

Independent review

***COMPLIANCE CERTIFIER
SUSPENSION DURING
AN INVESTIGATION***

February 2023



Te Kāwanatanga o Aotearoa
New Zealand Government

WORKSAFE
Mahi Haumarū Aotearoa



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Position statement

Purpose

This document explains the process that WorkSafe New Zealand will follow when conducting an independent review of a decision to suspend a compliance certifier's authorisation under regulation 6.16 of the Health and Safety at Work (Hazardous Substances) Regulations 2017 (the Regulations).

The document provides a framework to:

- i. enable WorkSafe to review the robustness, lawfulness and merits of the decision to suspend the compliance certifier
- ii. engage and provide assurance to the compliance certification community that there is a process for a suspension made under regulation 6.16 to be reviewed
- iii. improve the quality, efficiency and effectiveness of WorkSafe's regulatory decision-making.

Background

Under regulation 6.16 of the Regulations, WorkSafe may, if it considers it necessary for safety, suspend all or part of a compliance certifier's authorisation while conducting an investigation about the ability or conduct of a compliance certifier under regulation 6.15.

Although the regulations do not provide the power to review a suspension decision made under regulation 6.16, clause 46 of the Legislation Act 2019 provides the power to be exercised to correct an error or omission in a previous exercise of power.

This process is intended to provide a pathway by which a compliance certifier can seek a review of a suspension made under regulation 6.16.

Review process

A decision under regulation 6.16 to suspend a compliance certifier's authorisation while conducting an investigation under regulation 6.15 is not an appealable decision under regulation 6.35. However, a suspension decision can be reviewed to determine whether there has been an error in the making of the suspension decision or whether there was an omission of matters that should have been considered in the making of that decision.

The investigation being carried out under regulation 6.15 will continue whilst this review is undertaken.

WorkSafe will consider a request for a review of a suspension decision under regulation 6.16 in accordance with the process set out in this document.

SCOPE

In scope

This document covers:

- i. all matters pertaining to a request by a compliance certifier for an independent review of a suspension decision under regulation 6.16
- ii. the process of that review
- iii. communication of the outcome of the independent review to the certifier.

Out of scope

This document does not cover:

- i. the process that led to an investigation and subsequent suspension under regulation 6.15 and subsequent suspension decision under regulation 6.16. For information on these processes refer to the Regulatory Assurance team (RA Team)
- ii. the process for managing general complaints about WorkSafe, including our service or the behaviour of a staff member. Refer to the *Feedback and complaints policy*.

Who is this document for?

This document will be used by:

- compliance certifiers
- the independent reviewer carrying out the review of the suspension decision
- WorkSafe staff.

Principles

1. The decision maker who made the decision to suspend the compliance certifier must not be involved in the making of the decision on the independent review.
2. The independent review must be conducted by a person who has not been involved in the original suspension decision. Potential reviewees will be taken from those who have the delegated authority to make a decision under regulation 6.16.
3. WorkSafe will engage meaningfully with the certifier to inform them that they can request to have the decision reviewed and to communicate the final outcome of the review, including providing a copy of the independent reviewer's report.
4. WorkSafe will recognise the impact that a suspension decision under regulation 6.16 may have on a compliance certifier's business activities and their health and wellbeing.
5. The overarching criterion that an independent reviewer must consider when reaching a decision on their independent review is whether the health and safety grounds for the protection of workers, workplaces, and other persons which led to the suspension, are justified.
6. WorkSafe will undertake an independent review in a timely manner.

The Guiding Principles set out in WorkSafe's *Feedback and complaints policy* will also govern how this procedure is administered.

Adherence to the *Feedback and complaints policy*¹ document and this document should ensure that the independent review is carried out with the principles of natural justice.

It is anticipated that every request for a review of a suspension decision under regulation 6.16 will lead to an independent review being undertaken. Only in exceptional circumstances will WorkSafe not proceed with an independent review.

Procedure

Overview

All requests made by a compliance certifier for a review of a suspension decision under regulation 6.16 must be:

- i. acknowledged in writing
- ii. documented and held within WorkSafe's records management system (SharePoint)
- iii. carried out in a timely manner
- iv. concluded with written communications to the compliance certifier on the review outcomes.

The process is summarised in Figure 1.

¹ Refer to page 2 of the *Feedback and complaints policy*.

