



SIRA
State Insurance
Regulatory Authority

Merit review user guide

The *Merit review user guide* (User Guide) provides guidance regarding the procedures for the referral of work capacity decisions for merit review by the State Insurance Regulatory Authority (SIRA), as well as the procedure for merit reviews by SIRA under section 44BB(1)(b) of the *Workers Compensation Act 1987*.

This User Guide demonstrates how SIRA gives effect to the operation of those sections of the *Workers Compensation Act 1987* relating to the merit review of work capacity decisions. It is made to guide workers, employers, insurers and their representatives through the processes and procedures that will be used by SIRA.

The User Guide is not intended to provide legal advice about the operation of the legislation.

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Published 17 June 2016, effective 1 August 2016

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Explanatory note

The *Merit Review User Guide* (User Guide) provides guidance regarding the procedures for the referral of work capacity decisions for merit review by the State Insurance Regulatory Authority (SIRA, referred to here as the Authority), as well as the procedure for merit reviews by SIRA under section 44BB(1)(b) of the Workers Compensation Act 1987 (the 1987 Act).

The User Guide demonstrates how the Authority gives effect to the operation of those sections of the 1987 Act relating to the merit review of insurer work capacity decisions. It is designed to guide workers, employers, insurers and their representatives through the merit review processes and procedures that will be used by the Authority.

Established by SIRA, the Workers Compensation Merit Review Service (MRS) conducts merit reviews when there is a dispute regarding an insurer work capacity decision during the course of a claim.

This User Guide will help guide workers, officers of the Authority, members of the legal profession, the insurance industry and parties to claims, making and dealing with an application to MRS. Clear and easily accessible information directed towards self-represented workers is also available on the SIRA website. This User Guide is also intended to guide merit reviewers as to the manner in which a review is to be conducted.

The User Guide replaces the *Guidelines for work capacity decision internal reviews by insurers and merit reviews by the Authority* (the Review Guidelines) as far as they applied to merit reviews by the Authority. They will apply to all new applications received at MRS on or after 1 August 2016, and to all matters current at MRS on or after that date, which have not been determined by the issuing of findings and recommendations, unless otherwise provided for in this User Guide.

The former versions of the Review Guidelines that have been issued to date and the commencement timing details for this User Guide are as follows:

- Version 1, Review Guidelines effective 1 October 2012, gazetted 28 September 2012
- Version 2, Review Guidelines effective 1 January 2013, gazetted 7 December 2012
- Version 3, Review Guidelines effective 11 October 2013, gazetted 8 October 2013, and
- Version 4, this Merit Review User Guide effective 1 August 2016, published 17 June 2016.

In support of this Merit Review User Guide, the Authority publishes on its website at www.sira.nsw.gov.au a suite of complementary supporting information and materials to assist and inform workers, insurers and their representatives.

Questions about this User Guide, MRS, or any feedback for consideration in future revisions, should be directed to the Director Assessment Services.

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Published 17 June 2016, effective 1 August 2016

Division 1 – Introduction, registry and documents

Chapter 1 - Introduction and interpretation

- 1.1 The Workers Compensation Merit Review Service (MRS) has been established by the Authority to conduct merit reviews under section 44BB(1)(b) of the 1987 Act.

Workers Compensation Act 1987

44BB Review of work capacity decisions

- (1) An injured worker may refer a work capacity decision of an insurer for review:
- (a) by the insurer in accordance with the Workers Compensation Guidelines within 30 days after an application for internal review is made by the worker, or
 - (b) by the Authority (as a merit review of the decision), but not until the dispute has been the subject of internal review by the insurer, or
 - (c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority.

What is the purpose of the User Guide?

- 1.2 The *Merit review user guide* (User Guide) details the procedures for the referral of work capacity decisions for merit review, and the procedure for merit reviews conducted by the Authority under section 44BB(1)(b) of the Workers Compensation Act 1987 ('the 1987 Act').
- 1.3 This User Guide seeks to educate workers, employers, insurers and their representatives on the processes and procedures used by the Authority in the conduct of merit reviews.
- 1.4 This User Guide helps guide workers, officers of the Authority, members of the legal profession, the insurance industry and parties to claims, on how to make and deal with an application to the MRS. This User Guide is also intended to guide merit reviewers as to the manner in which a review is to be conducted.
- 1.5 The User Guide replaces *the Guidelines for work capacity decision internal reviews by insurers and merit reviews by the Authority* (Review Guidelines) that came into effect on 11 October 2013, insofar as they applied to merit reviews by the Authority. They will apply to all new applications received at MRS on or after 1 August 2016, and all matters current at MRS on or after that date, which have not been determined by the issuing of findings and recommendations, unless otherwise provided for in this User Guide.
- 1.6 As a transitional arrangement, and to avoid requirements that might be unreasonable in the circumstances on any person or entity, a merit reviewer may waive observance of any part or parts of this User Guide (except as legally required under legislation) for any application that has been lodged before it came into effect if to do so would be consistent with the system objects, the objects of MRS, and does not cause undue prejudice to the parties.

