

# MODEL OPERATING PROCEDURE

## WHS Non disturbance notices

### INDEX

1. Definitions .....	1
2. Purpose.....	1
3. Policy Section.....	1
5. Procedure.....	3
6. Appendix 1 – Guidance in defining the person with management or control of the workplace (PMCW) .....	7

### 1. DEFINITIONS

<b>Inspector’s compliance powers</b>	Means all functions and powers of an inspector under the WHS Act.
<b>Incident</b>	Is defined in ss35, 36 and 37 of the WHS Act
<b>PCBU</b>	Means person conducting a business or undertaking as defined in s5 of the WHS Act.
<b>PMCW</b>	Means person with management and control of a workplace as defined in s20 of the WHS Act and clarified in Appendix 1 of this procedure
<b>Regulator</b>	Means the Executive Director of SafeWork SA or their delegate
<b>Site</b>	In this procedure the meaning includes any plant, substance, structure or thing associated with the site.
<b>WHS Act</b>	Means the <i>Work Health &amp; Safety Act 2012 (SA)</i>

### 2. PURPOSE

To provide guidance to inspectors in relation to their power to issue non-disturbance notices (NDN) under s199 of the WHS Act.

### 3. POLICY SECTION

#### Power to issue a non-disturbance notice

Inspectors are empowered to issue a non-disturbance notice (NDN) under s198 of the WHS Act to a person with management or control of the workplace if the inspector reasonably believes that it is necessary to do so to facilitate the exercise of their compliance powers.

The legislation is silent on an NDN’s method of delivery; however every effort shall be made to issue the notice personally, or via email or facsimile in circumstances where an inspector’s attendance at a workplace may be delayed.

Section 199(1) of the WHS Act provides that the person issued with a non-disturbance notice is required to:

- (a) preserve the site at which a notifiable incident has occurred – for a specified period;
- or
- (b) prevent the disturbance of a particular site (including the operation of plant) in other circumstances for a specified period that is reasonable in the circumstances.

Section 203 of the WHS Act provides that a non-disturbance notice must be in writing.

Section 199(2) of the WHS Act provides that a non-disturbance notice must specify the period (of no more than 7 days) for which the notice applies, and set out:

- (a) the obligations of the person to whom the notice is issued; and
- (b) the measures to be taken to preserve a site or prevent disturbance of a site; and
- (c) the penalty for contravening the notice.

### **Person's ability to take certain actions whilst a non-disturbance notice is in force**

On receipt of a non-disturbance notice, a person is obliged to do or not do what is set out in the notice. However, even if a non-disturbance notice has been issued, s199(4) of the WHS Act provides that the notice does not prevent any action:

- (a) to assist an injured person (e.g. by persons at the workplace or any attending emergency services persons); or
- (b) to remove a deceased person (e.g. at the direction of the coroner); or
- (c) that is essential to make the site safe or prevent a further incident; or
- (d) that is associated with a police investigation; or
- (e) for which an inspector has given permission.

#### **Regulators Policy**

Information about what action can be taken whilst the non-disturbance notice is in force should also be included on the actual notice

### **Power to issue a subsequent non-disturbance notice**

Section 201 of the WHS Act provides that, if an inspector considers it necessary to do so, the inspector may issue one or more subsequent notices to a person, whether before or after the expiry of the previous notice. Any subsequent notice that is issued, must comply with the same requirements imposed for the original notice that was issued under s199(1).

Note that a decision made by an inspector to issue / not issue a non-disturbance or subsequent non-disturbance notice is a reviewable decision under s223 of the WHS Act. The following persons may seek Internal Review of the decision:

- The person to whom the notice was issued;
- The person with management or control of the workplace;
- A person conducting a business or undertaking whose interests are affected by the decision;
- A worker whose interests are affected by the decision;
- A health and safety representative who represents a worker whose interests are affected by the decision.

#### **Regulators Policy**

Inspectors will advise a person to whom a non-disturbance notice is issued that the person can seek an internal review of that notice.

- *Refer MOP SAFE 11/0881 Internal Review*
- *Internal Review Application Form*

A range of other provisions of the WHS Act apply to non-disturbance notices (and other notices) issued by an inspector, including those relating to validity of 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.

