

July 2020

CERTIFICATE OF COMPETENCE

Fit and proper assessment

Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016

Regulation 38(b) of the Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016 (the Regulations) requires:

- applicants for a new certificate of competence (CoC), or
- a holder of an existing CoC which is due for renewal, to be a fit and proper person to hold that CoC.

The holder of a CoC must ensure they continue to be a fit and proper person for the duration of that CoC.

A CoC is valid for five years after the date on which it was issued.

The New Zealand Mining Board of Examiners (the Board) must be satisfied about the fit and proper assessment before approving a new CoC, or renewing an existing CoC. This guidance sets out how the Board will assess applications for a CoC.

The fit and proper person assessment provides assurance that people who apply to hold a CoC under the Regulations will perform the CoC functions and duties safely, lawfully, and appropriately.

Definition of 'fit and proper'

A person is 'fit' and 'proper', when they:

- are of good character, and have due regard for the laws of New Zealand, and
- are likely to do so while holding a CoC.

Whether a person is fit and proper will also be affected by special considerations that take account of the nature of the activities that the applicant will be engaged in.

The Board may seek more information

For the purpose of determining whether an applicant for, or holder of, a CoC is fit and proper, the Board may ask:

- the applicant/holder to supply relevant information, and/or
- any person the Board believes is able to do so, to provide relevant information.

The Board may decline an application/renewal if information not provided

The Board may decline an application or renewal if it can't obtain sufficient information to be satisfied that an applicant or holder should hold a CoC.

Before doing this the Board will give the applicant or holder 14 working days to provide the requested information. Applicants or holders should contact the Board during this time if they won't be able to provide the information in that timeframe.

Factors to be considered

The Board may consider the following matters in determining whether an individual is fit and proper to hold a CoC:

- any criminal history, in New Zealand or elsewhere (not subject to the clean slate rule, discussed below)
- whether the applicant is subject to any unresolved complaint or current investigation in relation to a CoC or other similar licence or document in New Zealand or elsewhere
- any pending criminal proceedings against the applicant, whether in New Zealand or elsewhere

- any cancellation or suspension of a CoC or other similar licence or document in New Zealand or elsewhere in the last five years
- physical or mental health of the applicant, and
- any other matters that the Board considers relevant.

The following points discuss the factors listed above.

Criminal history

All applicants and renewals for a CoC must disclose to the Board any criminal history, except convictions covered by the Criminal Records (Clean Slate) Act 2004.

Applicants or current holders do not need to declare convictions covered by the Criminal Records (Clean Slate) Act 2004. If an applicant voluntarily discloses convictions covered by the Criminal Records (Clean Slate) Act 2004, those convictions will not be taken into account by the Board.

When considering the relevance of the applicant or holder's criminal history, the Board will consider:

- If there's a reasonable connection between the criminal history and the CoC
- The time that has passed since the conviction. For example, a recent conviction will generally carry more weight than a less recent conviction, particularly where the applicant has not reoffended.
- The time elapsed between each conviction and whether or not the behaviour appears to be escalating
- The seriousness of the offending or behaviour. The more serious the nature of the offending or behaviour the greater the weight it carries against finding the applicant fit and proper. A history of repeat offending will carry greater weight than a one-off minor offence.

The Board will take into account evidence that shows the applicant or holder has successfully engaged in rehabilitation activities and has made positive changes to their behaviour.

The Board may require applicants, who have resided in another country for a period of 12 months or more in the last five years to provide evidence of their criminal history (or absence of) while in the other country/countries.

Pending criminal charges

Applicants must advise the Board if they are facing charges for any criminal offence, whether in New Zealand or elsewhere. The Board may, if it considers appropriate in the circumstances, put the application or renewal on hold until the charges have been disposed of.

Failure to report pending criminal charges will be relevant to the assessment of whether the applicant or holder is a fit and proper person for the purposes of the CoC sought.

¹ See rule 1 of the Health Information Privacy Code.

Cancellation or suspension of a CoC

Applicants must advise the Board of any cancellation or suspension of a CoC or other similar licence or document in New Zealand or elsewhere in the last five years.

Physical and mental health

The Board may consider information about an individual's physical and mental health conditions that may affect their ability to carry out their responsibilities as required by the CoC. In order to be considered relevant, a health condition must:

- have a reasonable connection to the CoC applied for, and
- be likely to affect the applicant's ability to safely perform the functions of the CoC.