What definitions apply in this User Guide?

- 1.7 The definitions in sections 3, 4 and 32A of the 1987 Act, and sections 4, 42 and 70 of the 1998 Act, apply to this User Guide to the extent that they are not defined in clause 1.8.
- 1.8 The terms used in this User Guide have the following meanings:
- 1.8.1 **1987 Act** - *Workers Compensation Act 1987*.
 - 1.8.2 **1998 Act** - *Workplace Injury Management and Workers Compensation Act 1998*.
 - 1.8.3 **Applicant** - The party that initiates the referral of an application.
 - 1.8.4 **Application** – The means by which a worker requests the referral of a work capacity decision by an insurer for a merit review by the Authority.
 - 1.8.5 **Authority** – State Insurance Regulatory Authority (SIRA).
 - 1.8.6 **Days** – A reference to a number of calendar days, unless otherwise stated.
 - 1.8.7 **DX box** – Exchange box in the Australian Document Exchange Pty Ltd.
 - 1.8.8 **ECM system** – An electronic case management system established by the Authority.
 - 1.8.9 **Electronic Transactions Act** – *Electronic Transactions Act 2000*.
 - 1.8.10 **Form** – A form approved by the Authority that may contain an application and/or a reply to an application.
 - 1.8.11 **Insurer** – Any party against whom a claim is made under the 1987 Act or 1998 Act.
 - 1.8.12 **Interpretation Act** – *Interpretation Act 1987*.
 - 1.8.13 **MRS** – Workers Compensation Merit Review Service of the Authority.
 - 1.8.14 **Matter** – The application, reply all supporting documents and correspondence held by the Authority in relation to one discrete application. Each application lodged is given a discrete matter number.
 - 1.8.15 **Merit reviewer** – The person conducting a merit review by the Authority of a work capacity decision made by an insurer.
 - 1.8.16 **Officer of MRS** – A person working on behalf of the Authority undertaking work in relation to merit reviews.
 - 1.8.17 **Party** – The worker or the insurer in respect of the application for merit review.
 - 1.8.18 **Registry** – That part of the Authority that receives documents for the purpose of merit reviews.
 - 1.8.19 **Reply** – The means by which an insurer answers an application.
 - 1.8.20 **SIRA** – State Insurance Regulatory Authority.
 - 1.8.21 **WIRO** – Workers Compensation Independent Review Officer.
 - 1.8.22 **Workers Compensation Independent Review Officer** – The person holding office under Chapter 2, Part 3 of the 1998 Act who may conduct a procedural review of an insurer's work capacity decision after an internal review by the insurer and a merit review by the Authority.

What are the objectives of MRS?

- 1.9 The objectives of MRS are consistent with, and are in support of, the system objectives set out in section 3 of the 1998 Act.

Workplace Injury Management and Workers Compensation Act 1998

3 System objectives

The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives:

- (a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,*
- (b) to provide:*
 - prompt treatment of injuries, and*
 - effective and proactive management of injuries, and*
 - necessary medical and vocational rehabilitation following injuries,**in order to assist injured workers and to promote their return to work as soon as possible,*
- (c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,*
- (d) to be fair, affordable, and financially viable,*
- (e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,*
- (f) to deliver the above objectives efficiently and effectively.*

- 1.10 The MRS objectives should be used as an aid to the interpretation of this User Guide. The objectives of the MRS in dealing with merit reviews of work capacity decisions are:

- 1.10.1 to provide a timely, fair and cost effective system for the conduct of work capacity decision merit reviews, that is accessible, transparent, independent and professional
- 1.10.2 to conduct merit reviews fairly and according to the substantial merits of the application with as little formality and technicality as is practicable
- 1.10.3 to ensure the quality and consistency of decision making
- 1.10.4 to promote the resolution of the claim or dispute using dispute resolution processes appropriate to the claim or dispute
- 1.10.5 to promote the publication of merit reviews to enhance transparency, accountability, education and guidance, help improve work capacity decision making and minimise disputation
- 1.10.6 to make appropriate use of the knowledge and experience of merit reviewers, and
- 1.10.7 to establish and maintain effective communication and liaison with stakeholders concerning the role of MRS.

