

MODEL OPERATING PROCEDURE



Issue of notices and other general requirements relating to all notice types

NOTE: This MOP limited changes were made to this MOP on 7/4/2016 to ensure:

1. Current and correct hyperlinks and references to:
 - Teams or position
 - Templates or other documents
 - Delegations
 - Sections of the WHS Act or Regs
2. Correction of any grammatical or format errors.

A full review of this MOP will occur to reflect the new SWSA structure – post July 2016.

██████████ Support Officer
Corporate Services

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2. DEFINITIONS

Regulator	Means the Executive Director of SafeWork SA or their delegate
SWSA	Means SafeWork SA
Injustice	Means a violation of the rights of others; unjust or unfair action or treatment.
WHS Act	Means <i>Work Health & Safety Act 2012 (SA)</i>

3. PURPOSE

To provide guidance for inspectors on a range of provisions of the WHS Act that apply when preparing and issuing Prohibition, Improvement or Non-disturbance Notices as set out in sections 191 – 210 of the WHS Act.

4. POLICY SECTION

The [e-Manual Index](#) lists all of the resources that have been developed to assist inspectors with the use of notices. The resources include the separate model operational procedures have been developed to guide inspectors in relation to their power to issue:

- [Prohibition notices](#)
- [Improvement Notice MOP](#)
- [Non- disturbance notices](#)

Reasonable belief

Inspectors need to form a reasonable belief in relation to each element of the relevant section in the WHS Act that empowers them to issue an improvement, prohibition or non-disturbance notice.

- *For further information on forming a reasonable belief, refer to [Appendix 1](#) of this procedure.*

Notices must be in writing

Section 203 of the WHS Act provides that improvement, prohibition, or non-disturbance notices must be in writing.

- s.195 Prohibition notices are available in hardcopy book or electronically via InfoNET
- s.191 Improvement notices - are available in hardcopy book or electronically via InfoNET
- s.198 Non-disturbance notices - are available in hardcopy book or electronically via InfoNET

[See InfoNET Instructions on How to generate and print Notices](#)

Directions in improvement, prohibition and non-disturbance notices

Section 204 provides that directions included in an improvement or prohibition notice may:

- refer to a code of practice; and
- offer the person to whom the notice is issued a choice of ways in which to remedy the contravention or likely contravention.

If directions are included in a notice, compliance with them is mandatory and non-compliance is an offence under s.193.

For information on how Approved Codes of Practice should be referred to in Notices see:

[Operational Guideline No2: Approved Codes and Notices](#)

Recommendations in improvement and prohibition notices

Section 205 provides that recommendations can be included in an improvement or prohibition notice, but non-compliance with recommendations is not an offence [s.205(2)].

- *For further information on 'directions & recommendations', refer to [Appendix 2](#).*

Regulators' policy

When writing an improvement or a prohibition notice, inspectors will include suggested means of how a contravention or serious risk can be remedied in the notice, including reference to relevant codes of practice and/or other guidance material.

Methods available to issue or give a notice to a person

Section 209(1) provides that a notice may be issued or given to a person:

- a) by delivering it personally to the person (whether natural person or body corporate) or sending it by post, facsimile or electronic transmission to the person's usual or last known place of residence or business; or
- a) by leaving it for the person (whether natural person or body corporate) at that person's usual or last known place of residence or business with a person who appears to be over 16 years of age and who appears to reside or work there; or
- b) by leaving it for the person (whether natural person or body corporate) at the workplace to which the notice relates with a person who is or appears to be with management or control of the workplace; or
- c) in a prescribed manner.

For further information on the options for issuing or giving notices, refer to [Appendix 3](#).

Regulators' policy

Where the need for a notice is identified, the notice is to be delivered personally or left with another person at the place the notice relates to at the conclusion of an inspection.

If it is not possible to issue or give the notice at the conclusion of the inspection, inspectors need to make sure that the circumstances giving rise to the intended notice still exist at the time of issue to ensure the notice is valid. This may require a second attendance at the workplace or some other means of verifying the circumstances still exist.

Display of notices

Section 210(1) of the WHS Act provides that the person to whom the notice is issued must, as soon as possible, display a copy of the notice in a prominent position at or near the workplace or part of the workplace affected by the notice.

An example of such a position would be a notice board where other things are routinely placed to bring them to workers' attention.

The notice must remain on display while the notice is in force and must not intentionally be removed, destroyed, damaged or defaced or an offence has been committed [s.210(2)].

If a notice relates to more than one workplace, a copy of the notice is required to be displayed at each workplace.

