

November 2017

## HEALTH AND SAFETY AT WORK (HAZARDOUS SUBSTANCES) REGULATIONS 2017

# Investigation of Hazardous Substances Authorisations

### Introduction

This policy sets out WorkSafe's approach to investigation of complaints or concerns about authorisations under the Health and Safety at Work (Hazardous Substances) Regulations 2017 (the Regulations).

### Purpose

This operational policy provides guidance to staff and a consistent, transparent approach in WorkSafe's response to complaints and investigation of authorisations.

### Scope

This policy applies to investigations of hazardous substance-related authorisations under the Regulations.

Authorisations refer to a person, place or thing that has obtained or been granted a licence, certificate, or other authority under the Regulations. The relevant authorisation complaints and investigation provisions covered by this policy include:

- a. for compliance certifiers, regulations 6.15 to 6.20
- b. for compliance certificates and certificate holders (person named on the certificate), regulations 6.29-6.33. This covers compliance certificates referenced in other parts of the Regulations, such as approved handlers, cylinder designs and hazardous substance locations, and includes investigation of any matter relating to the certificate that could affect safety.
- c. for controlled substances licenses, regulations 7.4 to 7.8
- d. for Test Stations, regulations 15.54 to 15.55.

This policy applies when WorkSafe receives a complaint or has a reasonable concern about an authorisation. For example, this could be a complaint about the conduct or ability of a compliance certifier, or a concern about a test station not operating in an impartial or safe manner, or a concern about any other matter related to a compliance certificate that could affect health and safety.

Out of scope is policy covering:

- a. WorkSafe authorisations, compliance certifiers' audit or performance standards.
- b. compliance certificate exemptions, based on the Health and Safety at Work Act 2015 (HSWA) section 220 and regulation 6.34, which will be considered under WorkSafe's Exemptions Policy.

Other policies relevant to authorisations include:

- a. WorkSafe's Regulatory Function Investigations Policy and Authorisations Policy<sup>1</sup>.
- b. Enforcement policy and enforcement decision-making model.
- c. WorkSafe's Reviews Policy.

WorkSafe's Regulatory Function Investigations Policy applies to situations where there has been significant or immediate harm or significant risks to health and safety caused by work. That policy excludes investigation of the authorisation element. If an incident also involves an authorisation, the Certification Approvals and Registration (Audit and Investigations) team will coordinate an investigation response with WorkSafe's Inspectorate, to address any matters specific to the authorisation.

<sup>1</sup> The Regulatory Function: Authorisations policy applies to all administrative regimes under which a licence, permit, registration, consent, certificate, recognition or other authority is required by regulations.

This operational policy also applies to situations where there is a complaint or concern about an authorisation that does not trigger WorkSafe's Regulatory Function Investigations Policy, but there is still a reasonable concern about the authorisation. In these cases, an investigation will be used to clarify the facts and assess any risks to health and safety that need to be addressed.

## Principles

WorkSafe will follow the general approach and principles outlined in the Regulatory Function Authorisations Policy and Investigations Policy, including fairness, transparency and natural justice.

## Policy Statements

WorkSafe's approach to investigating hazardous substance related authorisations is set out below. Where the Regulations provide specific criteria, process or outcomes for an investigation or response to a complaint about an authorisation, this policy is modified to incorporate those matters.

WorkSafe may investigate an authorisation if it receives a complaint or has a reasonable concern about the authorisation.

## Preliminary assessment

WorkSafe will initially assess the issue to determine whether the matter should be investigated. This assessment would typically include, but is not limited to, considering the nature and source of the complaint, the nature and level of risks to health and safety and the compliance history related to the authorisation. Grounds for not progressing with an investigation include the issue being found to be frivolous, vexatious or malicious, or a finding that if upheld it would not be grounds to amend, vary or cancel an authorisation (for example if it were very minor).

WorkSafe will prioritise investigations based on assessed risks to health and safety or where harm has occurred. This will include coordination with the Inspectorate where the Regulatory Function Investigations Policy is activated, to assess any implications for the authorisation.

WorkSafe will also investigate situations related to an authorisation that, while not causing immediate harm, may present a risk to health and safety.

## Interim Suspension

WorkSafe may, where the Regulations allow and if it considers it appropriate as an interim measure due to risks to health and safety from the authorisation continuing in effect, suspend all or part of the

authorisation while it investigates the matters identified in relation to the authorisation and decides the outcome.

An authorisation that is suspended under the Regulations ceases to have effect for the period of the suspension.