What are the obligations of the Authority, the parties, and their representatives?

- 1.11 In exercising their functions and interpreting the provisions of this User Guide, the Executive Director Dispute Resolution Services, Director Merit Reviews, merit reviewers and officers of MRS must have regard to the objectives of the MRS, in addition to the system objectives in the Act.
- 1.12 **The Authority** is under an obligation, in relation to merit reviews referred to MRS, to:
- 1.12.1 provide and maintain a service to assist workers in connection with the merit review process
 - 1.12.2 review, monitor and report on compliance with this User Guide and the nature of complaints received about claims handling practices, and
 - 1.12.3 report any apparent non-compliance with this User Guide to the relevant regulatory authority.
- 1.13 **An insurer** is under an obligation, in relation to merit reviews referred to MRS, to:
- 1.13.1 encourage and facilitate the use of the service to assist workers to understand the merit review procedures
 - 1.13.2 comply with the requirements of this User Guide
 - 1.13.3 attempt to resolve the claim or dispute, and identify and narrow any issues in dispute before any application is lodged with MRS and to continue to do so while the application is being considered by MRS
 - 1.13.4 assist MRS to further the MRS objectives and the system objectives, and
 - 1.13.5 proactively participate in merit review processes and comply with requests or directions.
- 1.14 **A worker** is under an obligation, in relation to merit reviews referred to MRS, to:
- 1.14.1 attempt to resolve the claim or dispute, and identify and narrow any issues in dispute before any application is lodged with MRS and to continue to do so while the application is being considered by MRS
 - 1.14.2 assist MRS to further the MRS objectives and the system objectives, and
 - 1.14.3 proactively participate in merit review processes and comply with requests or directions, particularly in relation to the provision of information relevant to the decision under review.
- 1.15 **A representative of a worker or insurer** is under an obligation, in relation to merit reviews referred to MRS, to:
- 1.15.1 assist MRS to further the MRS objectives and the system objectives, and
 - 1.15.2 ensure that, as the solicitor, barrister, agent or other person representing a party at the MRS, they do not, by their conduct, cause the party they represent to fail to meet their obligations set out in clause 1.5 or clause 1.6.

Can legal practitioners recover costs related to reviews of work capacity decisions?

- 1.16 **Insurer legal costs prohibition** - The Workers Compensation Regulation 2010 has, since 2012, included a prohibition on recovery of legal costs for insurers in connection with a review of a work capacity decision, which is contained in *Schedule 8 Savings and transitional provisions, Part 1 Workers Compensation Legislation Amendment Act 2012, 9 Review of work capacity decisions—legal costs of insurers*. This provision remains in force.

Workers Compensation Regulation 2010

Schedule 8 Savings and transitional provisions

Part 1 Workers Compensation Legislation Amendment Act 2012

9 Review of work capacity decisions—legal costs of insurers

A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to an insurer in connection with an internal or other review under section 44 of the 1987 Act in relation to a work capacity decision of the insurer.

- 1.17 **Worker legal costs prohibition** - The 1987 Act has, from 2012 to December 2015, contained a prohibition on recovery of legal costs for workers in connection with the review of work capacity decisions in section 44(6). This provision was repealed on 4 December 2015.

Workers Compensation Act 1987

44 Review of work capacity decisions (NB: Repealed 4 December 2015)

(6) *A legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer.*

- 1.18 **Worker and insurer legal costs prohibition** - The 1987 Act has, since 4 December 2015, contained a prohibition on recovery of legal costs for workers and insurers in connection with the review of a work capacity decision, in *Schedule 6, Part 19I, Clause 8 (Provisions consequent on enactment of Workers Compensation Amendment Act 2015)*. This provision remains in force, because section 44BF of the 1987 Act has not as yet commenced.

Workers Compensation Act 1987

Schedule 6 Savings, transitional and other provisions

Part 19I Provisions consequent on enactment of Workers Compensation Amendment Act 2015

8 Review of work capacity decisions—recovery of costs

A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to a worker or an insurer in connection with a review of a work capacity decision for which an application is made under section 44 of the 1987 Act before the commencement of section 44BF of that Act (as inserted by the 2015 amending Act).

Chapter 2 – Interpreters at the Workers Compensation Merit Review Service

- 2.1 If a worker indicates that an interpreter is required to assist in relation to a merit review, an officer of MRS will arrange an interpreter to be available to the worker.

Who can act as an interpreter?

- 2.2 Interpreters accredited by NAATI (National Accreditation Authority for Translators and Interpreters) will be used if an interpreter is required.
- 2.3 In the absence of a NAATI interpreter, a non-NAATI interpreter may be used at the discretion of the merit reviewer, as long as that person is not a support person accompanying the worker to a merit review.