Regulators' policy

Inspectors are to advise the person to whom the notice is given of their obligation in relation to displaying and preserving the notice and the relevant offences associated with non-compliance.

Where allegations are made that a notice has not been displayed in accordance with s.210(1) of the WHS Act, or has been removed, defaced, destroyed or damaged, an inspector will make inquiries into the alleged non-compliance. This may require attendance at the workplace or may be through follow-up and verification by telephone conversations and the taking of statements from relevant persons.

Extension of compliance date for improvement notices

Section 194(2) of the WHS Act provides that an inspector may modify an improvement notice – in writing - to **extend the time for compliance** providing that the compliance period in the original notice has not expired. Subsequent extensions of time may also be given, provided the previously extended period has not expired [s.194(4)].

Modification of notices

An inspector may make other **minor** changes to a notice in certain circumstances:

- to clarify the intent of the notice [s 206 (1)(a)];
- to correct errors or references [s206 (1)(b)]; and
- to reflect changes of address or other circumstances [s206(1)(c)].

SA Jurisdictional note

If an inspector makes any modification or changes to a notice, the updated status must be recorded on InfoNET and any file running sheets. A notation is to be made on the file copy of the relevant notice. A copy of any correspondence must be placed in the file. If the decision was made to amend a notice during a site inspection, the amendment to the notice is to be recorded on the relevant Inspection Report in addition to the above requirements.

- *Further information on making minor changes to notices and extending the time for compliance in an improvement notice can be found in [Appendices 4](#) and [5](#) of this procedure.*

Validity of notices - Formal irregularities and defects

Section 208 of the WHS Act provides that a notice is not invalid only because of:

- a) a formal defect or irregularity in the notice, unless the defect causes or is likely to cause substantial injustice; or
- b) a failure to use the correct name of the person to whom the notice is issued will not make the notice invalid, as long as the notice sufficiently identifies the person and it was issued or given to the person in accordance with s.209 of the WHS Act.
 - o *Further information detailing what does make a notice invalid, can be found in [Appendix 6](#) of this procedure.*

In circumstances where the irregularity or defect **does not** cause substantial injustice, the notice can be modified by the inspector under s.206(1) of the WHS Act as previously discussed.

In circumstances where the irregularity or defect **does** cause substantial injustice, and cannot be saved by the operation of s.208, the notice must be referred to the regulator for cancellation under s. 207.

- o *For further detail on the process to cancel a notice, refer to page 7 of this MOP.*
- o *The regulator's [delegates](#) for cancelling a notice are detailed at [Appendix 7](#)*

Regulator Policy

Regulator's [delegates](#) shall forward a copy of any notices cancelled under s. 207 within 3 business days of cancellation to the Chief Inspector for review and presentation at the next available Executive Meeting.

Internal Review

A decision to issue or not issue a notice is a reviewable decision, as is extending the compliance time in an improvement notice. Section 223 of the Act details the persons who can apply for a review of a notice. During the review, the contents of the notice and the supporting evidence will be considered. Refer to [e-Manual Index](#) for further information on Internal Reviews

Injunctions for non-compliance with notices

Section 215(1) provides that the regulator may apply to the IRC for an injunction:

- compelling a person to comply with a notice; or
- restraining a person from contravening a notice

Section 215(2) provides that the regulator may do the above:

- whether or not proceedings have been brought for an offence against the WHS Act in connection with any matter in relation to which the notice was issued; and
- whether any period for compliance with the notice has expired.

Regulator Policy

The use of injunctions will be only considered in exceptional, pressing or urgent circumstances (e.g. where a significant risk to public safety exists). An inspector's team manager will seek a legal case conference to discuss the matter if an injunction is considered necessary. See [Case Conference SOP](#)