## Investigation

WorkSafe will consider information from any source it considers appropriate to help determine whether the authorisation was obtained or is being used or relied on appropriately and whether further action as provided for in the Regulations is the best way to promote health and safety.

When WorkSafe decides to investigate a matter relating to an authorisation, it will inform the person identified on the authorisation document<sup>2</sup> of the nature of the complaint or concern and allow a reasonable opportunity for that person to make submissions. WorkSafe will consider any submission or information provided.

The provisions of the Privacy Act and Official Information Act will apply, as required. WorkSafe will make any information it has that may be prejudicial to the authorised person available to that person unless WorkSafe withholds that information because its disclosure may endanger the safety of an individual.

Before making a finding against the authorisation, WorkSafe will provide the person identified on the authorisation document a copy of the draft investigation report and proposed action, and allow a reasonable opportunity to comment. WorkSafe will consider any submission from that person before a final decision is made.

Typical findings that could result in further action include:

- obtaining the authorisation by fraud; misrepresentation, or concealing facts;
- being negligent, or incompetent, in exercising the authorisation;
- not meeting, or continuing to meet, a relevant requirement for the issuing of the authorisation, including any conditions required by WorkSafe.

## Investigation outcomes

On completion of the investigation, WorkSafe will do one or more of the following:

- a. take no further action
- b. reinstate the authorisation (if it has been suspended)
- c. issue a warning letter (for example if the matter is relatively minor)
- d. cancel the authorisation
- e. amend the authorisation (where the Regulations allow).

<sup>2</sup> This may be the person identified on a compliance certificate, controlled substance license or grant of authorisation for a compliance certifier or test station.

WorkSafe will inform the person identified on the authorisation document in writing of its decision. If the decision is to amend, suspend or cancel the authorisation it will advise the reasons. It will also advise either the right to appeal the decision in the District Court if this provided for in the Regulations, or if the decision is not appealable in the District Court, of any other provisions that may apply under WorkSafe's Reviews Policy.

The cancellation or changes to the authorisation take effect on the date on which the authorisation is cancelled or changed.

Where WorkSafe has acted on a complaint received, it will inform the complainant of the general outcome.

## Related Action

WorkSafe's Certifications, Approvals and Registrations team (Audit and Investigations) will coordinate investigations as appropriate with the WorkSafe Inspectorate.

WorkSafe will also consider whether alongside the authorisation being suspended amended or cancelled, specific enforcement action against the person named on the authorisation document is appropriate<sup>3</sup>, such as a prosecution, in line with its enforcement policy. For example, this may be appropriate in cases of serious harm or risk to safety that would justify the authorisation being cancelled or where there had been a breach of the HSWA primary duty of care.

## Investigation of organisations

When the authorisation is granted to a person that is not an individual, the investigation and outcomes can be applied to each or any person identified in the authorisation documents as being employed or engaged within the scope of the authorisation.

For example, WorkSafe may vary the scope, suspend or cancel part of an authorisation identifying the individuals permitted to carry out functions on behalf of the compliance certifier that is not an individual. In this case, the suspension or cancellation applies only to those individuals identified and for the matters specified, and does not apply to the remaining aspects of the certifier's authorisation. The effect of the suspension or cancellation is that the compliance certifier's authorisation does not permit that individual to undertake the authorised functions while the suspension is in place, and not at all in the case of a cancellation.

If WorkSafe receives a complaint or has a reasonable concern about the conduct or ability of a person named on an authorisation document who is also required to maintain accreditation to a standard by International Accreditation New Zealand (IANZ) as part of their authorisation, WorkSafe may refer the matter to IANZ to assess and investigate as appropriate. The details of this will be covered in an operating level agreement between IANZ and WorkSafe. This does not limit WorkSafe's ability to conduct its own investigation as WorkSafe considers appropriate.

## Review and publication of this policy

This policy will be reviewed as needed to ensure it is still achieving its objectives, address any identified operational inefficiencies and recognise any relevant changes to legislation or regulations.

This policy is included within WorkSafe's practice framework and will be available externally.

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<sup>3</sup> HSWA Section 208 states persons must comply with the conditions on the authorisation they obtain (this applies generally to permits, certificates, licences and certifiers). Section 209 states it is an offence to give information that is false or misleading in a material particular, or that omits any matter or thing without which the information is misleading. Similarly, the Regulations provide that a compliance certificate may be cancelled, if it was obtained through fraud, misrepresentation, or concealment of facts.