

# MODEL OPERATING PROCEDURE

## HSR Cessation of work

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### 1. DEFINITIONS

<b>Assist</b>	Means the inspector provides support, help and aid to the parties to encourage them to reach agreement.
<b>Decide</b>	Means the inspector makes a decision after consideration of the issues in dispute.
<b>HSR</b>	Means a duly elected and trained health and safety representative or a deputy HSR
<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>Person</b>	Means either a natural person or an incorporated entity recognised by the law as having the rights to hold property, to enter into legal contracts, and to sue and be sued in his, her or its own name
<b>Regulator</b>	Means the Executive Director SafeWork SA
<b>SWSA</b>	Means SafeWork SA
<b>WHS Act</b>	Means <i>Work Health &amp; Safety Act 2012 (SA)</i>

### 2. PURPOSE

To provide guidance for inspectors when dealing with cessation of unsafe work directions given by a worker or HSR under sections 84 and 85 of the *WHS Act*.

### 3. BACKGROUND

Section 84 of the *WHS Act* provides that a worker may cease or refuse to carry out work if the worker has a **reasonable concern** that to carry out the work would expose them to a **serious risk** to their health or safety emanating from an **immediate or imminent exposure to a hazard**.

Section 85(1) of the *WHS Act* provides that a HSR may direct a worker from the work group they represent to cease work, if the HSR has a **reasonable concern** that to carry out the work would expose the worker to a **serious risk** to their health or safety emanating from an **immediate or imminent exposure to a hazard**.

#### **Guidance**

Refer to [Appendix 1](#) of this procedure for guidance on 'reasonable concern'.

For further information on 'serious risk' and 'immediate or imminent exposure to a hazard', refer to Part 1 of the Guidance section of MOP 11/0838 Prohibition Notices.

Section 85(6) of the WHS Act provides that a HSR may not give a cease work direction unless they have completed initial training prescribed by the WHS regulations (as referred to in s72(1)(b) of the WHS Act), or previously completed such training when acting as a HSR for another work group, or completed equivalent training under a corresponding WHS law (i.e. the WHS Act in another jurisdiction).

#### **Guidance**

Refer to [Appendix 2](#) of this procedure for guidance on the transitional arrangements to enable an HSR to exercise powers under this Part of the WHS Act

Section 85(2) of the WHS Act requires the HSR, before giving a direction to cease unsafe work, to consult about the matter with the PCBU for whom the workers are carrying out the work, **and** to attempt to resolve the matter as an issue by using the issue resolution process outlined in Division 5 of the WHS Act (i.e. following an agreed issue resolution procedure or, if there is no agreed procedure, the default procedure in regulation 23 of the WHS Regulations).

#### **Regulator's policy**

Consistent with its meaning in s48 of the WHS Act, 'consultation' by the HSR will be considered to have occurred prior to directing that work cease, if:

- relevant information about the issue in question has been shared by the HSR with the PCBU;
- the PCBU was given a reasonable opportunity to express its view on the matter;
- the views, if any, of the PCBU were taken into account before the HSR proceeded to act; and
- the PCBU is advised by the HSR of the outcome of consultation in a timely manner.

Refer to [Appendix 3](#) of this procedure for guidance on 'consultation'.

However, as provided in s85(3) of the WHS Act, the HSR may direct the worker to cease work without carrying out the requirements of s85(2) if the risk is so serious and immediate or imminent it is not reasonable to consult or attempt to resolve the issue before giving the direction to cease work. Section 85(4) of the WHS Act provides that the HSR must then consult with the relevant PCBU as soon as practicable after giving the cease work direction.

Section 85(5) of the WHS Act provides that a HSR who has directed a worker to cease unsafe work must inform the PCBU of any such direction. Section 86(a) of the WHS Act provides that a worker who ceases or refuses to carry out work at their own initiative must notify the PCBU as soon as practicable of the action taken.

