

Commissioner for Fair Trading Guidelines

Deferring the Suspension of a Licence Under Section 42A of the *Home Building Act 1989*



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CONTENTS

1	AUTOMATIC LICENCE SUSPENSION	2
2	NOTIFYING LICENCE HOLDERS	3
2.1	CONSUMER, TRADER AND TENANCY TRIBUNAL ORDERS	3
2.2	COURT ORDERS	3
3	CIRCUMSTANCES WHERE SUSPENSION MAY BE DEFERRED.	4

1 Automatic licence suspension

- 1.1 Section 42A of the *Home Building Act 1989* provides for the automatic suspension of a **contractor licence** or **building consultancy licence** where the licence holder fails to comply with an order of the Consumer, Trader and Tenancy Tribunal or a court to pay an amount of money in respect of a building claim [s42A (1) & (2)].

The automatic suspension provisions do not apply in relation to the failure of a licence holder to comply with any other type of order including a work order or rectification order.

- 1.2 The due date for payment of the amount of money in respect of a building claim is the end of the time limit specified in the order for payment or if no time limit is specified in the order – the end of the period determined by the Commissioner for Fair Trading [s42A (3)].
- 1.3 The automatic suspension of a licence comes into force 28 days after the date the money was due to be paid under the order [s42A (4) (a)]. Where an order has been stayed pending the outcome of an appeal the automatic suspension will take effect as soon as the decision is confirmed on appeal [s42A (4) (b)].
- 1.4 The suspension remains in place until such time as the Commissioner is satisfied that the licence holder has complied with the order to pay an amount of money [s42A (2)], or the licence expires at the end of its term.
- 1.5 The automatic suspension provisions apply to all building claims **commenced after the 31st of March 2009** [s79 (2)]. The provisions of section 99 (3) of the *Home Building Act 1989* enabling a claim to be made under a contract of insurance (i.e. home warranty insurance policy) where the contractor's licence is suspended under section 42A apply to all contracts of insurance **entered into after the commencement of section 99 (3)** [s79 (3)].
- 1.6 The Commissioner may defer the operation of these automatic suspension provisions for any period up until the date on which the licence is due for renewal [s42A (5)]. A decision by the Commissioner to defer, or not to defer, the operation of a suspension cannot be reviewed by the Administrative Decisions Tribunal [s42A (6)].
- 1.7 A decision to defer the operation of a suspension of a licence under these guidelines means that the suspension will not take effect and will not be a trigger for a home warranty insurance claim under section 99 (3) of the *Home Building Act 1989*.
- 1.8 These guidelines set out the process for notifying licence holders that their licence is subject to the automatic suspension provisions and the matters that the Commissioner takes into consideration when determining whether to defer the operation of the suspension.
- 1.9 The Commissioner may delegate to any person or committee the exercise of any of the functions conferred or imposed on the Commissioner by or under section 42A of the *Home Building Act* [s8 (1) (c) *Fair Trading Act 1987*].

2 Notifying licence holders

2.1 Consumer, Trader and Tenancy Tribunal Orders

2.1.1 The Consumer, Trader and Tenancy Tribunal must inform the Commissioner for Fair Trading of any order it makes when determining a building claim. This information must be provided as soon as practicable after making the order and must include information about the time limit for compliance. These requirements are contained in section 48S of the *Home Building Act 1989*.

2.1.2 When the Commissioner receives information from the Tribunal about an order, in respect of a building claim, for a licence holder to pay an amount of money, the Commissioner will notify the licence holder in writing of:

- the date that the licence will be suspended if the licence holder does not provide the Office of Fair Trading with evidence of having complied with the order;
- the suspension of the licence in turn possibly triggering a claim under any home warranty insurance policy that might be in place for the work which was the subject of the Tribunal proceedings that had resulted in the order being made;
- the capacity for the Commissioner to defer the commencement of the suspension and the circumstances in which the Commissioner will consider a suspension; and
- the Administrative Decisions Tribunal being unable to review a decision by the Commissioner to defer, or not to defer, the operation of the suspension.

