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Suspending or cancelling a practising certificate

Informative

Purpose

This document provides information on the process for suspending or cancelling practising certificates, as prescribed in the NSW Work Health and Safety (Mines and Petroleum Sites) Regulation 2022 .

Relevant legislative provisions

Part 7, section 124 of the Regulation

Part 9 Division 4, section 143 and 144 of the Regulation

Part 15, section 186 and 190 of the Regulation

Part 3, section 35, 36 and 37 of the *Work Health and Safety Act 2011*

Regulatory approach to suspension and cancellation

At all times, when considering whether there are grounds to suspend or cancel a practising certificate, or a certificate of competency, the principles detailed in our [Compliance and enforcement approach](#) will be applied.

The Resources Regulator has finite resources and will not investigate every notifiable or high potential incident with specific regard as to whether there are grounds to suspend or cancel a practising certificate. Whether grounds to suspend or cancel may exist will be considered:

- as part of critical incidents (those involving a workplace fatality or where a worker or workers have suffered life-threatening injuries) and major investigations (typically incidents where a worker has suffered serious injuries, or it is assessed that the maximum reasonable consequence of the incident was a fatality or life-threatening injuries)
- as part of investigations into complaints regarding the conduct of a certificate holder, where the complainant provides substantive evidence to support an allegation that while performing their statutory function, the certificate holder placed workers or others at serious risk
- where the regulator becomes aware that grounds for suspension or cancellation of a practising certificate may exist and it is reasonably considered that the circumstances are significant enough to warrant further investigation (for example, potentially reckless or negligent conduct, or provision of false and misleading information).

Certificate holders are afforded procedural fairness based on:

- regulatory obligations imposed in section 145 of the Regulation. A certificate holder must be provided notice of intention to suspend or cancel in writing and can object. The regulator must consider the objection when making a final decision.

- a decision to suspend or cancel a certificate on the grounds prescribed in section 143 of the Regulation being a reviewable decision.
- the application of Resources Regulator governance framework to ensure the consistent application of our compliance and enforcement guidelines.

Grounds for suspension or cancellation

Section 143 of the Regulation prescribes the grounds on which the regulator may suspend or cancel a practising certificate. A practising certificate must be suspended or cancelled by way of a written notice.

Suspension under this section is not time limited, however the regulator must revoke a suspension as soon as reasonably practicable after being satisfied the suspension should not continue.

Suspension or cancellation of a certificate does not preclude additional compliance action in relation to contraventions of the WHS laws.

The Regulator may suspend or cancel a practising certificate if satisfied that any one, or more, of the following grounds exists.

Not competent to perform the function

Section 138(2) of the Regulation prescribes that the regulator may be satisfied that an individual is competent to perform a statutory function *only* if the person holds a certificate of competence, or an interstate practising certificate, or meets other criteria specified by the regulator, which may be published by notice published in the gazette.

On this basis, the potential to suspend or cancel a practising certificate solely based on competence is restrained by the wording of the Regulation.

It is the position of the Resources Regulator that were an individual to have their certificate of competency, or interstate certificate of competency or practising certificate cancelled, this may be considered as grounds to suspend or cancel as an instrument required to be considered competent to perform a statutory function is no longer held.

Cannot be relied upon to perform the statutory function without risking the health and safety of an individual

The ability of an individual to reliably undertake a statutory function without placing others at risk is critical.

Suspension or cancellation on this basis may be considered where the regulator is satisfied it is proven, that:

- the actions of the individual placed people at risk, and
- these actions were not a one-off occurrence and were demonstrative of an ongoing, repetitive pattern of negligent or reckless behaviour

This would occur in conjunction with any assessment as to whether the individual failed to comply with any duties imposed on them under the WHS Act more generally, which may also lead to consideration of suspension or cancellation as outlined in section 4.6 below.

An individual has not complied with a condition on a certificate

Section 142 of the Regulation prescribes the conditions which may be imposed on a practising certificate. Conditions include:

- upon request by written notice:
 - providing the regulator with specific information relating to the holder's competency, or other matters relating to the certificate

- satisfying the regulator that the holder has the necessary knowledge of law and ethics to be able to hold a certificate
- complete any training courses which may be listed on the certificate
- keep records which demonstrate the holder remains eligible to hold the certificate
- advise the regulator of change of address or contact details

Consistent with our compliance and enforcement approach, genuine administrative oversights, one-off errors, or omissions by certificate holders will not result in a punitive response such as cancellation however may be the subject of other lower order compliance action, such as an official caution. It should be noted that in accordance with section 142(3) of the Regulation, a failure to comply with the conditions on a practising certificate is a penalty notice offence.