#### **Alternative work**

If a worker ceases work under the above-mentioned provisions of the WHS Act, (either at their own initiative or under a HSR's direction), s86(b) of the WHS Act provides they must remain available to carry out suitable alternative work. Section 87 of the WHS Act provides that the PCBU may direct the worker to carry out suitable alternative work at the same or another workplace. The work must be both safe and appropriate for the worker to carry out until their normal work can resume.

Section 88 of the WHS Act provides that unless the worker unreasonably fails to comply with the direction of the PCBU in relation to alternative work, their cease work action does not affect the continuity of their engagement for prescribed purposes. (This relates to their ongoing entitlement to payment and associated conditions. The prescribed purposes are set out in regulation 24 of the WHS Regulations as the assessment of eligibility for, or the calculation of benefits for, any benefit or entitlement associated with the worker's engagement, including remuneration and promotion, as affected by seniority; superannuation benefits; authorised leave entitlements; and any entitlement to notice of termination of the engagement.).

### ***Regulator's policy***

It is acknowledged that a worker may reasonably refuse to comply with a direction from the PCBU to carry out alternative work if:

- they have reasonable cause for concern for their health or safety in carrying out that alternative work;
- they do not have the required training or experience to carry out the alternative work;
- they do not hold a relevant licence under the WHS Regulations or other legislation for the work they are asked to do; or
- the equipment required to carry out the task safely is not available.

### **Inspector may be required to attend the workplace**

Section 89 of the WHS Act provides that the relevant HSR, PCBU or worker may ask the regulator to appoint an inspector to attend the workplace to assist in resolving an issue arising in relation to the cessation of work.

### ***Regulator's policy***

An inspector will attend the workplace as soon as possible after the request is made, and that 'assist in resolving an issue' includes issuing relevant notices.

## **4. PROCEDURE**

Requests for inspector's assistance may be received via:

- telephone; or
- email or other written correspondence; or
- conversations; or
- personal attendance by a workplace party at an SWSA office.

<b>Responsibility</b>	<b>Description</b>
<b>Help Centre</b>	<ul style="list-style-type: none"><li>• Facilitate creation of InfoNET file if not already in place</li><li>• Forward the notification to the relevant line manager</li></ul>
<b>Line Manager</b>	<b>Appoint an inspector</b> who shall commence relevant inquiries: <ul style="list-style-type: none"><li>• where the workplace is within the metropolitan area – within 1 business day</li><li>• where the workplace is outside the metropolitan area – within 2 business days</li></ul>
<b>Inspector</b>	<b>Assessment</b> <p>Discuss the matter with SWSA Principal Liaison Officer(s) (Workplace Consultation), and ascertain their availability to assist you with your inquiries as necessary.</p> <p>Within the timeframes specified above, contact the worker or HSR that issued the cessation direction to obtain the full history of the matter and reasons for the cessation direction before obtaining details from the PCBU (or management representative).</p> <p>Provide the parties with any preliminary guidance or advice.</p> <p>If the request to assist resolve an issue arising in relation to a work cessation is withdrawn at this time, attendance at the workplace is not required, and the matter ends. Record the actions and outcome on InfoNET.</p>

