

July 2016

Court orders

Civil proceedings relating to non-compliance with notice
s122 of the Health and Safety at Work Act 2015 (HSWA)

Introduction

WorkSafe may apply to the District Court for a Court Order under section s122 of the Health and Safety at Work Act 2015 (HSWA) where a notice¹ has not been complied with or if it is satisfied that the notice is likely to be contravened. WorkSafe can seek to have the person who has been issued the notice ('the duty holder') compelled to comply with the notice or be restrained from contravening the notice.

Purpose

This policy outlines how WorkSafe can use Court Orders to ensure sustained compliance, prevent harm from occurring, and deter non-compliance with notices. Court Orders cannot guarantee that duty holders will comply with notices. The expectation is that the commencement of civil proceedings and the subsequent possibility of being held in contempt of court for breaching a Court Order will act as a deterrent to non-compliant duty holders.

Scope

This policy describes the approach that WorkSafe will adopt regarding the commencement of civil proceedings under s122 of HSWA.

Policy

A. The use of s122 is limited to breaches of prohibition notices

While this provision in HSWA applies to any notice issued under HSWA, WorkSafe will limit its use to prohibition notices. This is because 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 secure compliance with those notices.

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 will 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.

Where there is a failure to comply with other notices, action may be taken in accordance with other WorkSafe policies and guidance.

¹ Notice means any of the following notices issued under HSWA: an improvement notice, a prohibition notice, non-disturbance notice, a suspension notice and a subsequent notice (s100).

B. Is an application under s122 appropriate in the circumstances?

Court processes have serious implications for victims, witnesses and defendants. The New Zealand public should have confidence that WorkSafe will seek Court Orders only when it is appropriate to do so.

Decisions to apply for Court Orders must be fair, consistent, and proportionate to the seriousness of the risk that is, or would be, presented by a failure to comply with the prohibition notice.

WorkSafe expects that a decision to seek a Court Order to address non-compliance with, or contravention of, a prohibition notice will be made in exceptional, urgent or pressing circumstances. The desired outcome is that the Court Order secures compliance with the prohibition notice that has been issued and that the serious risk to the health and safety of persons is eliminated or minimised accordingly.

In deciding whether to seek a Court Order under s122, factors to be considered by WorkSafe include:

- whether there is sufficient evidence to establish that there has been, or is likely to be, non-compliance with, or contravention of, the prohibition notice (including that the prohibition notice was correctly issued)
- the degree of harm that may result from non-compliance with, or contravention of, the prohibition notice
- the number of persons who are, or would be, exposed to the risk of harm that may result from non-compliance with, or contravention of, the prohibition notice
- whether a Court Order is the most appropriate method to secure compliance with, or prevent contravention of, the prohibition notice in the circumstances.

These factors are not comprehensive or exhaustive. In making a decision about a Court Order, WorkSafe should always take account of the particular circumstances. It should also consider the application of other relevant WorkSafe policies, including the [Enforcement Policy](#) and the [Prosecution Policy](#).

In addition to an application for a Court Order, it should be noted that under the *Prosecution Policy*, a breach of a prohibition notice would ordinarily be expected to result in prosecution action.

C. Who makes the decision?

Inspectors who consider that a Court Order should be sought must make a recommendation

to their manager. If their manager agrees that a Court Order should be sought, legal advice must be obtained to confirm that an application may be made.

The decision to seek a Court Order must be made by the inspector's manager, a Chief Inspector, or other person who holds a delegation to do so, following receipt of legal advice.

The process is further explained in the *Operational Guidance: Court Orders*.

D. What happens if the duty holder breaches the Court Order?

Where a Court Order is obtained, inspectors must monitor a duty holder's compliance with those orders. Concerns that a duty holder may be breaching a Court Order should be immediately referred to Legal Services. Breaching a Court Order is serious. Where a duty holder refuses or fails to comply with a Court Order, the duty holder may be in contempt of court. Legal Services will provide advice on the appropriate course of action in such circumstances.