- For further information, refer to MOP SAFE 11/0842 Issue of notices and other general requirements relating to all notice types
- Sections 203 – 210 of the WHS Act

## 5. PROCEDURE

Responsibility	Description
<b>Inspector</b>	<p><b>Notifiable incident site</b></p> <p>When an inspector arrives at the site, (or earlier if an inspector, without attending the site, has directed that the site can be disturbed), the WHS Act s39 duty of a PMCW to preserve the scene of a notifiable incident site, ends.</p> <p>The first arriving inspector must first consider if there is a need to preserve the site, or any plant, substance, structure or thing associated with the site, in order to facilitate the exercising of your compliance powers.</p> <p>The most obvious reason to preserve the site would be to allow time, without the scene changing, to conduct inquiries and other investigative processes to establish the cause of the incident. This may include the need to arrange for a technical specialist or subject matter expert to attend the site to assist you.</p>
<b>Inspector</b>	<p><b>Circumstances other than a notifiable incident</b></p> <p>When performing functions other than responding to a notifiable incident, consider whether you need to prevent disturbance of a particular site (including operation of plant). Examples of such circumstances include:</p> <ul style="list-style-type: none"> <li>• when immediate or imminent exposure to a hazard creating a serious risk is indicated (to warrant issuing a prohibition notice), but this cannot be objectively determined without a technical assessment of the site, plant, substance or thing; and/or</li> <li>• when you arrive at a site of an incident that is not required to be notified - to allow time to make necessary inquiries into the incident; and/or</li> <li>• where there is a need to have a suitably competent person attend the site to collect a sample on behalf of the inspector for subsequent analysis; and/or</li> <li>• where it is not practical for the inspector to seize and remove an item for testing or examination off site.</li> </ul>
<b>Inspector</b>	<p><b>Preparing for and issuing a non-disturbance notice</b></p> <p>The basis of your reasonable belief that it is necessary to issue a non-disturbance notice, can be determined by making sufficient inquiries and an analysis of the following types of information to reach the relevant conclusion upon which to issue the notice. It will be supported if information from one source is validated / verified by the same information from another source, rather than relying on one source only.</p>

<p><b>Inspector</b></p>	<p><b>Forming a reasonable belief</b></p> <p>In forming a reasonable belief to issue a notice, consider the following:</p> <ul style="list-style-type: none"> <li>• your observations;</li> <li>• photographs taken of the site, sketches made and measurements taken (if it is safe and practicable to do so);</li> <li>• that sufficient details of the situation are recorded in your notebook (which will also enable a comparison with the situation during any subsequent attendance at the site;</li> <li>• information obtained from speaking with persons who work at the workplace or are associated with the workplace;</li> <li>• information obtained from reviewing relevant documents;</li> <li>• information from relevant codes of practice, Australian Standards and other published guidance material;</li> <li>• advice provided by suitable technical specialists (if relevant); and</li> <li>• the known prior history of the person.</li> </ul>
<p><b>Inspector</b></p>	<p><b>What to do when you reasonably believe a non-disturbance notice is required</b></p> <p>If you reasonably believe it is necessary to issue a non-disturbance notice, so that you can exercise your compliance powers, do the following:</p> <ul style="list-style-type: none"> <li>• determine the appropriate, reasonable period of time for preserving a notifiable incident site or preventing disturbance of a site which must be no more than 7 days from the date the notice is issued;</li> <li>• prepare the non-disturbance notice;</li> <li>• issue the non-disturbance notice by giving it to the person with management or control of the workplace using one of the methods outlined in s209 of the WHS Act; specifically: <ul style="list-style-type: none"> <li>○ by delivering it personally to the person or sending it by post, fax or electronic transmission to the person's usual or last known place of residence or business; or</li> <li>○ by leaving it for the person at the person's usual or last known place of residence or business with a person who appears to be over 16 years and who appears to reside or work there; or</li> <li>○ by 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 or control of the workplace; or</li> <li>○ as prescribed by regulations</li> </ul> </li> </ul> <p><b>Notes on issuing a non-disturbance notice:</b></p> <ol style="list-style-type: none"> <li>1. The period of time for preserving a notifiable incident site or preventing disturbance of a site that you specify in the non-disturbance notice can be <b>no more than seven (7) days</b> from the date the notice is issued.</li> <li>2. If seven (7) days is not reasonably required, ensure that an appropriate lesser period of time is specified.</li> <li>3. If additional time is subsequently found to be needed, you can issue a subsequent non-disturbance notice.</li> </ol>