<p><b>Inspector</b></p>	<p><b>Attending the workplace</b></p> <p>Confirm the person who issued the cessation of work notice is a HSR.</p> <p>Discuss the issue giving rise to the request for your attendance first with the worker who either ceased or refused to carry out work or the HSR who gave the s85 direction to cease work to establish:</p> <ul style="list-style-type: none"> <li>• the history and circumstances of the issue leading up to the work cessation;</li> <li>• how and when the notification of the work cessation was given to the PCBU; and</li> <li>• what has occurred since the work cessation commenced (for example, if the PCBU has directed any alternative suitable work).</li> </ul> <p>If a HSR directed the work cessation, your initial inquiries should also establish:</p> <ul style="list-style-type: none"> <li>• if the HSR is duly elected under the WHS Act;</li> <li>• what consultation occurred and the issue resolution process (if any) that was followed prior to or after the work cessation direction was given; and</li> <li>• if the HSR has completed initial training which entitles the HSR to direct a work cessation (subject to transitional provisions in the WHS Act).</li> </ul> <p>Discuss the circumstances leading up to and following the work cessation direction with the PCBU (or management representative), including the PCBU's understanding of the HSR's training status.</p> <p>Note: Joint discussions with the relevant worker or HSR and PCBU (or management representative) may be conducted if all parties are agreeable.</p> <p>Discuss the issue with any other relevant person. This may include workers affected by the direction of a HSR or any relevant HSR (if a worker has ceased or refused to carry out work).</p> <p>Consider if the substantive issue resulting in cessation of unsafe work also impacts others (i.e. other workers not involved in the cessation and other persons who may be exposed to the alleged serious risk). If necessary, exercise any relevant compliance power (including the issue of any relevant notice) to deal with the broader health or safety issue.</p>
<p><b>Inspector</b></p>	<p><b>Further inquiries outside the workplace</b></p> <p>If, at the time, you consider that further inquiries outside the workplace are needed before you can act to assist to resolve the matter, advise the relevant worker or HSR (or both as relevant) and the PCBU (or management representative) of your intentions.</p> <p>Examples of when further inquiries outside the workplace may be required are to:</p> <ul style="list-style-type: none"> <li>• check the information you have been given is correct (e.g. checking with a training provider about a person's competency to operate plant if that is the issue resulting in you having been requested to attend the workplace); or</li> <li>• carry out research on the risk that is the subject of the work cessation, including seeking technical advice.</li> </ul> <p>Where relevant, advise the worker or HSR and PCBU (or management representative) that the PCBU may, in the meantime, direct any worker that has ceased work to carry out safe and appropriate alternative work at the same or another workplace until normal work can be resumed.</p>

<p><b>Inspector</b></p>	<p><b>Determine the outcome of your inquiries (A, B, C, D or E as relevant)</b></p> <p><b>A: You believe either that there was/is serious risk or that the worker or HSR, as relevant, had reasonable concern</b></p> <p>If you believe there was/is a serious risk emanating from an immediate or imminent exposure to a hazard, or either the worker who ceased or refused to carry out work or the HSR who directed the work cessation had a reasonable concern regarding this:</p> <ul style="list-style-type: none"> <li>• advise the parties of your belief and the reasons for this;</li> <li>• recommend how the risk may be remedied; and</li> <li>• remind the parties (if necessary) that suitable, safe and appropriate work may be directed by the PCBU until the serious risk is remedied, and that the continuity of workers' engagement applies unless suitable alternative work is unreasonably refused.</li> </ul> <p>Consider issuing a prohibition notice in relation to a serious risk if the relevant circumstances warrant.</p> <p><b>B: You do <u>not</u> believe either that there was/is serious risk or that the worker or HSR, as relevant, had reasonable concern</b></p> <p>If you do not agree there was/is a serious risk, or that the concern of the relevant worker or HSR was reasonable:</p> <ul style="list-style-type: none"> <li>▪ advise the parties of your belief and the reasons you do not agree that a worker should have ceased or refused to carry out work or that a HSR should have directed work to cease; and</li> <li>▪ recommend to the worker(s) or HSR, as relevant, that work be resumed, indicating to the parties that a failure to resume work cannot be addressed by you or any other inspector but rather would need to be resolved through a dispute settlement procedure under the relevant Award or workplace agreement via the representative Union; FairWork Australia; or the South Australian Industrial Relations Tribunal.</li> </ul> <p>Consider issuing an improvement notice in relation to a contravention of WHS laws if the circumstances warrant.</p> <p><b>C: You believe the HSR is not eligible to direct cease work</b></p> <p>If the HSR who directed the work to cease has not undertaken the initial training prescribed by s. 85 (6) of the WHS Act (subject to transitional provisions in the WHS Act), or previously completed that training when acting as a HSR for another work group, or completed training equivalent to that training under a corresponding WHS law, inform the parties that the HSR is not eligible to direct that work cease in the workplace. In this situation, the work cessation direction is invalid.</p> <p>Provide the HSR with guidance on their rights to training under s72 of the WHS Act.</p> <p><b>D: Dispute relates to “suitable alternative work” or payment for the period work has ceased</b></p> <p>Explain to the parties that, when directing alternative work be done, they must take into account the worker's skill, knowledge, training and experience so they are not exposed to new risks.</p>
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	<p>Explain to the parties that the WHS Act provides for continuity of workers' engagement unless they unreasonably fail to comply with a direction to perform safe and appropriate alternative work. Explain that you consider a worker may reasonably refuse to comply with a direction from the PCBU to carry out alternative work if:</p> <ul style="list-style-type: none"> <li>• they have reasonable cause for concern for their health or safety in carrying out that alternative work;</li> <li>• they do not have the required training or experience to carry out the alternative work</li> <li>• they do not hold a relevant licence under the WHS Regulations for the work they are asked to do; or</li> <li>• the equipment required to carry out the task safely is not available.</li> </ul> <p>If the alternative work raises a health and safety issue, recommend that parties seek to resolve that issue through the agreed health and safety issue resolution procedure in the workplace or, if there is no agreed procedure, the default procedure in regulation 23 of the WHS Regulations.</p> <p>If there continues to be disagreement between the parties about what constitutes "suitable alternative work" or payment for the period work has ceased, recommend the parties seek to resolve the matter through a dispute settlement procedure under the relevant Award or workplace agreement via the representative Union; FairWork Australia; or the South Australian Industrial Relations Tribunal.</p> <p><b>E: If the HSR has directed a cessation of work and the PCBU has dissuaded relevant workers from ceasing work</b></p> <p>Address the question of 'serious risk' or 'reasonable concern' as for A or B above.</p>
<b>Inspector</b>	<p><b>Communicating your decision</b></p> <p>Inform the relevant worker (or HSR) and PCBU (or management representative) about your decision (A, B, C or D above) in writing by referring to it in your Inspection Report.</p>
<b>Inspector</b>	<p><b>File management</b></p> <p>Enclose copies of all information obtained and provided, the Inspection Report (or other written decision) and other file closure documents in the relevant InfoNET file.</p>