Chapter 3 – Timelines at the Workers Compensation Merit Review Service

Can time limits be extended?

- 3.1 The Executive Director Dispute Resolution Services and/or the Director Merit Reviews may, if the circumstances justify, abridge or extend any time limit fixed by this User Guide (excluding any time limit fixed by the legislation), including any time limit affecting the Authority, an officer of MRS, or a merit reviewer.
- 3.2 The Executive Director Dispute Resolution Services and/or the Director Merit Reviews may extend time under clause 3.1 after the time expires, whether or not an application is made before the time expires, or at all.

How are periods of time calculated?

- 3.3 Any period of time fixed by this User Guide for the doing of any act or in connection with any merit review or request by the Authority, or a merit reviewer, will be calculated in accordance with section 36 of the *Interpretation Act* and this clause:
- 3.3.1 where a period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time will be reckoned exclusive of that day or of the day of that act or event
- 3.3.2 where, apart from this sub-clause, the period in question, being a period of five days or less, would include a day on which the registry is closed for lodgment in person, that day will be excluded, and
- 3.3.3 where the last day for doing a thing is a day on which the registry is closed for lodgment in person, the thing may be done on the next day on which the registry is open for lodgment in person.

Chapter 4 - Documentation and other supporting material

- 4.1 All relevant documents that a party would like to be considered as part of their application or reply should be listed in the application or reply, and must be provided to the other party.

What happens at the MRS if the date a document was delivered is unknown?

- 4.2 For the purpose of this User Guide, if the date of delivery or receipt of a document is unable to be ascertained, and the document was delivered to the address given by a worker or insurer for delivery of documents, then the following deeming provisions apply at MRS.
- 4.3 Unless there is evidence to the contrary, the documents are to be taken to be received by the person as follows:
- 4.3.1 in the case of personal delivery to a physical address, the day the document is delivered to that address
 - 4.3.2 in the case of postage to a postal address, five days after the document is posted
 - 4.3.3 in the case of sending to a DX box, two days after the document is left in that DX box or in another DX box for transmission to that DX box
 - 4.3.4 in the case of an email to an email address, on the day the email is sent if sent before 5:00pm, or on the day after the email is sent if sent at or after 5:00pm, or
 - 4.3.5 in the case of a facsimile to a facsimile number, on the day the facsimile is sent if sent before 5:00pm, or on the day after the facsimile is sent if sent at or after 5:00pm.
- 4.4 For matters lodged via the ECM system, the provisions of section 13 of the *Electronic Transactions Act* apply for the purpose of this User Guide.

How are surveillance images and footage managed?

- 4.5 Any surveillance images or footage to be lodged with the Authority are to be provided by the insurer in DVD format and must first be provided to the worker. Any investigator's or loss adjuster's report concerning those surveillance images or footage must also be provided with the surveillance images or footage when they are provided to the worker and lodged with the Authority.
- 4.6 If surveillance images or footage have been provided by an insurer to a worker for the first time in support of a reply lodged with the Authority, the worker will be offered an opportunity to respond to the surveillance images or footage.
- 4.7 Surveillance images and footage held by the Authority are where they contain personal information, subject to the *Privacy and Personal Information Protection Act 1998*.

Chapter 5 - Electronic case management system

- 5.1 The Authority may establish an ECM system to do one or more of the following:
 - 5.1.1 enable documents with respect to merit reviews to be created, exchanged, filed, issued, accessed and used in electronic form
 - 5.1.2 enable parties to merit reviews to communicate in electronic form with MRS and with other parties
 - 5.1.3 enable information concerning the progress of merit reviews to be provided in electronic form to parties, and/or
 - 5.1.4 enable MRS and merit reviewers to communicate in electronic form with parties to merit reviews.
- 5.2 The Authority may establish a practice note for the use of the ECM system, and establish requirements for persons to become registered users of the ECM system.
- 5.3 Such a practice note may provide, among other things, for the specification of the level of access to the ECM system to which persons or specified classes of persons are entitled, the conditions of use of the ECM system applicable to persons generally or persons of any such class, the security methods by which persons using the ECM system are identified and verified, and how users gain access to the ECM system.
- 5.4 Subject to any practice note, a person may not use the ECM system for particular matters unless the person is a registered user of the ECM system and is:
 - 5.4.1 a party to the application for merit review, or
 - 5.4.2 a representative of a party to the application for merit review.
- 5.5 In relation to any matter, the level of access to the ECM system to which a user is entitled, and the conditions of use applicable to a user, is subject to any decision of the Authority.
- 5.6 Documents and information lodged via the ECM system may be dealt with in accordance with the provisions of the *Electronic Transactions Act*.
- 5.7 When the Authority sends documents, or forwards correspondence to a party who is a registered user of the ECM system, the Authority will generally only do so via electronic communication to that party.

