

# MODEL OPERATING PROCEDURE

## Prohibition notices

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### 2. DEFINITIONS

<b>PCBU</b>	Means person conducting a business or undertaking as described in s.5 of the <i>Work Health &amp; Safety Act 2012 (SA)</i>
<b>Reasonable Belief</b>	Is defined in Part 1 of Guidance section in model operational procedure MOP 11/0824 Issue of Notices and other General Requirements Relating to all Notice Types
<b>Regulator</b>	Means the Executive Director of SafeWork SA or their delegate
<b>Reviewable Decision</b>	Means a reviewable decision under section 223 of the WHS Act
<b>SWSA</b>	Means SafeWork SA
<b>WHS Act</b>	Means <i>Work Health &amp; Safety Act 2012 (SA)</i>

### 3. PURPOSE

To provide guidance for inspectors when issuing prohibition notices under Part 10, Division 2 of the WHS Act.

### 4. POLICY SECTION

#### Issuing a prohibition notice

Section 195(2) of the WHS Act provides that an inspector may give a person who has control over an activity a direction prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until the inspector is satisfied that the matters that give or will give rise to the risk have been remedied when the inspector reasonably believes that:

- an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard [s195(1)(a)]; or
- an activity may occur at a workplace that, if it occurs will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard [s195(1)(b)];
  - For clarification on ‘an activity that is occurring or may occur’ and ‘serious risk and immediate and imminent exposure’, refer to [Appendix 3](#) of this procedure.

When a prohibition notice is to be issued, it must be issued to the person who has control over the activity to be prohibited.

- Refer to [Appendix 3](#) of this procedure for further information about 'the person who has control over the activity'.

#### **Regulator Policy**

*It is the Regulators' policy that inspectors will issue a prohibition notice in all cases where they reasonably believe that an activity is occurring or may occur involving a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.*

- Refer to Principles of Operation for the WHS Inspector

Section 195(3) of the WHS Act provides that an s.195(2) prohibition direction may be given orally, but must be confirmed by written notice (prohibition notice) issued to the person who has control over the activity as soon as practicable.

#### **SA Jurisdictional Note**

*The intent of an s.195(3) oral direction is for the inspector to stop an activity immediately upon its observation. SafeWork SA Principles of Operation for the WHS Inspector enforce the requirement that a prohibition notice be issued when required. This is consistent with the requirements of the WHS Act.*

*The inspector must make it clear that any oral direction to stop an activity is being made under s.195(2) and it is an offence for the person to not comply.*

An oral direction prohibiting the conduct of an activity and the subsequent issuing of a prohibition notice takes effect immediately upon being issued, and ordinarily continues to operate until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.

Section 197 requires a person to whom an s.195(2) direction, or an s.195(1) prohibition notice is issued, to comply with the direction or notice. Penalties apply for non-compliance.

#### **SA Jurisdictional Note**

*There is no requirement in the WHS Act for an inspector to visit a workplace to verify that the risks identified in the notice have been remedied. However, if a person advises an inspector that a prohibition notice contravention has been remedied, the inspector shall conduct follow up enquiries to confirm that fact.*

*It is recognised that not all prohibition notices will be 'complied with'. For example, a notice prohibiting a type of high risk work without the appropriate high risk work licence will stay in place indefinitely; whereas a prohibition notice to guard dangerous parts can be 'complied with' by installation of a guard.*

### **Contents of a prohibition notice**

Section 196(1) of the WHS Act provides that a prohibition notice must state:

- (a) that the inspector believes that grounds for the issue of the prohibition notice exist and the basis for that belief; and
- (b) briefly, the activity that the inspector believes involves or will involve the risk and the matters that give or will give rise to the risk; and
- (c) the provision of the Act that the inspector believes is being, or is likely to be, contravened by that activity.

The above mandatory content for prohibition notices is designed to ensure that the person who is issued with the notice understands the inspector's decision, including the basis for belief.