## 5. FURTHER INFORMATION

- National Compliance & Enforcement Policy
- Principles of Operation
- Framework For a Common Approach to Inspection Work
- Other procedures as referenced in the body of this procedure

## 6. REVIEW

This procedure must be reviewed 2 years after the last issue date and must be immediately modified if practices and/or procedures change.

**Document Owner:** Principal Liaison Officer (Workplace Consultation) Help & Response Team.

### Version Control Information:

- V1 – 20 Dec 2012

## 7. Appendix 1: Guidance 1 – Reasonable concern of worker or HSR

Section 84 of the WHS Act provides that a worker may cease or refuse to carry out work if the worker has a **reasonable concern** that to carry out the work would expose them to a serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard.

Section 85(1) of the WHS Act provides that a HSR may direct a worker from the work group they represent to cease work, if the HSR has a **reasonable concern** that to carry out the work would expose the worker to a serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard.

It is considered that a worker or HSR, as relevant, will have 'reasonable concern' in this regard if they had justifiable reason(s) to believe there was an immediate or imminent exposure to a hazard giving rise to a serious risk.

There may or may not, in fact, have been a serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard when the inspector looks back to the circumstances existing when the worker or HSR acted.

What needs to be considered is the information available to the worker or HSR at the time they took the action and whether, in those circumstances, it was reasonable for them to have formed the view that it was appropriate for a work cessation. The inspector needs to "stand in the shoes" of the worker or HSR at the time. The benefit of perfect wisdom or hindsight is not relevant to the consideration.

