

Gonczarek, Melinda

From: Speaker
Sent: Monday, 15 August 2022 7:24 AM
To: #LA, Members
Cc: Duncan, Tom
Subject: Information and awareness re WHS Prohibition Notice
Attachments: Letter to WHS Commissioner 150822.pdf; Prohibition_Notice_N-0000005068.pdf

Morning fellow MLAs,

On Friday afternoon I was served a prohibition notice by the WHS commissioner. Copy of notice attached.

This is a very difficult and distressing action, and I believe has serious impacts on the functions of the Assembly committees. As such I have written this morning to the Commission seeking to have this notice lifted.

As the notice impacts on the immediate functioning of the Assembly committees and as such impacts on all MLAs, I have attached a copy of letter I have sent the Commission for your information.

Today's sitting will continue as scheduled at 9am.

I will keep you informed of the Commission's reply.

Joy Burch MLA
Speaker





Speaker

Ms Jacqueline Agius
Work Health and Safety Commissioner
Jacqueline.agius@act.gov.au

Dear Commissioner,

I write in relation to the service, by your office, of prohibition notice N-0000005068 (the notice), on me in my role as Speaker of the Legislative Assembly for the Australian Capital Territory.

The notice purports to prohibit:

Undertaking any hearings or committee meetings at Legislative Assembly of the Australian Capital Territory until a risk assessment has been undertaken, adequate control measures are implemented in line with the Hierarchy of Control, and consultation has been undertaken with all affected workers.

The terms of the notice are profoundly misconceived as a matter of law, represent a grave threat to the privileges of the Assembly, and could quite possibly amount to a contempt of the Assembly.

By the terms of the notice, you purport to have a power to restrain all the Assembly's select and standing committees from performing their core scrutiny and accountability functions on behalf of the Assembly, under threat of a fine for non-compliance and until actions specified by you are fulfilled to your satisfaction.

Such a proposition is entirely without merit. The action taken by you cuts directly across the separation of powers between the legislative and executive arms of government and, on its face, seeks to upend the exclusive cognisance of the Assembly to exercise control over its proceedings.

The Assembly has an inherent power of inquiry, which is predominantly exercised through its committees. Through Assembly standing orders, committees also have the power to call for papers, persons and records. Neither the general power of inquiry, nor committees' powers under standing orders can be displaced by your exercise of powers under the *Work Health and Safety Act 2011* (WHS Act). Were the Assembly to have envisaged that the powers of the Commissioner could be exercised in such a manner, express statutory provision would have been required.

These are matters of deep constitutional significance.

It is particularly egregious for a government agency to issue such a notice at a time when the Select Committee on Estimates 2022-2023 is commencing its scrutiny of the ACT Executive.

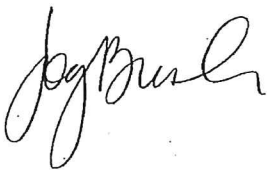
Setting aside issues relating to parliamentary privilege and the appropriate separation of powers, there are a number of technical and merits issues that arise in connection with the way in which the relevant powers under the WHS Act have been exercised and the terms of the notice itself.

While the WHS Commissioner fulfills important regulatory functions, these functions do not take precedence over the effective performance of the Assembly's legislative, representative, and accountability functions. I would be willing to enter a general dialogue with you at some later point about managing these tensions between the executive and the legislature.

Given the concerns I have raised, I would respectfully ask that you withdraw the notice.

Should the notice not be withdrawn by 10.15am on Monday 15 August 2022, I will be duty bound to consider taking action in the ACT Supreme Court to have the notice set aside.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joy Burch', written in a cursive style.

Joy Burch MLA
Speaker
Legislative Assembly for the ACT

15 August 2022



PROHIBITION NOTICE

This is a Prohibition Notice issued under section 195 of the Work Health and Safety Act 2011

Information

Notice number N-0000005068

Issued By: Meaghan O'Connor ID number: P50341

To whom this notice is issued

Name of registered individual: Australian Capital Territory

Business or trading name: Legislative Assembly for the Australian Capital Territory

ABN: 0

Registered Address: 196 London Circuit, Canberra, ACT suburb: state: postcode:

Site address: suburb: state: ACT postcode:

Method of service: Email

Served on: Joy Burch

Date of issue: 12/08/2022

A verbal instruction was issued on:

12/08/2022 03:08 PM

Description

The provision that the inspector believes is being, or is likely to be, contravened by the activity (s196(1)(c)) is **WHS Acts Section number - 19**

You are prohibited from carrying on the following activity, or the carrying on of the activity in a specified way:

Undertaking any hearings or committee meetings at Legislative Assembly of the Australian Capital Territory until a risk assessment has been undertaken, adequate control measures are implemented in line with the Hierarchy of Control, and consultation has been undertaken with all affected workers.

until the inspector is satisfied that the matters that give or will give rise to the risk have been remedied (s195(2)).

The inspector reasonably believes that grounds for the issue of this notice exist (s195(1)), i.e. (a) 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 exposure to a hazard; or (b) 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.