Division 2 – Merit reviews by the Authority

Chapter 6 – Workers Compensation Merit Review Service jurisdiction

What is a work capacity decision?

6.1 Work capacity decisions by insurers are defined in section 43 of the 1987 Act.

Workers Compensation Act 1987

43 Work capacity decisions by insurers

(1) *The following decisions of an insurer (referred to in this Division as work capacity decisions) are final and binding on the parties and not subject to appeal or review except review under section 44BB or judicial review by the Supreme Court:*

- (a) *a decision about a worker's current work capacity,*
- (b) *a decision about what constitutes suitable employment for a worker,*
- (c) *a decision about the amount an injured worker is able to earn in suitable employment,*
- (d) *a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,*
- (e) *a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,*
- (f) *any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)–(e).*

(2) *The following decisions are not work capacity decisions:*

- (a) *a decision to dispute liability for weekly payments of compensation,*
- (b) *a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act.*

6.2 Section 43(1)(a) to (e) of the 1987 Act specifically identifies some decisions of insurers which are work capacity decisions that are final and binding on the parties and not subject to appeal or review except review under section 44BB or judicial review by the Supreme Court.

6.3 Section 43(1)(f) of the 1987 Act expands upon the definitions of a work capacity decision to also include 'any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation'.

6.4 Section 43(2) of the 1987 Act identifies some decisions of insurers which are **not** work capacity decisions.

6.5 An officer of the MRS may reject an application or any part of an application as not duly made if the officer is satisfied that the application or part thereof does not establish that it relates to a work capacity decision.

Which work capacity decisions can be referred for merit review?

- 6.6 A worker may refer a work capacity decision, or decisions, to the Authority for merit review, but only after that work capacity decision has been the subject of an internal review by the insurer, in accordance with section 44BB(1)(b) of the 1987 Act.

Workers Compensation Act 1987

44BB Review of work capacity decisions

- (1) An injured worker may refer a work capacity decision of an insurer for review:
- (a) by the insurer (an internal review) in accordance with the Workers Compensation Guidelines within 30-days after an application for Internal Review is made by the worker, or
 - (b) by the Authority (as a merit review of the decision), but not until the dispute has been the subject of Internal Review by the insurer, or
 - (c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority.

When must you lodge an application for merit review?

- 6.7 Any application for merit review **must** be made by the worker to the Authority in accordance with section 44BB(3) of the 1987 Act.

Workers Compensation Act 1987

44BB Review of work capacity decisions

- (3) The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:
- (a) an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority)...
 - (b) an application for review by the Authority may be made without an internal review by the insurer if the insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made,

- 6.8 If an insurer has failed to complete an internal review and notify the worker within 30 days of the internal review being lodged, an application for merit review may be lodged by a worker without the internal review having been completed.
- 6.9 If an insurer has completed an internal review, a workers application for merit review must be lodged with the MRS within 30 days of receiving notice of the internal review decision from the insurer.

Chapter 7 - Lodging applications and replies with the Workers Compensation Merit Review Service

Where do you send documents to MRS?

- 7.1 Any applications, replies, supporting documents, letters or other correspondence to MRS should, unless explicitly directed otherwise, be addressed to the MRS registry at:

Merit Review Service
State Insurance Regulatory Authority
Post: **Level 19, 1 Oxford Street,**
Darlinghurst, NSW, 2010
DX: **DX 10 SYDNEY**
Email: mrs@sira.nsw.gov.au

- 7.2 It is sufficient notification, or service, for any document or correspondence directed to the Executive Director Dispute Resolution Services, Director Merit Reviews, a merit reviewer, officer of MRS, or the MRS to be left in the DX box of the Authority at DX 10 Sydney or at another DX box for transmission to that exchange box.

When is the MRS registry open?

- 7.3 The registry is open to the public for lodgment of documents in person from 8:30am to 5:00pm except on Saturdays, Sundays, and public holidays.
- 7.4 The registry will, notwithstanding clause 7.3, be kept open to the public for business or closed for business, at such times and on such days as the Authority may direct.
- 7.5 The registry may make provision for lodgment of documents electronically and also outside the registry's usual opening hours. Any documents lodged electronically after 5:00pm are deemed to have been received on the next day that the registry is open to the public for lodgment of documents in person.

What happens if parties have representatives or agents?