	<ol style="list-style-type: none"> <li>4. If a lesser period of time of non-disturbance is ultimately found to be needed, the notice can be varied by an inspector.</li> <li>5. When issuing the non-disturbance notice, advise the receiver of their requirement to: <ol style="list-style-type: none"> <li>a. display the notice as prescribed by s210(1); and</li> <li>b. that any person must not intentionally remove, destroy, damage or deface the notice whilst it is in force [s210(2)]; and</li> <li>c. that it as an offence if either of the above two requirements are not complied with</li> </ol> </li> </ol>
<p><b>Inspector</b></p>	<p><b>Amending, varying or cancelling a notice</b></p> <p>A non-disturbance notice can be amended, varied or cancelled.</p> <p>Section 206 provides that an inspector can make minor changes to a notice –</p> <ul style="list-style-type: none"> <li>• for clarification; or</li> <li>• to correct errors or references; or</li> <li>• to reflect changes of address or other circumstance.</li> </ul> <p>Section 207 provides that, except for what is provided for in s206, only the regulator can make any other variations to, or cancel a non-disturbance notice.</p> <p>For further detail on the processes required for varying, amending or cancelling a non-disturbance notice, refer to:</p> <ul style="list-style-type: none"> <li>• <i>MOP SAFE 11/0842 Issue of notices and other general requirements relating to all notice types.</i></li> </ul>
<p><b>Inspector</b></p>	<p><b>Subsequent Notices</b></p> <p>Once the initial non-disturbance notice lapses (as at the date specified on the notice) or at any time during the notice period (for example, it becomes apparent that more time for site preservation is required than is currently specified in the notice), you may issue a subsequent notice.</p> <p>In order to issue a subsequent notice, you must again have a reasonable belief that it is necessary to facilitate the exercise of your compliance powers.</p> <p>Requirements of s199(2) of the WHS Act apply to subsequent non-disturbance notices in exactly the same way as for initial notices.</p> <p>There is no limit to how many non-disturbance notices may be issued in relation to a notifiable incident site or relevant other circumstance, provided you have the necessary reasonable belief, and the statutory requirements for what must be set out in the notice, are met.</p>
<p><b>Inspector</b></p>	<p><b>Follow up</b></p> <p>Given that a non-disturbance notice is issued for the purpose of facilitating exercise of inspector powers, the presumption is that during the period of the initial notice and/or subsequent notice(s), the inspector will attend the relevant site to address the matters giving rise to the notice(s) being issued. At the same time, the inspector should make observations and conduct enquiries to assess whether the notice(s) have been complied with during the inspector's absence from the site; e.g. check that the site plant structure substance or thing has not been disturbed.</p>

	<p>If the inspector is not attending the site during the period specified in the notice, other arrangements should be made to assess ongoing compliance with the notice (e.g. through follow-up and verification by telephone conversations with relevant persons).</p> <p>If it becomes evident that a notice has not been complied with and the site has been disturbed during the period specified in the notice, you should explain to the PMCW that it is an offence to refuse or fail to comply with the notice without reasonable excuse, ask why they did not comply with the notice and record their reason(s), if any are provided, in your notebook.</p> <p>Where non-compliance with a notice is identified, consult your line manager and consider referring the matter for investigation for possible prosecution or other enforcement action.</p>
<b>Line Manager</b>	<p>Monitor site preservation and investigation progress with inspectors who have issued non-disturbance notices to ensure this procedure is complied with; and</p> <p>Schedule a case conference for matters that require further investigation as a result of a PMCW's non-compliance with a non-disturbance notice.</p>

**Document Owner:**

- Operational Support Team
- ██████████

**Version Control**

- Version 1 – 21 Nov 2012

## 6. Appendix 1 – Guidance in defining the person with management or control of the workplace (PMCW)

Non-disturbance notices are required to be issued to the person with management or control of the relevant workplace.

Section 20 of the WHS Act states:

**person with management or control of a workplace** means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace but does not include—

- (a) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or
- (b) a prescribed person.

“Person” can be a natural person or a body corporate or body politic (refer to Part 3 of the Guidance section in model operational procedure, *Entry to Workplaces and related powers and obligations*).

A person with management or control of the workplace could be the:

- person conducting a business or undertaking (PCBU);
- owner, except if there is a lease, contract or other arrangement that provides or has the effect of providing for another person to have effective and sustained control of the site; or
- the occupier (e.g. tenant) of the site.

Who has what control must always be determined in the context of the specific set of circumstances which present at the time. It could be the PCBU or other person who has direct charge of the site or the person who has the legal or practical ability to direct or command what may happen at the site.

Generally, the person with management or control of the workplace will be the same as the PCBU. However, where there are multiple PCBU's in relation to a particular matter, identify which PCBU has responsibility or control in relation to the site that you reasonably believe needs to be preserved/not disturbed so that you can exercise your powers.

This is of particular importance in cases where the site may be owned by one person and occupied by another (e.g. tenant), where a principal contractor engages a contractor (such as in the [construction industry](#)), and where a PCBU engages workers from a labour hire company