5. PROCEDURE

Responsibility	Description
Inspector	<p>Preparing a notice</p> <p>Prepare your notice in the approved template (either electronic or hard copy) in accordance with the relevant procedures. (See e-Manual index)</p>
Inspector	<p>Further research before issuing notice</p> <p>If at the conclusion of an inspection, you believe a notice may be necessary, but you need to make further inquiries or conduct further research in order to form a <i>reasonable belief</i>, advise the relevant parties of this fact and include the summary of your observations in the Inspection Report along with your intended further actions.</p>
Inspector	<p>If a notice cannot be issued at conclusion of inspection</p> <p>If it is not possible to issue notices at the end of an inspection, a second inspection may be required to enable further observations and enquiries, ensuring you can still form the reasonable belief required to confirm the contravention or serious risk continues supporting a valid notice.</p> <p>Alternatively, other arrangements should be made to assess that circumstances still exist to warrant issue of the notice (e.g. through follow-up and verification by telephone conversations with relevant persons.)</p> <p>Consider seeking the regulator’s approval for the taking of remedial action for matters where serious and imminent threat to a persons safety is evident, and no person in control is available to issue a notice to (see s212). Contact your line manager and discuss the matter in the first instance.</p>
Inspector	<p>Issue or giving of notices</p> <p>Issue or give a notice by using one of the available methods detailed on page 2 of this procedure.</p> <p>Use the most immediate and direct method of issuing or giving the notice to ensure that:</p> <ul style="list-style-type: none"> • the notice is physically in the relevant person’s hands at the time of concluding an inspection at the workplace or as soon as practicable in other circumstances; and • the notice (and any accompanying Inspection Report) can be best understood in the context of verbal communications between the inspector with the relevant person during the visit; and • circumstances giving rise to the contravention, likely contravention or serious risk continue to exist when the relevant notice is issued. <p>If the person to whom it is intended that the notice be issued is available, hand the notice directly to that person or, if the person is a body corporate, to an officer of the body corporate (see Appendix 3 for definition) - this is the “delivering it personally” method.</p>
Inspector	<p>Issue or giving of notices (continued)</p> <p>If the person you would prefer to give the notice to is not available and you are still at the workplace, give the notice to another person (e.g. the management representative you have been dealing with if the person is a corporation, or a co-worker if the person is a natural person) – this is the</p>

	<p>“leaving it with another person” method.</p> <p>Inform the person who is given the notice about the obligation of the person named in the notice to display the notice as soon as possible after they receive it in a place at or near the area(s) affected by the notice.</p> <p>Ensure the person who is given the notice acknowledges the obligation to display the notice while it remains in force, and that it is an offence for anyone to intentionally remove, destroy damage or deface the notice.</p> <ul style="list-style-type: none"> ○ Appendix 3 of this procedure offers further guidance on the issuing (giving) of notices. <p>If you are not going back to the workplace to issue the notice, send the notice by mail, facsimile or electronic transmission to a natural person’s usual or last known place of residence or business or the usual or last known business address of a body corporate.</p> <p>Make notes in your field notebook of the issuing process you used.</p>
<p>Inspector</p>	<p>If minor modifications to the notice are required,</p> <p>Where a minor technical issue is identified in a notice, you may modify your notice to:</p> <ul style="list-style-type: none"> • clarify intent; • correct errors or references; and • to reflect changes of address or other circumstances. ○ Appendix 4 of this procedure offers further guidance and examples of minor changes that can be made to notices <p>If the notice has already been complied with, there is no need to retrospectively make minor changes.</p>
<p>Inspector</p>	<p>If an extension of compliance time to an improvement notice is agreed</p> <p>You may modify an improvement notice to extend the time specified for compliance if the specified time has not expired, having regard to what is reasonable in the circumstances and where the person cannot comply by the nominated compliance due date to reasonable and unforeseeable circumstances.</p> <ul style="list-style-type: none"> ○ Appendix 5 of this procedure offers further information on considerations for extending the compliance time on an improvement notice <p>Ensure you record the reasons for your belief that an extension of compliance time is reasonable in your inspector notebook and the Inspection Report for the visit.</p>
<p>Inspector/ Line manager / Regulators delegate</p>	<p>Variation and cancellation</p> <p>Where formal irregularities or defects are identified in relation to a notice that may cause substantial injustice, the notice should be varied or cancelled by the regulator. An inspector cannot cancel or vary a notice.</p> <p>If the original notice is to be cancelled, determine whether a new notice should be issued based on the current factual circumstances in relation to the matter that gave rise to the original notice.</p> <p>Regulator’s delegates shall forwarded a copy of any cancelled notices within 3</p>