2.1.3 The Commissioner will also notify all insurers with which the licence holder holds (and has previously held) eligibility for home warranty insurance of the intention to suspend the licence unless evidence is provided to the Office of Fair Trading of the licence holder having complied with the order.

2.1.4 Should the order not be complied with, and no application to defer the operation of the suspension be made, by the date notified to the licence holder the licence will be suspended and the licence holder and insurer/s notified accordingly.

2.2 Court Orders

2.2.1 If a court orders a licence holder to pay money in respect of a building claim, the licence holder must notify the Commissioner within 7 days and provide the following information:

- the amount of money ordered to be paid;
- the date on which money is due to be paid;
- the name of the person to whom the money is to be paid;
- any other information prescribed by Regulation.

2.2.2 This requirement is contained in section 48V of the *Home Building Act 1989* and commences operation on 1 of April 2009.

2.2.3 Any other party to the court proceedings also has the right to notify the Commissioner of the making of the order and the terms of the order [s48V (2)].

- 2.2.4 When the Commissioner receives notice from a licence holder or any other party in accordance with the provisions section 48V of the Act, the Commissioner will notify the licence holder in writing of:
- the date that the licence will be suspended if the licence holder does not provide the Office of Fair Trading with evidence of having complied with the order;
 - the suspension of the licence in turn possibly triggering a claim under any home warranty insurance policy that might be in place for the work which was the subject of the court proceedings that had resulted in the order being made;
 - the capacity for the Commissioner to defer the commencement of the suspension and the circumstances in which the Commissioner will consider a suspension; and
 - the Administrative Decisions Tribunal being unable to review a decision by the Commissioner to defer, or not to defer, the operation of the suspension.
- 2.2.5 The Commissioner will also notify all insurers with which the licence holder holds (and has previously held) eligibility for home warranty insurance of the intention to suspend the licence unless evidence is provided to the Office of Fair Trading of the licence holder having complied with the order.
- 2.2.6 Should the order not be complied with, and no application to defer the operation of the suspension be made, by the date notified to the licence holder the licence will be suspended and the licence holder and insurer/s notified accordingly.
- 2.2.7 Where the Commissioner receives notice from another party to the proceedings, the Commissioner will initiate appropriate investigative action if the licence holder does not provide to the Commissioner, within 7 days of the order being made, the information required by section 48V (1) of the Act.

3 Circumstances where suspension may be deferred

- 3.1 The Commissioner for Fair Trading will consider a request to defer the operation of the suspension of a licence in the following three circumstances:
- (a) The licence holder provides evidence, prior to the date of expiry of the licence, satisfying the Commissioner for Fair Trading that the licence holder has complied with the order to pay an amount of money in respect of a building claim;
 - (b) The licence holder has lodged an appeal against the decision giving rise to the order to a higher court and that court has stayed the operation of the decision; or
 - (c) The licence holder provides evidence that the party to whom they have been ordered to pay money has voluntarily accepted an alternative arrangement – such as a payment plan or arrangements for the relevant work to be rectified.

In this circumstance the Commissioner will seek confirmation of the arrangements from the other party. The deferral will initially be for the period of the agreed arrangement and will be subject to continuing compliance with the agreed arrangement. At the successful conclusion of the agreed arrangement the deferral will be extended until the date of licence renewal.

- 3.2. Generally, requests for deferral of the operation of the suspension of a licence will only be considered in the above three circumstances. Requests for deferral of the suspension of a licence based on other circumstances will be considered on individual merit. However, submissions as to the impact of the suspension of a licence on the personal or business circumstances of the licence holder (and/or associated parties) or submissions as to the validity of the decision of the Tribunal or court will not be accepted as warranting the deferral of the suspension of a licence.
- 3.3 Any request for deferral of the suspension must be made in writing and should be received by the Office of Fair Trading before the date that the suspension is due to come into effect.
- 3.4 The Commissioner may temporarily defer operation of the suspension while considering a request for deferral of the operation of the suspension.
- 3.5 The Commissioner will notify all insurers with which the licence holder holds (and has previously held) eligibility for home warranty insurance of any application for deferral of the suspension and notify the licence holder and the insurer/s of the outcome of the application.