- 7.6 If a legal practitioner, agent or other representative represents the worker in respect of the merit review:
- 7.6.1 it is sufficient notification for the merit reviewer, an officer of MRS or an insurer to send any document required to be sent to the worker, to the legal practitioner, agent or other representative, and
 - 7.6.2 the merit reviewer or an officer of MRS may, notwithstanding that the worker has representation, contact the worker directly in relation to a merit review.
- 7.7 If a legal practitioner, agent or other representative represents the insurer in respect of the merit review:
- 7.7.1 it is sufficient notification for the merit reviewer, an officer of MRS or a worker to send any document required to be sent to the insurer to the legal practitioner, agent or other representative, and
 - 7.7.2 the merit reviewer or an officer of the MRS may, notwithstanding that the insurer has representation, contact the insurer directly in relation to a merit review.
- 7.8 If a party, represented by a legal practitioner, agent or other representative, requests the MRS to do so, the merit reviewer or an officer of MRS may at their discretion, send a copy

of any document required to be sent to that party, to the party direct, in addition to that party's legal practitioner, agent or other representative.

- 7.9 If, after an application or reply is lodged at the MRS, a party retains a legal practitioner, agent or other representative to represent them, or changes their representative, that party must notify the Authority and the other party in writing within five days of the date of the retainer or change in representation.

How do you lodge an application?

- 7.10 An application for merit review by the Authority must be made in accordance with the requirements of section 44BB(2) of the 1987 Act.

Workers Compensation Act 1987

44BB Review of work capacity decisions

(2) An application for review of a work capacity decision must be made in the form approved by the Authority and specify the grounds on which the review is sought. The worker must notify the insurer in a form approved by the Authority of an application made by the worker for review by the Authority or the Independent Review Officer.

- 7.11 An application for merit review to the Authority **must** be made by the worker in the form approved by the Authority. The form approved by the Authority for that purpose is the 'Work capacity – application for merit review by the authority' form available on the SIRA website at <http://www.sira.nsw.gov.au>.
- 7.12 A worker may be assisted in completing the application form by another person such as the insurer, a support person, agent, union, representative, employer, legal representative, or interpreter.
- 7.13 The application **must** specify the work capacity decision, or decisions, which the worker seeks to be reviewed, as well as the period of time in weeks which are sought to be reviewed relating to those decisions.
- 7.14 The application **must** also explain how and why the worker believes the decision should be changed, and the worker may attach any new or additional information relevant to the work capacity decision.
- 7.15 The worker does not need to attach to their application all of the existing documents and information relating to the claim or the work capacity decision, as the insurer will be required to provide all relevant information to the Authority as part of their reply to the application.
- 7.16 The worker **must** notify the insurer of the application in a form approved by the Authority by sending the insurer a copy of the application form before, or at the same time as, lodging the application with the Authority.
- 7.17 The Authority may decline to review a work capacity decision if the worker has not complied with section 44BB(2).

What happens after an application is lodged?

- 7.18 The Authority will write to the worker and insurer as soon as practicable and preferably within seven days of receiving the application for review to acknowledge receipt of the application and to:
- 7.18.1 explain the review process that will be undertaken

- 7.18.2 confirm that the worker and insurer may provide any new or additional information relevant to the work capacity decision, after first exchanging that with the other party
- 7.18.3 advise if any additional information is required to assist in the conduct of the merit review from the parties, and when that information is due, and
- 7.18.4 indicate when and how the merit review decision will be conveyed to the worker and insurer.

How do you lodge a reply to an application?

- 7.19 A reply to an application for merit review must be lodged by the insurer with the Authority in the form approved by the Authority, as quickly as possible and preferably within seven days of receiving the worker's application. The form approved by the Authority for that purpose is the 'Work capacity – reply to an application for merit review by the Authority' form available on the SIRA website at <http://www.sira.nsw.gov.au>.
- 7.20 The reply lodged with the Authority must be submitted electronically via email or via the ECM system and must:
 - 7.20.1 include a detailed list of all documents relevant to the work capacity decision, or decisions, and the review of that decision, including documents supplied by the worker, and
 - 7.20.2 attach electronic copies of all of the documents included in the list of relevant documents, including documents supplied by the worker.
- 7.21 The insurer must first notify the worker of its reply to the application, by sending the worker a copy of the reply before, or at the same time as, lodging the reply with the Authority.
- 7.22 The reply provided to the worker must include the list of all relevant documents but does not need to attach copies of all the relevant documents being lodged with the reply. The insurer must provide the worker with copies of any of those documents which have not already been provided to the worker previously.