Section 196(3) of the WHS Act provides that, without limiting s.195, a prohibition notice that prohibits the carrying on of an activity in a specified way may do so by specifying one or more of the following:

- (a) a workplace, or part of a workplace, at which the activity is not to be carried out;
- (b) anything that is not to be used in connection with the activity;
- (c) any procedure that is not to be followed in connection with the activity.

Section 195 of the WHS Act is limited to prohibiting an activity, and does not extend particularly to plant, substances, structures or procedures at a workplace.

This means you cannot prohibit the drill press simply because the belts and pulleys are unguarded. The prohibition notice must prohibit the activity of **using the drill press** (the activity). In effect, the drill press is then prohibited.

Section 196(2) of the WHS Act provides that a prohibition notice may include directions on the measures to be taken to remedy the risk, activities or matters to which the notice relates, or the contravention or likely contravention referred to in s.196(1)(c).

Section 204 of the WHS Act provides that a prohibition notice may include directions that:

- (a) refer to a code of practice; and
- (b) offer the person to whom a notice is issued a choice of ways in which to remedy the contravention

### **Regulator Policy**

It is regulator policy that an inspector will include on a prohibition notice, the measures to remedy the contravention. It is an offence if a person fails to comply with these measures.

Example direction to remedy the contravention: Install guarding over the drive belts and pulleys of the XYZ drill press to eliminate access to the exposed drive belts and pulleys.

Section 205 of the WHS Act provides that recommendations may be included in a prohibition notice. It is not an offence if a person does not comply with a recommendation.

For further information on directions and recommendations, refer to:

- o [Appendix 1](#) of this procedure, and
- o *MOP SAFE 11/0824 Issue of notices and other general requirements relating to all notice types*

### **Review of an inspector's decision to issue a prohibition notice**

An inspector's decision to issue a prohibition notice is a *Reviewable Decision*. Inspectors will verbally explain the ability to, and process for, a person to seek a review whilst issuing any prohibition notice.

- o *Refer to MOP SAFE 11/0806 Request for Review of a Decision for further information on the review process*

### **Remedial action**

Section 211 of the WHS Act provides that the regulator may carry out any remedial action the regulator believes reasonable to make a workplace or situation safe where a prohibition notice has been issued and the person to whom it is issued fails to take reasonable steps to comply with the notice.

Where a prohibition notice has been issued and is not complied with and the regulator then intends to then take remedial action under s.211, the regulator must give written notice to the person to whom the notice was issued of their intention to take such remedial action and the person's s.213 liability for the costs of that action.

- o *See MOP SAFE 11/0853 Remedial Action for further information and the regulators template notice of intention to take remedial action.*

Section 212(1) of the WHS Act provides that in circumstances in which a prohibition notice can be issued exist and the notice cannot be issued at a workplace because after taking reasonable steps, the person with management or control of the workplace cannot be found, the regulator may take any remedial action necessary to make the workplace safe. A written notice is not required in this circumstance, as there is no person to issue a prohibition notice to.

**Example**

*An inspector observes a large open trench that is 1800mm deep on a roadside. There are protruding sharp objects in the bottom of the trench. The trench is adjacent to a playground where children are playing and is alongside a footpath that pedestrians are walking along. It is apparent that works are in progress, but no person from the PCBU can be contacted or located. After discussions, the regulator chooses to take remedial action and instructs the inspector to arrange temporary fencing.*

**Other provisions of the Act relative to prohibition notices**

A range of other provisions of the WHS Act apply to prohibition notices issued by an inspector, including those relating to the validity of notices, directions and recommendations in notices, changes to notices, giving (or service) of notices, display of notices, follow-up to assess notice compliance status, and use of injunctions in circumstances of non-compliance.