A certificate has been improperly obtained (false and misleading)

Notwithstanding the due process prescribed in section's 144 and 145 of the Regulation, where the regulator is satisfied that it is proven a person has obtained a certificate by deception, the certificate will be cancelled, and further enforcement action may be considered.

A certificate has been issued in error

In situations where the regulator has erroneously issued a certificate to a person (being a person who has not either not applied for a certificate, or who it is identified after the certificate has been issued does not possess the prescribed competencies to be issued a certificate), the certificate will be cancelled and, if necessary, a new certificate will be issued.

An example of this would be a situation where an applicant has applied for, and is only eligible to receive, an open cut examiner's certificate, and is incorrectly issued a manager's certificate due to an administrative error. In this instance the first certificate would be cancelled, and a new one issued.

A contravention of the WHS laws has occurred which has (or could have) caused a serious risk to the health and safety of a person

Suspension or cancellation on this basis would require the regulator to be satisfied that the actions (or inaction) of a certificate holder contravened a provision of the WHS laws, and that because of those actions the individual:

- placed people at serious risk (irrespective of the actual consequences), or
- may have placed people at serious risk

A key element is a requirement to prove that persons were (or may have been) placed at serious risk:

- it is considered that a *notifiable incident*, as prescribed in section 35 of the WHS Act, will almost invariably involve persons being placed at serious risk.
- section 37 of the WHS Act and section 190 of the Regulation defines *dangerous incidents* as those that “*exposes a worker...to a serious risk to a person’s health and safety*”. It also prescribes that this exposure must be “*immediate or imminent*”.
- section 124(5) of the Regulation defines a *high potential incident* as an incident “*that would have been a dangerous incident if a person were reasonably in the vicinity at the time the incident occurred...*”. In other words, persons may have been placed at serious risk, if they were present.
- apart from the defined notifiable or high potential incidents, the Regulator will also consider situations where a worker or workers have been medically diagnosed with debilitating permanent or long-term psychological injuries arising from intimidation, bullying or harassment.

The second key element is that the situation which gave rise to the incident or injury must have arisen from the contravention. In other words, it must be proven that, but for the actions of the certificate holder, the situation which gave rise to the incident or injury would not have occurred.

In summary, the regulator may be satisfied there are grounds to suspend or cancel a practising certificate where it is proven that:

- a notifiable incident (as defined in section 35 of the WHS Act), or a high potential incident (as defined in section 124(5) of the Regulation) has occurred, or
- a worker, or workers, has suffered debilitating permanent or long-term psychological injuries arising from intimidation, bullying or harassment, and
- the incident or injuries occurred as a direct result of the actions of the certificate holder, and
- those actions are a contravention of the WHS Act, WHS (Mines and Petroleum Sites) Act or subordinate regulations under those Acts, or the Explosives Act, or the Radiation Control Act.

Suspension or cancellation on this basis does not require a conviction for an offence.

It must be noted that section 151(1)(e) of the Regulation prescribes that a contravention is also grounds for the cancellation of a certificate of competency.

Additional grounds to suspend practising certificates

Certificate holder charged under WHS Laws

Regardless of whether other grounds exist as outlined in the previous section, if a certificate holder is charged with an offence under the WHS Act, the Explosives Act or the Radiation Control Act, in accordance with section 144(1)(a) of the Regulation the regulator may suspend their practising certificate.

Suspension under this sub-section is not time limited, however the regulator must revoke a suspension as soon as reasonably practicable after being satisfied the suspension should not continue.

On this basis it is reasonable to assume that where a certificate was suspended solely on this basis, if the charges were withdrawn or the prosecution was unsuccessful, then the suspension would be revoked immediately on either of those outcomes.

If the certificate holder was convicted of the offence, the regulator may then consider whether grounds exist to cancel the practising certificate and the certificate of competency of the certificate holder.

For the purposes of investigation

Section 144(1)(b) of the Regulation permits the Regulator, where it is reasonably believed that grounds to suspend or cancel may exist, to suspend a practising certificate to investigate whether grounds exist to suspend or cancel a certificate.

A suspension for the purposes of investigation is time limited to 28 days however may be extended for an additional 28 days where the investigation is not complete, and the regulator still has reason to believe there are grounds for suspension or cancellation.

Except for a suspension under section 144(1)(a) or cancellation under section 143(1)(e), when it is identified there may be grounds for suspension or cancellation, a practising certificate will initially be suspended for the purposes of an investigation.

The suspension shall be considered as revoked after 28 days if the certificate holder has not been notified that a further 28 days is required to complete the investigation.