Acknowledgement of insurer's reply

- 7.23 The Authority will write to the worker and insurer as soon as practicable and preferably within seven days of receiving the reply from the insurer to acknowledge receipt of the reply and to:
 - 7.23.1 explain the review process that will be undertaken
 - 7.23.2 advise if any additional information is required to assist in the conduct of the merit review from the parties, and when that information is due, and
 - 7.23.3 indicate when and how the merit review decision will be conveyed to the worker and insurer.

Exchange of information by workers and insurers

- 7.24 Any information that the worker sends to the Authority, whether as part of an application, in response to a request by the Authority, or otherwise, must be sent to the insurer before, or at the same time as, sending the information to the Authority.
- 7.25 Any information that the insurer sends to the Authority, whether as part of a reply, in response to a request by the Authority, or otherwise, must be sent to the worker before, or at the same time as, sending the information to the Authority.

Chapter 8 - The merit review process

Why may the Authority decline to review a decision?

- 8.1 The Authority may decline to review a decision, and dismiss an application or part thereof, for a number of reasons including:
- 8.1.1 **No work capacity decision** - The application does not establish that it relates to a work capacity decision under section 43 of the 1987 Act
 - 8.1.2 **No internal review** - The work capacity decision has not first been the subject of an application for internal review by the insurer, as required by section 44BB(1)(b) of the 1987 Act
 - 8.1.3 **Not in the approved form** - The application has not been made in the form approved by the Authority, under section 44BB(2) of the 1987 Act
 - 8.1.4 **Review grounds not specified** - The application does not specify the grounds on which the review is sought, under section 44BB(2) of the 1987 Act
 - 8.1.5 **Insurer not notified** - The worker has not notified the insurer of the application as required by section 44BB(2) of the 1987 Act
 - 8.1.6 **Not lodged within time** - The application has not been made within the time limits set out in section 44BB(3)(a) and (b) of the 1987 Act
 - 8.1.7 **Frivolous or vexatious application** - The application for review is frivolous or vexatious, under section 44BB(3)(c) of the 1987 Act
 - 8.1.8 **Information not provided** - The worker has failed to provide information which has been requested by the reviewer, under section 44BB(3)(c) of the 1987 Act

Workers Compensation Act 1987

44BB Review of work capacity decisions

(3) *The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:*

- (a) *an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer),*
- (b) *an application for review by the Authority may be made without an internal review by the insurer if the insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made,*
- (c) *the reviewer may decline to review a decision because the application for review is frivolous or vexatious or because the worker has failed to provide information requested by the reviewer*

- 8.1.9 **Application withdrawn by worker** - The worker advises that they would like to withdraw their application, or
 - 8.1.10 **Claim finalised** - The worker's claim with the insurer has been resolved, settled, finalised or determined.
- 8.2 The Authority will notify the worker and insurer if the Authority declines to review a decision and dismiss an application or part thereof.
- 8.3 If the Authority declines to review a decision, the dispute has not 'been the subject of merit review by the Authority' as required by section 44BB(1)(c) of the 1987 Act in order to enable a subsequent application to be made to WIRO for procedural review.

Can you correspond with a merit reviewer?

- 8.4 Workers, insurers and their representatives must not correspond directly with merit reviewers in relation to a merit review, either in respect of a current or concluded review.
- 8.5 All correspondence to, and communication with, a merit reviewer must, unless the Director Assessment Services, Director Merit Reviews, or the merit reviewer directs otherwise, be directed to the merit reviewer through the MRS registry.

How is the merit review conducted?

- 8.6 The Authority merit review is to be undertaken by a merit reviewer appointed by the Authority who is a person:
- 8.6.1 with the appropriate level of knowledge, expertise and skill relevant to the particular work capacity decision referred for review, and
 - 8.6.2 who was not involved in the making of the original work capacity decision or the internal review by the insurer.
- 8.7 The merit reviewer may determine his or her own procedure, is not bound by the rules of evidence and may inquire into any matter relating to the review of the work capacity decision in such manner as they think fit.
- Note:** Most merit reviews are currently conducted on the papers, however some merit reviews have benefitted from either a teleconference, or a face to face meeting or conference between one or more of the parties and their representatives with the merit reviewer and/or an officer of MRS, depending on the nature of the claim and the work capacity decision under review.
- 8.8 Merit reviewers are bound by the rules of procedural fairness.
- 8.9 The merit reviewer is to endeavour to ensure that the parties understand the nature of the application, the issues to be considered and the role of the merit reviewer as an independent decision-maker, and that the parties have had an opportunity to have their submissions and any relevant documents or information considered.
- 8.10 The merit reviewer is to act with as little formality as the circumstances of the review permit and according to equity, good conscience and the substantial merits of the review without regard to technicalities and legal forms.
- 8.11 The merit reviewer will take into account the workers compensation system objectives and the objectives of MRS at all times.
- 8.12 The merit reviewer may reasonably require additional information from the worker or the insurer for the purposes of the review, which the worker and insurer must provide, under section 44BB(3)(d) of the 1987 Act.