- *See sections 203 – 210 of the WHS Act; and*
- *Refer to MOP SAFE 11/0824 issue of notices and other general requirements relating to all notice types.*

## 5. PROCEDURE

Responsibility	Description
Inspector	<p><b>Forming a reasonable belief that a serious risk emanating from an immediate or imminent exposure to a hazard is occurring or may occur:</b></p> <p>What you see, read and are told, and by whom, are important things to support your reasonable belief that an activity giving rise to a serious risk is occurring or is likely to take place. Make appropriate notebook entries to record your observations and enquiries.</p> <p>If it is safe to do so and appropriate, take photographs, make sketches or take measurements. Take details of the names and contact details of those observed undertaking the activity and any witnesses.</p> <p>If the relevant activity is not occurring at the time, you will need to make further enquiries and observations to determine if you can form a reasonable belief that the serious risk activity <b>may occur</b> again.</p> <p>Consider the following questions:</p> <ul style="list-style-type: none"> <li>• How is the job to be finished?</li> <li>• Have workers been told to cease the activity giving rise to the serious risk?</li> <li>• Has the person made other arrangements to complete the work?</li> <li>• What is the person's compliance history?</li> </ul> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p><i>For further information on "directions" and "recommendations", refer to MOP SAFE 11/0824 Issue of Notices and other General Requirements relating to all Notice Types.</i></p> <p><i>For information on "activity to be prohibited" and "activity that is occurring/may occur", and "serious risk" and "immediate or imminent exposure", refer to Guidance Appendices 1 and 2 of this procedure.</i></p> </div> <p>Ensure you have identified details of the correct person to whom you will issue the prohibition notice – the person who has control over the activity giving rise to the serious risk emanating from an immediate or imminent exposure to a hazard. Commonly this will be the person conducting the business or undertaking (PCBU).</p> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p><i>For information on the correct person on whom to issue the prohibition notice, and their correct legal entity, refer to:</i></p> <ul style="list-style-type: none"> <li>○ <i>Guidance Appendix 3 of this procedure and</i></li> <li>○ <i>Part 3 of the guidance section in MOP SAFE 11/0844 Entry to Workplaces and Related Powers and Obligations.</i></li> </ul> </div> <p>Ensure that the activity is stopped – either by immediately issuing a prohibition notice or by first giving an oral direction which must be confirmed in writing in the form of a prohibition notice as soon as practicable.</p>

<p><b>Inspector</b></p>	<p><b>Prepare the notice</b></p> <p>Discuss the likely contents of the notice with the person (or the management representative as relevant) and relevant Health &amp; Safety Representative, taking into consideration the seriousness of the contravention / risk.</p> <p><i>Note: this action is solely to check that the content is an accurate reflection of your observations and enquiries, and is not a legal requirement or an opportunity for workplace parties to dispute your actions. Discussion at this time may reduce the chance of the person seeking an internal review of your decision.</i></p> <p>Consider their views, and amend the notice if you consider it is appropriate to do so. Remember that the belief must be yours, not theirs.</p> <p>Prepare a notice completing all the mandatory fields in the template including:</p> <ul style="list-style-type: none"> <li>• your belief that grounds exist for issuing the notice and the basis for this belief;</li> <li>• briefly, the activity that you believe involves or will involve the risk and the matters that give or will give rise to the risk; and</li> <li>• the provision of the WHS legislation you believe is being or likely to be, contravened by that activity.</li> </ul> <p>Include as relevant:</p> <ul style="list-style-type: none"> <li>• directions to remedy the risk, activities or matters to which the notice relates or contravention that may refer to a code of practice, and offer the person a choice of ways to remedy the contravention.</li> <li>• recommendations, which provide referral to appropriate guidance material such as an Australian Standard, publication etc.</li> </ul> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p><i>For further information on “directions’ and “recommendations”, refer to</i></p> <ul style="list-style-type: none"> <li>○ <i>MOP SAFE 11/0824 Issue of Notices and other General Requirements relating to all Notice Types.</i></li> </ul> </div> <p>If you are issuing a notice that prohibits the carrying on of an activity in a specified way, you may do so by specifying one or more of the following:</p> <ul style="list-style-type: none"> <li>• a workplace, or part of a workplace, at which the activity is not to be carried out;</li> <li>• any thing that is not to be used in connection with the activity;</li> <li>• any procedure that is not to be followed in connection with the activity.</li> </ul>
<p><b>Inspector</b></p>	<p><b>Issue the notice</b></p> <p>Finalise and sign the notice.</p> <p>Issue the notice (and, where appropriate, an Inspection Report) to the person who has control over the relevant activity (or the management representative as relevant), using one of the giving methods outlined in s.209 of the WHS Act.</p> <ul style="list-style-type: none"> <li>• personally, or post fax or electronic transmission to the persons usual last known place of residence or business; or</li> <li>• leaving it at the person’s usual last known place of residence or business with a person who appears to be over the age of 16 years and who appears to reside or work there; or</li> <li>• leaving it for the person at the workplace to which the notice relates with a person who is or appears to be the person with management and control of the workplace; or</li> <li>• in a prescribed manner.</li> </ul>