If an applicant has a physical or mental health issue relevant to the CoC applied for, the Board may ask the applicant to provide information from their health care provider. Health care providers will be asked to provide an opinion on the applicant's fitness to hold the CoC and whether they have any concerns about the well-being of the applicant or any other person if a CoC is granted.

The additional information will only be collected if it is necessary for a lawful purpose connected to the Board's functions.¹ To meet this standard, the Board will clearly demonstrate the need for the additional information in relation to the CoC sought.

Principles the Board will apply when assessing fit and proper

Decisions to be made on a case-by-case basis

Fit and proper assessments will be made on a case-by-case basis, with consideration of the context.

Procedural fairness in decision-making

The Board will apply procedural fairness, or 'natural justice'. This means the Board will act fairly when exercising statutory powers that may affect a person's rights, interests, or legitimate expectations.

To ensure natural justice, the Board will:

- consider all relevant factors
- disregard all irrelevant factors
- avoid actual or perceived bias - the decision-maker will avoid pre-judgement in the matter
- disclose all relevant information that is being relied on to enable the applicant to make an informed submission, unless disclosure of that information would be likely to endanger the safety of any person
- allow a reasonable opportunity (at least 14 days) for applicants or holders to be heard in person or in writing, and
- provide a full explanation of the reasons for the decision.

Cancellation of a CoC

The Board must cancel a CoC if, after giving the holder at least 14 days' written notice and an opportunity to be heard (including in person), it is satisfied on reasonable grounds:

- the CoC was issued in error, or
- that the holder's application for the certificate contained false information or evidence, or
- that the holder is no longer fit and proper (or does not hold relevant qualifications and experience prescribed under the Regulations).

Suspension of a CoC

The Board must cancel or suspend a CoC for a period as it sees fit if, after giving the holder at least 14 days' written notice and an opportunity to be heard (including in person), it is satisfied on reasonable grounds:

- the holder has not performed to the standard expected so their actions have, or could have, endangered the life of a person(s), and
- the holder has shown themselves to be unfit to hold a CoC by carrying out any task that they could reasonably be expected to perform in a proper manner.

The Board may suspend or cancel a CoC if it is satisfied the holder has not complied with their continuing professional development requirements.

A person whose CoC is suspended or cancelled must return their CoC to the Board within 14 days after the date of the suspension or cancellation.

Allegations about an applicant or holder

If the Board has received allegations about an applicant or holder:

- the Board must be reasonably confident that the information is reliable and credible, which may include seeking corroboration of the information if this is practical, and
- the applicant or holder must be given a reasonable opportunity to comment.

The weight of all the evidence

The Board will consider all relevant factors and decide on balance whether the applicant is fit and proper to hold the CoC. A decision will only be made when the Board has considered all the relevant evidence including any submission by the applicant.

Privacy statement

When applicants complete the application form, they consent to the Board collecting information about them relevant to the application. Consent means that the Board may collect personal information about them from other government agencies and organisations (including overseas government departments).

All information supplied with an application will be stored securely in electronic form and dealt with in accordance with the Privacy Act 1993, including Information Privacy Principle 9 (Agency not to keep personal information for longer than necessary).

Obligation on holders of a CoC

Holders of a CoC need to tell the Board in writing if:

- they get a conviction after being granted the CoC, or
- any other relevant matters change.

The Board may need to reassess whether or not the holder remains a fit and proper person, which may result in:

- no further action being taken, or
- the CoC being cancelled under Regulation 45(2)(c).
In this case, the Board will give the holder at least 14 days' notice of the intention to suspend or cancel. The holder will be provided the opportunity to be heard by way of a formal written statement, or in person.

Board will advise all applicants in writing of their decision

The Board will advise the applicant or holder of its decision as soon as is reasonably practical. This will be done in writing.

Review process

Should the Board decline the application or renewal, the applicant or holder has the right to appeal the decision to the District Court within 20 working days of the date of the decision.

After hearing an appeal, the District Court can do any one or more of the following:

- make any decision it thinks should have been made
- direct the Board to
 - re-hear the proceedings concerned, or
 - consider or determine (whether for the first time or again) any matters the Court directs, or
 - enter judgement for any party to the proceedings
- make any order the Court thinks just, including any order as to costs.

The decision of the District Court is final.

Application forms

Application forms for a CoC are here: worksafe.govt.nz