Workers Compensation Act 1987

44BB Review of work capacity decisions

(3) *The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:*

...

(c) *the reviewer may decline to review a decision because the application for review is frivolous or vexatious or because the worker has failed to provide information requested by the reviewer,*

(d) *the worker and the insurer must provide such information as the reviewer may reasonably require and request for the purposes of the review*

- 8.13 If requiring additional information from the worker, the merit reviewer should allow the worker no less than seven days to supply any such information. The merit reviewer may

decline to review a decision if the worker fails to provide information requested by the reviewer under section 44BB(3)(c) of the 1987 Act.

- 8.14 The merit reviewer is to consider all of the material substantively and on its merits as if the original work capacity decision had not been made, and is obliged to make findings that they think are more likely than not to be correct.
- 8.15 Merit reviews by the Authority are to be conducted in private and are not open to the public.

What happens when the merit review is completed?

- 8.16 The merit reviewer is to notify the insurer and the worker of the findings of the review and may make recommendations to the insurer based on those findings, giving reasons for any such recommendation, under section 44BB(3)(e) of the 1987 Act.
- 8.17 The merit review recommendations to the insurer are binding on the insurer and must be given effect to by the insurer under section 44BB(3)(g) of the 1987 Act.

Workers Compensation Act 1987

44BB Review of work capacity decisions

(3) The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:

...

(e) the reviewer is to notify the insurer and the worker of the findings of the review and may make recommendations to the insurer based on those findings (giving reasons for any such recommendation),

...

(g) recommendations made by the Authority are binding on the insurer and must be given effect to by the insurer

- 8.18 The Authority will write to the worker and insurer as soon as practicable and preferably within 30 days of receiving the application, notifying the insurer and the worker of the findings and any recommendations arising from the review.
- 8.19 The notification of the decision will be in writing and will include:
 - 8.19.1 details of the findings of the review
 - 8.19.2 details of any recommendations to the insurer based on those findings
 - 8.19.3 a statement of reasons which includes the following:
 - 8.19.3.1 findings on material questions of fact, referring to the documents or other material on which those findings were based
 - 8.19.3.2 the merit reviewer's understanding of the applicable law and rules, including the legislation, regulations or guidelines, and
 - 8.19.3.3 the reasoning process that led the merit reviewer to the findings and to any recommendations made.
 - 8.19.4 advice to the worker that they may make an application to WIRO for a review of the insurer's procedures in making the original work capacity decision, within 30 days after receipt of the merit review decision from the Authority, under section 44BB(1)(c) of the 1987 Act.

Which merit reviews are published?

- 8.20 The Authority is committed to the publication of merit reviews on the SIRA website at www.sira.nsw.gov.au and/or on the Australasian Legal Information Institute (AustLII) website at www.austlii.edu.au.
- 8.21 The publication of merit reviews is to enhance transparency, accountability and education and to provide guidance to workers, insurers, representatives and all scheme stakeholders. Publication is intended to assist in improving claims management practices, work capacity decision making and minimise disputation in the workers compensation scheme.
- 8.22 The Authority operates under a presumption in favour of the publication of merit reviews, which may include:
- 8.22.1 **publication of a merit review in full**, which may only occur where the Authority obtains the consent of the worker, and
 - 8.22.2 **publication of de-identified and anonymised merit reviews**, findings and recommendations, statements of reasons, case studies, or head notes about new, novel, or notable issues, ensuring that the privacy of individuals is respected.
- 8.23 The Authority may, withhold from publication all or part of a merit review if it is desirable to do so because of the confidential or sensitive nature of the information, or for any other reason. The final decision concerning whether a decision should be withheld from publication rests with the Director, Assessment Services.
- 8.24 Any MRS correspondence, decisions, findings and recommendations, or statements of reasons that are not available to the public are not to be published or distributed by either the worker or insurer, or their representatives or agents, unless prior consent has been obtained from the worker and the Authority.

Note: An individual's privacy should be respected. Failure to respect the privacy of an individual may result in a breach of the *Privacy and Personal Information Protection Act 1998 (NSW)* and/or the *Health Records and Information Privacy Act 2002*. Section 243 of the 1998 Act also prohibits disclosure of information except in certain circumstances.