Basis for belief (s196(1)(a))

I, Inspector Meaghan O'Connor, have formed a reasonable belief at 15:40pm on 12/08/2022, that the Legislative Assembly of the Australian Capital Territory has contravened section 19 of the Work Health and Safety Act. Section 19 states- A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged, by the person and workers

whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking. The Select Committee on Estimates 2022-23 (the Committee) has not undertaken a risk assessment in relation to the planned activity 'Estimates 2022-23 Hearings' and has not consulted, so far as is reasonably practicable, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by the activity. Workers have been directed to attend this planned activity face-to-face only, without alternative options being provided that are readily available to control and eliminate the risk.

Briefly, the activity that the inspector believes involves or will involve the risk, and the matters that gave or will give rise to the risk (s196(1)(b))

The Legislative Assembly of the Australian Capital Territory has not identified reasonably foreseeable risks in the workplace, or implemented adequate control measures in relation to potential and known risks. The risk is transmission of a biological hazard in the workplace, being Covid-19, without consideration of eliminating the risk (in line with the Hierarchy of Controls) in preventing contraction of the disease that could cause serious injury or death.

This Notice may include directions concerning the measures to be taken to remedy the risk or contravention. You must comply with the direction

1. Undertake a risk assessment in relation to face-to-face hearings or committee meetings at the Legislative Assembly of the Australian Capital Territory.
2. Develop and implement adequate control measures in line with the Hierarchy of Control pursuant to regulation 36 of the Work Health and Safety Regulation 2011.
3. Consult with all workers who are, or are likely to be, directly affected by the activity.
4. Provide evidence of the risk assessment, control measures, and consultation process having been undertaken to Inspector O'Connor via meaghan.o'connor@worksafe.act.gov.au

This notice must be displayed in a prominent place at or near the workplace, or part of the workplace, at which work is being carried out that is affected by the notice pursuant to section 210 of the Work Health and Safety Act 2011.

The inspector recommends that you:

Review the following information:

Work Health and Safety (How to Manage Work Health and Safety Risks Code of Practice) Approval 2020
Work Health and Safety (Work Health and Safety Consultation, Cooperation and Coordination Code of Practice) Approval 2022

See over for important information on your rights and responsibilities.

Prohibition Notice issued under section 191 of the Work Health and Safety Act 2011 - further information

If you have any questions you may contact the inspector who issued this notice.

Display of Notices

A person to whom a notice is issued must, as soon as possible, display a copy of the notice in a prominent place at or near the workplace, or part of the workplace, at which work is being carried out that is affected by the notice (s 210(1)). A person must not intentionally remove, destroy, damage or deface a notice displayed under s 210(1) while the notice is in force (s 210(2)). The maximum penalty for failing to comply with these provisions is \$5,000 for an individual or \$25,000 for a corporation.

Compliance with direction or notice

The person to whom a Prohibition notice is issued must comply with the notice (s197). The maximum penalty for failing to comply with this requirement is \$100,000 for an individual or \$500,000 for a corporation.

Regulator may carry out action

If a person to whom a prohibition notice is issued fails to take reasonable steps to comply with the notice, and after giving written notice of its intentions and the persons liability for the costs, the regulator (WorkSafe ACT) may take any remedial action it believes reasonable to make the workplace or situation safe (s 211). The regulator may then recover the reasonable costs of taking this remedial action (s213).

Contents of Notice

This Notice may state 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 (s196(3)).

Directions and recommendations

A direction may refer to a code of practice and may offer the person a choice of ways in which to remedy the contravention (s 204). A Prohibition notice may include recommendations. It is not an offence to fail to comply with recommendations in a notice (s205).

Changes to notice by inspector

An inspector may make minor changes to a notice for clarification, to correct errors or references, or to reflect changes of address or other circumstances (s206).

Privacy statement

WorkSafe ACT may obtain personal information about you in connection with this notice. The information may be collected and stored using the powers, and to carry out functions or activities, under the *Work Health and Safety Act 2011* and related work safety laws. Under that Act, the information can be disclosed to other ACT Government agencies or non-government organisations, and other Australian work safety enforcement agencies.

WorkSafe ACT is obliged to handle your information openly, transparently and in accordance with the Territory Privacy Principles set out in the *Information Privacy Act 2014*. For more information about how WorkSafe ACT will collect, use, share, and store your personal information and how you can access and correct the information, please see the Privacy Statement at www.act.gov.au/privacy.

Review of this *Work Health and Safety Act* notice

If you have any questions or need more information you may contact the inspector who issued this notice, or email worksafe@act.gov.au.

You, or another person whose interests are affected by the decision, may apply for an internal review of the decision to issue this notice.

A review may be sought within 14 days. You may also make an application for the reviewer to stay the operation of the Prohibition notice.

Please ensure you include the notice number in your application for a review, together with the applicant's name and address, and the reason you are seeking the review.

An application for a review can be made in writing to: The Work Health and Safety Commissioner WorkSafe ACT, GPO Box 158 Canberra City ACT 2601 or by email: worksafe@act.gov.au

You may then seek a review of an internal reviewer's decision in the ACT Civil and Administrative Tribunal (ACAT). Information about that process can be found at www.acat.act.gov.au.

The decision to issue this notice is also reviewable under the *Administrative Decisions (Judicial Review) Act 1989* on application to the ACT Supreme Court. Further, a person may make a complaint to the ACT Ombudsman about the issue of this notice.

WorkSafe ACT contact details

PO Box 158, Canberra ACT 2601

Email: Worksafes@act.gov.au

Phone: (02) 6207 3000

Fax:(02) 6205 0336.

Translating and Interpreting Service

Phone: 131 450