	<p><b>continued</b></p> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p><i>For further information see:</i></p> <ul style="list-style-type: none"> <li>○ MOP SAFE 11/0824 Issue of Notices and other General Requirements relating to all Notice Types.</li> <li>○ MOP SAFE 09/0149 Inspection Reports</li> </ul> </div> <p>Give a copy of the notice to the HSR as relevant, or if there is no HSR, to a worker member of the health and safety committee (if any) or worker representative under any other agreed arrangements at the workplace.</p> <p>Explain to the person to whom the notice was issued:</p> <ul style="list-style-type: none"> <li>• the display of notice obligations under s.210 of the WHS Act;</li> <li>• that any clarification about the requirements of the notice should be referred back to you as the issuing inspector or to your Line Manager; and</li> </ul> <p>the person's rights to seek an internal review</p>
<p><b>Inspector</b></p>	<p><b>Consider if remedial action may be necessary</b></p> <p>The regulator may carry out remedial action to make a workplace safe in the following circumstances:</p> <ul style="list-style-type: none"> <li>• where a prohibition notice is issued and the person fails to take reasonable steps to comply with the notice;</li> <li>• a prohibition notice cannot be issued at a workplace, after taking reasonable steps, as the person with management or control cannot be found.</li> </ul> <p>If you believe that remedial action is necessary, discuss the matter with your line manager.</p> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p><i>For further information see:</i></p> <ul style="list-style-type: none"> <li>○ MOP SAFE 11/0853 Remedial Action</li> </ul> </div>
<p><b>Inspector</b></p>	<p><b>Follow up</b></p> <p>Verify that the person to whom the notice was issued has remedied the serious risk identified in the notice at an appropriate time.</p> <p>Once satisfied that the matters that gave or will give rise to the serious risk have been remedied, you can acknowledge this status in a relevant Inspection Report.</p> <p>You may issue improvement notice(s) as relevant for contraventions that are not covered and remedied by the prohibition notice.</p> <p>If you follow up on and form a reasonable belief that the prohibited activity is continuing/occurring and that there has been failure to comply with the prohibition notice, take detailed notes of how you formed that belief, including details of people you spoke with / observed, relevant documentation / reports etc. If relevant and safe to do so, take photographs, make sketches and take measurements.</p> <p>Record the failure to comply with the prohibition notice and the details of your observations of the activity giving rise to an immediate or imminent serious risk in your Inspection Report and consider referring the matter for further investigation and potential prosecution or other enforcement action.</p> <p>Advise the person to whom the notice was issued that it remains in force.</p>

## 6. FURTHER INFORMATION

- Investigations SOP
- Principles of Operation for the WHS Inspector
- Compliance & Investigations Manual

## 7. REVIEW

This SOP must be reviewed two (2) years after the date of issue and must be immediately modified if practices and/or procedures change.