Some relevant factors to consider in making an objective assessment about whether there was 'reasonable concern' by the worker or HSR are:

- the plant substance structure or work process is new and unknown;
- the nature of the site and/or work in question (e.g. is it generally known to be 'hazardous?');
- the nature of the hazard(s) and risk(s) involved, including any unusual contributing factors at the time such as environmental conditions;
- the attempts by the worker or HSR, if any, to assess the situation and seek clarity regarding the nature of the hazard(s) and risk(s);
- the extent to which, if at all, the risk(s) associated with the site and/or work in question were controlled, and the information generally available or provided to them by the PCBU regarding controls at the time;
- what could have reasonably and readily been done by the PCBU or other relevant person in control of the situation at the time to address the worker or HSR's concern; and
- past history (if any) regarding the same or similar situation at the workplace.

## **8. Appendix 2: Guidance 2 – Transitional provisions relating to HSR power to direct that work cease**

Item 19 of Schedule 6 of the *Work Health & Safety Act 2012 (SA)* details the transitional arrangements for HSR's elected under the *Occupational Health Safety & Welfare Act 1986*.

Newly elected HSRs must not, from 1 January 2013, direct that unsafe work cease until they have completed initial training prescribed by the WHS regulations (as referred to in s72(1)(b) of the WHS Act), or previously completed such training when acting as a HSR for another work group, or completed equivalent training under the WHS Act in another jurisdiction (note that all other HSR powers – other than the power to issue a provisional improvement notice - can be exercised whether or not the HSR has undertaken approved training); or

HSRs elected under the *Occupational Health Safety & Welfare Act 1986* can exercise all powers under the WHS Act for twelve months from 1 January 2013, but will not be able to exercise power to direct unsafe work to cease after that time if they have not completed training prescribed by the WHS regulations (as referred to in s72(1)(b) of the WHS Act), or previously completed such training when acting as a HSR for another work group, or completed equivalent training under the WHS Act in another jurisdiction (note that all other HSR powers – other than the power to issue a provisional improvement notice - can be exercised whether or not the HSR has undertaken approved training).

## 9. Appendix 3: Guidance 3 - HSR consultation in relation to directing a cessation of work

Section 85(3) of the WHS Act provides that consultation is not required prior to a HSR directing that work cease if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction. In this case, s85(4) of the WHS Act provides that the HSR must carry out the consultation as soon as practicable after giving the direction to cease work.

Whether consultation occurs prior to or after directing a cessation of work, WHS regulators consider that consultation will have occurred, initiated by the HSR (or deputy HSR as relevant), if:

- the HSR has - verbally or in writing - provided information to the PCBU (or management representative) about remedying the matters giving rise to the HSR's concern that there is a **serious risk** to healthy and safety emanating from an immediate or imminent exposure to a hazard;

(Note: For the purposes of consultation the HSR does not have to specify the remedy but may suggest options for remedying the serious risk.)

- the HSR has allowed the person an opportunity to express their views and to contribute within reasonable time to remedy the serious risk;

(Note: the person may express their view immediately – in which case the HSR can immediately move to the next step; alternatively, the person may need to take reasonable time to consider the HSR's view, for example to obtain authorisation from a more senior manager or to seek expert advice on the matter – in which case, the HSR needs to allow for a reasonable time to pass for the person to either action the matter if they agree with the HSR or respond otherwise to the HSR before the HSR moves to the next step. 'Reasonable time' will vary dependent on the circumstances, the issue in the workplace and/or the immediacy of the risk.);

- the HSR has taken into account the views of the person before directing the work cessation; and
- the HSR has advised the person of the outcome of consultation in a timely manner.

### Consultation can still be said to have occurred:

- even if the person does not respond to the HSR in a reasonable time or at all. In this case, the HSR can take the failure to respond into account before deciding to direct a work cessation. There does not have to be a two-way exchange, only the opportunity for this to occur; or
- there is no agreement between the HSR and the person. The person does not have to agree that there is a serious risk or agree with the HSR about how to remedy the matter. The time period for consultation or degree of consultation required is not specified in the WHS Act. It will depend on the circumstances and must be reasonable for the relevant circumstances.

Consultation does not require the HSR to specifically state they will direct that work cease if they are not satisfied with the outcome of the consultation process (though they can state this).