Process for review of a suspension made under Regulation 6.16

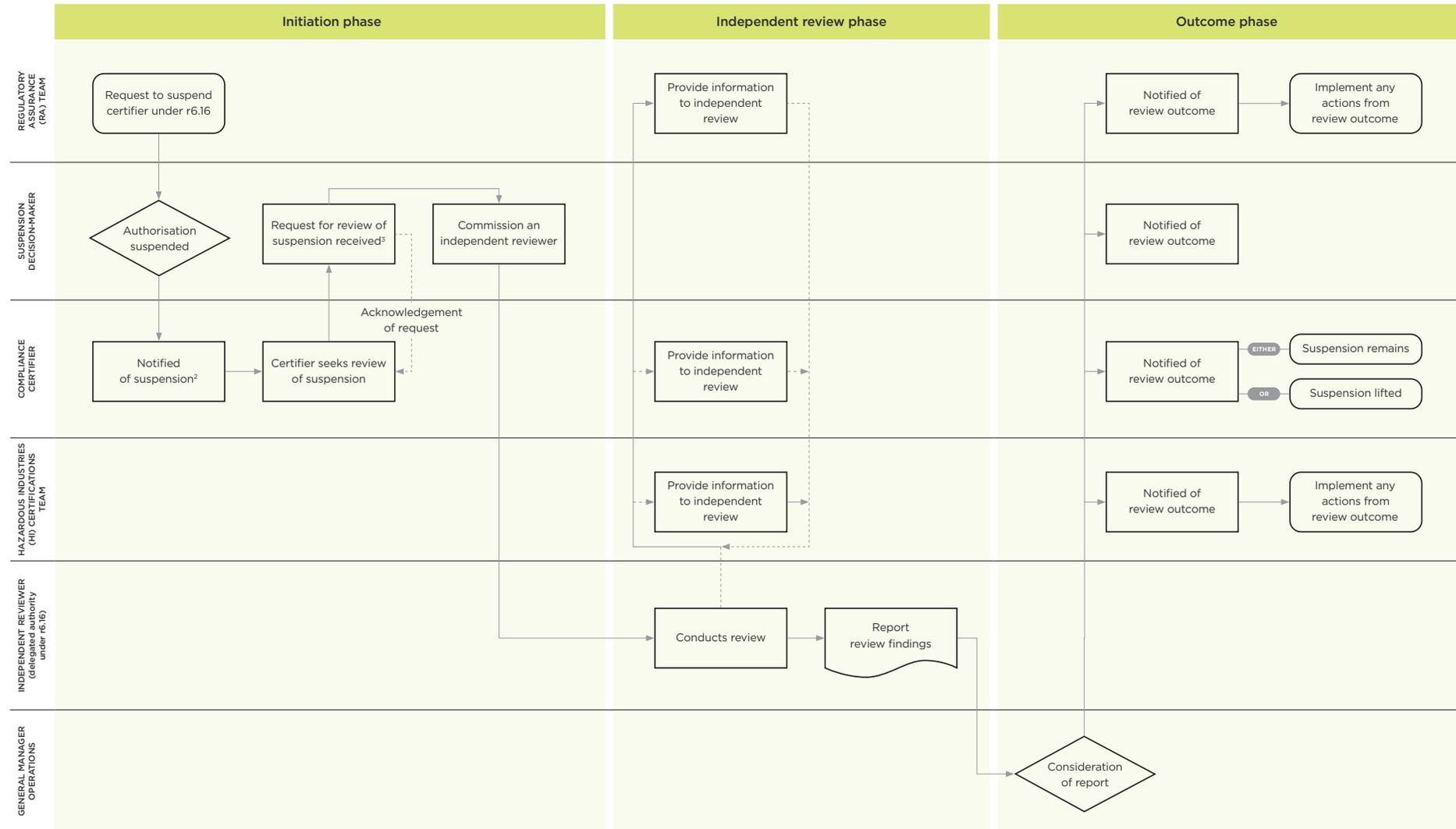


FIGURE 1: Process overview

Start/end Decision Document Feedback Process

² Letter must notify individual of their review rights, how to request to review, and what they can expect from it.

³ The person selected to undertake the review must be a person within the organisation, independent from the investigation and original suspension decision.

Step 1: Initiation

The procedure is initiated when a compliance certifier who has been suspended under regulation 6.16 requests an independent review of that suspension decision.

The request must be made to WorkSafe in writing.

SUSPENSION AND RECEIPT OF A REQUEST FOR A REVIEW OF A DECISION

At the time a compliance certifier is suspended, they will be advised:

- that they can request to have their suspension reviewed
- how they should request an independent review
- the timeframe (20 working days) by which such a request must be received by WorkSafe
- the process for the independent review and what they can expect from it.

ACKNOWLEDGEMENT

On receipt of a request for an independent review, the suspension decision maker will acknowledge receipt of the request within 5 working days.

ASSIGN AN INDEPENDENT REVIEWER

The suspension decision maker will commission a person who is independent from the original suspension decision to conduct an independent review of that decision.