**Document Owner**

Operational Support

**Contact:**



### **Version Control Detail**

V1 – 28 Nov 2012

## **Appendix 1 - Guidance – Part 1 - Activity to be prohibited and activity that is occurring/may occur**

### **Activity to be prohibited**

Ensure that only the specific activity or the carrying on of the activity in a specified way is prohibited in the notice.

Do make observations of the manner in which the activity is taking place. Describe the activity you are prohibiting precisely - specifically indicate the unsafe activity and the particular location where it is occurring or has occurred (e.g. "roof repair work at height of more than 2 metres on sheds 1,2 and 3 at Baxter Street factory", not "work at heights".)

Do not prohibit all activity at the workplace.

Do not prohibit an activity which is not occurring unless you can form a reasonable belief that it may occur and will involve a serious risk emanating from an immediate or imminent exposure to a hazard.

### **Activity that is occurring/may occur**

Ensure that the activity which involves/will involve a serious risk emanating from an immediate or imminent exposure to a hazard is taking place or may take place at the workplace.

Do be certain that any identified activity giving rise to a serious risk is actually occurring at the time the prohibition notice is to be issued or that you are able to reasonably form the belief that this activity may occur.

Do ensure, if the activity is not actually occurring at the time of making your observations, that the "basis of inspector's belief" field of the notice includes the reason(s) why you believe the activity may occur again.

Do not assume that an unsafe activity that has previously occurred may occur again and give rise to a serious risk just because the job remains uncompleted. Sufficient observations/enquiries need to be made to establish exactly how the job is intended to be continued. Inspectors need to be satisfied, with justifiable reasons that the activity giving rise to immediate or imminent exposure to a serious risk may occur again.

Do make enquiries to verify what actions have been taken by the person in control of the activity to prevent the activity from occurring. For example, how is the job to be finished if not by the way it was being done? Have the workers been informed that the activity that involved the serious risk is not to be continued and why? Has the person in control made appropriate arrangements to ensure that the job can be completed safely? In making further enquiries, the inspector is working to ensure that the actions the person plans to take next do not involve an immediate or imminent exposure to a serious risk. If they do, then it may be appropriate to issue a prohibition notice.

Do consider if there is past history to suggest that the person has not complied with previous commitments to ensure the same risk is addressed.

If at a particular workplace or site there are a number of activities taking place, each of which the inspector reasonably believes constitutes an immediate or imminent exposure to a serious risk to a person's health and safety, separate prohibition notices are required to be issued in order to prohibit each activity.

Given that a prohibition notice is issued on the basis of an activity which will involve a serious risk emanating from an immediate or imminent exposure to a hazard, it is possible that a single activity may give rise to more than one contravention of the WHS legislation. In this case consider whether any further enforcement action is required or necessary to address multiple contraventions.

## Appendix 2 - Guidance – Part 2 – Serious risk and immediate or imminent exposure

The power to issue a prohibition notice is predicated on the presence of a “serious risk” at a workplace. This “serious risk” must also emanate from an immediate or imminent exposure to a hazard.

This establishes a two-step test. It is not enough for a serious risk to be simply present for a prohibition notice to be issued. A driver is exposed to a serious risk of an accident every time he or she gets behind the wheel but this risk could not be seen to emanate from an immediate or imminent hazard.

The term “serious risk” has been included in s.195 of the WHS Act to provide a means of dealing with the risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions (in addition to more immediate safety risks).

The Oxford dictionary definitions most appropriate in the context of s.195 are:

- “serious” = “significant or worrying because of possible danger or risk; not slight or negligible”, and
- “risk” = “a situation involving exposure to danger”.

In the case of *Fallas v Mourlas* [2006] NSWCA 32 Justice Tobias held that “for a risk to qualify as significant, it must have a real chance of materialising. For a risk to have a real chance of materialising it must lie somewhere between a trivial risk and a risk likely to materialize, although it is probably closer to the second than the first.”

Therefore, “serious risk” in the context of s.195 of the WHS Act can be seen as a significant risk that is neither trivial nor slight, and which has a real chance of materializing.

