on their jurisdiction, an eligible person may lodge an appeal under section 217 with the relevant administrative appeal court or tribunal.

8. Information about right of review

Eligible persons are to be informed of their right of review under Part 7 of the RSNL when notified of the outcome of reviewable decision. This requirement for the provision of information about the right of review is mandated under the RSNL for inclusion in:

- > notices by the Regulator for accreditation, registration and exemption applications;
- > notices by the Regulator for the forfeiture of seized things;
- > directions by the Regulator for the amendment of safety management systems;
- > directions by the Regulator for operators to undertake necessary actions for the safe construction or operation of a railway in response to certain reports and for persons to stop works near a railways; and
- > improvement notices, prohibition notices and non-disturbance notices issued by rail safety officers,

Accordingly, all such formal correspondence by the Regulator and the ONRSR contains a section on the right of review under Part 7 of the RSNL, providing details of:

- > an eligible person's right to apply for a review of the decision by the Regulator in accordance with section 216 and where to obtain the ONRSR form to apply for such a review; and
- > an eligible person's right to appeal to a court or tribunal pursuant to section 217 (including in relation to a decision made under section 216).

A "Rights of Review" document - an extract of sections 216 and 217 of the RSNL – is also attached to all such correspondence, containing the relevant procedural requirements and time limits for review.