

October 2016

Remedial action

(s119-120 Health and Safety at Work Act 2015)

Introduction

WorkSafe can take remedial action by engaging contractors to make the workplace or situation safe where a duty holder fails to take reasonable steps to comply with a prohibition notice or where a prohibition notice cannot be issued because a duty holder cannot be found. Prior to taking remedial action WorkSafe must give written notice to the duty holder of its intention to take remedial action and the duty holder's liability for the costs of that action.

Prohibition notices are issued in circumstances that give rise, or may give rise, to serious risk to the health and safety of persons. These circumstances are more likely to require action to manage the risk.

Where a prohibition notice is issued, the activity would not only involve a serious risk to the health and safety of a person(s), but is also likely to fall significantly below the standard of compliance outlined in WorkSafe's guidance. The prohibition notice must specify the matter that gives rise to the risk (or is likely to give rise to the risk) and, where relevant, the provision that is, or is likely to be breached. The prohibition notice may also contain other recommendations such as measures that could be taken to remedy the risk.

Purpose

This policy outlines the approach WorkSafe will adopt when considering whether to take remedial action.

Scope

This policy will apply from the point at which an inspector has:

- issued a prohibition notice that has not been complied with; or
- determined that a prohibition notice should be issued, but after taking reasonable steps to locate a duty holder to issue a prohibition notice to, the duty holder cannot be found.

It does not provide guidance for issuing prohibition notices. This is covered in the [Enforcement Policy](#) and the [Enforcement Decision-making Model](#).

Policy statements

The statements below outline what should be taken into account when considering whether to recommend remedial action. This list is not exhaustive. It should be read in conjunction with applicable WorkSafe operational policies and procedures.

A. The circumstances which gave rise to the prohibition notice being issued, still exist

This provision only applies when a prohibition notice has been issued and the duty holder has failed to take reasonable steps to comply, or the duty holder cannot be found. These circumstances are more likely to require action to manage the risk. WorkSafe should consider whether it should take action to make the situation safe. By taking remedial action, WorkSafe does not assume on going management of the risk associated with the business or undertaking.

B. Reasonable steps must be taken to locate a duty holder to issue a prohibition notice to, or to obtain a duty holder's compliance with a prohibition notice if one has been issued

Reasonable steps must be taken to locate a duty holder to issue a prohibition notice to,

taking into account the urgency of the situation. These steps should be documented.

If a duty holder can be found, reasonable steps should be taken to obtain the duty holder's compliance with the prohibition notice. Reasonable steps include, but are not limited to, WorkSafe internal escalation processes, site visits and telephone calls. The steps taken must be documented. Consideration will be given to taking further investigation and/or potential prosecution action. Evidence of the non-compliance must be documented.

C. Does the situation require involvement from emergency services, other agencies or local authorities?

If the duty holder has failed to take reasonable steps to comply with the prohibition notice or a prohibition notice cannot be issued, inspectors must consider whether emergency services, local authorities or other agencies are better placed to deal with the situation.

If WorkSafe is the appropriate agency to make the situation safe, it must consider whether remedial action is reasonable in the circumstances.

Consideration must be given to whether this course of action is consistent with [WorkSafe's Prosecution and Enforcement Policies](#) and any other applicable operational policies and guidance. WorkSafe's policies are intended to provide guidance to inspectors on how they should apply their discretion. Inspectors should always take account of the particular circumstances.

D. Approval to take remedial action is obtained from a WorkSafe staff member with the appropriate delegation (Chief Inspector)

The inspector should discuss the matter with their manager as soon as practicable. One or more of the following must be taken into consideration prior to recommending remedial action:

- the urgency of the recommended action taking place
- alternative actions that maybe available to address the risk such as applying for a Court Order under s122 of HSWA

- the risk to the public/workers and other factors associated with the original risk
- the available ways of eliminating or minimising the risk, the likely cost associated with these ways, and which of these are the most suitable options when considering the cost in proportion to the risk reduction
- the health and safety of inspectors, and contractors engaged to do the work. Contractors may need to be accompanied by inspectors under s168(1)(b) of HSWA.

In most cases, the final decision-maker will be the Chief Inspector though in cases of public significance, the decision-maker will be the General Manager or the Chief Executive (in accordance with any internal procedures).

E. WorkSafe corporate policies and procurement procedures must be followed when engaging contractors to carry out the work

Consideration must include:

- the skills and knowledge required to manage the work and if this can be supplied by WorkSafe or if a principal contractor should be engaged
- the most cost effective way in which to have the work undertaken
- the management of any health and safety risks associated with doing the work
- the procurement process (refer to the WorkSafe Procurement Policy).

WorkSafe may recover the costs of taking remedial action.¹ WorkSafe is developing a policy on cost recovery. This will be available in due course.

F. Review of the decision to take remedial action

HSWA does not provide for a formal review of WorkSafe's ability to take remedial action. In the first instance, attempts should be made to clarify any issues relating to the notice to take remedial action with the duty holder. If issues remain unresolved, the duty holder should be referred to the manager or Chief Inspector. Any formal legal challenge to the notice to take remedial action must be referred to Legal Services.

¹ S121 Cost of remedial or other action.