The independent reviewer will be commissioned within 5 working days following receipt of the request for a review and will be provided with terms of reference for the review.

The independent reviewer will be a person who holds a delegated authority under regulation 6.16.

The reviewer must:

- be independent of the original suspension decision
- be independent of the suspended compliance certifier, for example, no professional associations
- have no other conflicts of interests, notwithstanding that the independent reviewer will be internal to WorkSafe
- have appropriate technical knowledge (or access to such knowledge) and an understanding of the matters that may need to be considered in undertaking a review
- be able to undertake a review within the timeframes specified in this policy.

Step 2: Independent review

COLLATING INFORMATION

The independent reviewer will collate all information relevant to the matter of safety that led to the suspension under regulation 6.16. All parties that are approached for information will participate fully and cooperatively to provide the information to the reviewer within 10 working days.

The independent reviewer may also request information from the suspended compliance certifier if there is insufficient information to determine the basis of their request for a review and whether the original decision was or was not justified. As far as practicable, the compliance certifier will have 20 working days to provide information.

If the compliance certifier can provide reasonable justification to WorkSafe to show they are unable to respond within 20 working days, the independent reviewer may consider an extension of the timeframe to ensure the compliance certifier is given full opportunity to participate in and contribute to the review.

REPORTING ON THE REVIEW

The independent reviewer must take into account all relevant information available or supplied before making an assessment on whether the decision to suspend under regulation 6.16 was appropriate.

The independent reviewer will prepare a report, which must address:

- the name of the independent reviewer
- the context in which the suspension decision was made, including the basis for the suspension and the safety concerns
- the basis upon which the compliance certifier is appealing the suspension
- the information and material considered in the review
- the process followed, including all parties who were spoken to, interviewed or provided information as part of the review
- the findings of the review including whether the safety concerns identified, which formed the grounds for the suspension, were indisputable, and whether there was an error in the making of that suspension decision or whether there was an omission of matters that should have been considered in the making of that suspension decision.

Step 3: Review outcome and closure

The independent reviewer must, in their report, conclude whether there has been an error in the making of the suspension decision or whether there was an omission of matters that should have been considered in the making of that decision.

CONSIDERATION OF THE INDEPENDENT REVIEWER'S REPORT

The independent reviewer will provide a copy of their report to the General Manager, Operations. The General Manager Operations will have 5 working days to consider the report.

Taking the findings of the independent reviewer's report into account, the General Manager, Operations will make a final decision on whether or not there was an error or omission in the exercise of the power under regulation 6.16.

NOTIFICATION TO THE COMPLIANCE CERTIFIER

The compliance certifier will be notified of the findings of the independent review by the General Manager, Operations within 5 working days after a final decision has been made by the General Manager, Operations. A copy of the independent review (redacted as appropriate) will be provided to the compliance certifier in confidence.

If the decision of the General Manager Operations is that there was an error or omission in the exercise of the power under regulation 6.16, they will initiate a process for the compliance certifier's suspension to be lifted.

If the decision of the General Manager Operations is that there was not an error or omission in the exercise of the power under regulation 6.16 and the suspension remains in place, the compliance certifier will have a further avenue of review through the Office of the Ombudsman.

NOTIFICATION TO INTERNAL STAKEHOLDERS

Having regard to the confidentiality and privacy of the compliance certifier, relevant internal WorkSafe teams will be notified of the outcome of the independent review and the final decision of the General Manager Operations.

Actions that may be required to implement the final decision (for example, actioning any required changes to the Register of Compliance Certifiers) will be implemented.

CLOSE OUT

Once the review has been completed (including all notifications and actions), all records and documentation will be saved to WorkSafe's records management system.

Appendix 1: Glossary

TERM	MEANING
Compliance certifier	A person authorised by WorkSafe under regulation 6.8
Delegated authority	A person with delegated authority from the Chief Executive to exercise a power under regulation 6.16
Independent reviewer	A person commissioned to undertake an independent review of a suspension during an investigation
Outcome	Findings of the independent review as set out in the independent reviewer's report
Regulation 6.15	Health and Safety at Work (Hazardous Substances) Regulations 2017 - WorkSafe may investigate complaints and concerns
Regulation 6.16	Health and Safety at Work (Hazardous Substances) Regulations 2017 - Suspension during investigation
Regulation 6.35	Health and Safety at Work (Hazardous Substances) Regulations 2017 - Right to appeal against certain decisions
Suspension decision maker	The person who made the decision to suspend a compliance certifier's authorisation during an investigation
The Regulations	The Health and Safety at Work (Hazardous Substances) Regulations 2017

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