Do remember that there is a two-step test to consider before issuing a prohibition notice.

1. a serious risk must exist, and
2. the serious risk must come from an immediate or imminent exposure to a hazard and have a real chance of materialising

For example: An illustration of where a “serious risk” would be present is where a person is operating a tractor without rollover protection at a workplace that is not flat or even-surfaced. It is clear in these circumstances that the person is engaging in an activity which involves a serious risk to their health or safety that emanates from an immediate or imminent exposure to a hazard.

In this case the hazard to which they are exposed is the tractor rolling over and the risk is one which has a real chance of materializing because there is no rollover protectors fitted to the tractor. In these circumstances an inspector is clearly empowered to issue a prohibition notice to immediately put a stop to the activity.

Do not assume there is a serious risk merely because of a lack of evidence of inspection/maintenance records.

Do remember to assess each serious risk situation on a case by case basis to ensure that both parts of the test are met for a prohibition notice to be issued.

“Immediate or imminent exposure” refers to an exposure to danger that is close to contemporary – that is, the exposure to risk is present or nearly so.

For a prohibition notice to be issued, the risk would have to be considered ‘serious’ and be associated with an immediate or imminent exposure to a hazard.

Ensure that you have formulated appropriate reasons for your belief that the activity or carrying on of an activity in a specified way that is to be prohibited is or will be an immediate or imminent exposure to a serious risk to a person's health and safety.

Do analyse all the information that has come to your attention – your observations, what you have been told and by whom, what documents, signage, labelling you have read, any sampling/monitoring results, what guidance material you have referred to, and what technical advice or guidance you have received or know of – and identify what aspects of all that information make you believe that the activity is an immediate or imminent exposure to a serious risk to health and safety.

Do consult with workplace/site parties to ensure your understandings are based on fact(s).

Do be certain there is immediate or imminent exposure to a serious risk by taking into account any existing controls for the activity being considered for prohibition. It may be that the circumstances more appropriately warrant an improvement notice because additional / improved risk controls are reasonably practicable.

### **Appendix 3 - Guidance – Part 3 - Person who has control over the activity to be prohibited**

Ensure that you identify the person who has control over the activity that gives rise or may give rise to the immediate or imminent exposure to serious risk. This should be the person with the most direct control over the activity and could be a PCBU or a worker. This is of particular importance in cases where a principal engages an independent contractor, such as in the construction industry, and in circumstances where a “host” engages workers from a labour hire agency.

It is generally not appropriate for prohibition notices to be issued to all parties in a contractual chain. In most cases where a contractual chain exists, only the party responsible for the actual work activity which is considered to give rise to an immediate or imminent exposure to a serious risk should be issued a prohibition notice. (If you consider that any party above them in the contractual chain has failed to meet its WHS Act duties in the particular circumstances, an appropriately worded improvement notice is likely to be more relevant for them.)

If it can be established that multiple parties do have overlapping control of the activity, separate prohibition notices can be issued to each person in relation to the specific matter(s) over which each have control.

If the serious risk activity involves use of a specific item of plant, consider who owns the plant. If the owner of the plant is different to the person in control of the activity at the workplace (for example the operator of a plant hire business), consider if it is necessary to also issue a prohibition notice to the owner of the plant to prevent the plant from being used in another workplace.

Do clarify who has control of the actual activity.

Do not jump to conclusions about who is in control.

Do be certain that the person with ongoing control of the activity you propose to prohibit is the correct person (e.g. the supplier of damaged hired equipment that has been returned or is to be returned without further use at a workplace has ongoing control of that equipment, not the hirer.)

Do be certain to identify the most relevant and appropriate person in control of the particular activity you reasonably believe is giving rise to a contravention or serious risk. It will not usually be the case that each party should be issued identical notices. Nor, for example, would it generally be the case that a “principal contractor” or “host” has control over every aspect of work conducted by a contractor or labour hire worker. Each of these parties generally will be in control of different aspects of what is going on at the workplace.