	business days of cancellation to the Chief Inspector for review, collation and presentation at the next available Executive Meeting.
Inspector/Line manager	<p>Recording and communicating minor modifications, extension of compliance time or variation or cancellation</p> <p>Record any minor modifications to a notice, extensions of time for compliance with an improvement notice, or variation or cancellation of a notice – to update the status of the notice on InfoNET.</p> <p>Communication of minor modifications made to a notice, an extension of compliance time in an improvement notice, or the variation or cancellation of a notice may be made to the person originally issued the notice by means of the inspector recording this in their Inspection Report (if attendance at the workplace is coinciding in time) or by other means such as by telephone or the same means by which the original notice was given to the person, e.g. email, facsimile etc.</p> <p>Minor modifications to a notice can be marked up on the original issued notice if the inspector is on site. The file copy of the notice will be amended, and a copy of any electronic amendment (e.g. email, fax) will be placed in the file.</p>
Inspector	<p>Follow up of notices</p> <p>Refer to the relevant procedures in the MOPs: Improvement Notices, Prohibition notices and Non- disturbance notices for procedural steps relating to follow-up of notices.</p>
Inspector/Line manager	<p>Injunctions</p> <p>Where non-compliance with a notice is identified, review the circumstances to consider whether it might be appropriate for an injunction to be sought to enforce compliance with the notice.</p> <p>Considerations include the enforcement decision-making criteria in the National Compliance and Enforcement Policy and whether:</p> <ul style="list-style-type: none"> • a serious risk to workers or members of the public exists; • other means of trying to achieve compliance have not been successful; and • the compliance history of the person to whom the notice is issued shows them to be a habitual or repeat offender or reckless. <p>Where you believe an injunction should be sought, seek a legal case conference.</p> <ul style="list-style-type: none"> ○ Refer to Case Conference SOP

6. FURTHER INFORMATION

- See topic of 'Notices' and/or 'Improvement Notices' in the [E-Manual Index](#)

6. REVIEW

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

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Version Control Information

- V1 – 28 Nov 2012
- V2 – 7 April 2016

8. APPENDIX 1 - GUIDANCE - INSPECTOR'S "REASONABLE BELIEF"

An inspector's "reasonable belief" relates to each element of the specific provision in the WHS Act that empowers the inspector to issue the specific notice.

To issue a non-disturbance notice, the inspector must reasonably believe that a person with management or control of a workplace should preserve a site where a notifiable incident has occurred or prevent disturbance of a site in other circumstances and that it is necessary to do so to facilitate the exercise of his or her compliance powers.

To issue an improvement notice, the inspector must reasonably believe that a person is:

- contravening a provision of the WHS Act; or
- has contravened a provision of the WHS Act in circumstances that make it likely that the contravention will continue or be repeated.

To issue a prohibition notice, the inspector must reasonably believe that:

- 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 or imminent exposure to a hazard, or
- 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.

The case *George v Rockett* (1990) 170 CLR 104 provides some guidance around the concept of reasonable belief.

The High Court held that '*When a statute prescribes that there must be "reasonable grounds" for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.*'

"Reasonable belief" is less than "proof" but more than "suspicion."

Suspicion = state of conjecture or surmise where proof is lacking.

Belief = being confident that the information available tends to support an argument rather than reject it.

The existence of facts is required which are sufficient to induce that state of mind in a reasonable person. This is an objective test, precluding the arbitrary exercise of the power of the inspector to issue a notice.

The basis of a reasonable belief 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 information from another source, rather than relying on one source only:

- observations made by the inspector;
- information obtained from speaking with persons who work at the workplace (including HSRs) or are associated with the workplace;
- information obtained from reviewing relevant documents at the workplace;
- information about the correct situation – from relevant codes of practice, Australian Standards and other published guidance material;
- advice provided by suitable technical specialists (if relevant); and
- known prior history of the relevant person.

9. APPENDIX 2 – GUIDANCE - DIRECTIONS AND RECOMMENDATIONS

Directions in improvement and prohibition notices

The purpose of directions in improvement and prohibition notices is to assist the person to whom the notice is issued to comply with the notice. The directions may include measures which aim to ensure the person to whom the notice is issued understands how to remedy the breach or serious risk matter identified in the notice.

Directions may reference a code of practice and give the person to whom the notice is issued a choice of ways to remedy a contravention or serious risk.

It is not mandatory for an inspector to include a direction in a notice, therefore the inspector needs to consider if it is appropriate in the circumstances to include directions or not.

Where an inspector does include a direction in an improvement or prohibition notice **compliance with that direction will be mandatory**. If the direction includes a choice of ways to remedy the contravention or serious risk, the person issued the notice must implement one of the ways specified.

A direction should direct the person to whom the notice is issued to **exactly** what it is they need to do to meet their obligations.

For example, a direction could state:

“...The racking unit located on the western wall of warehouse B must be accessed safely using either the [REDACTED] mobile powered plant or the [REDACTED] pallet mover located at the workplace, or equivalent powered plant.”

If an inspector issues a notice which includes a direction they must be confident that their direction provides the best means or choice of means by which to remedy the detected contravention or serious risk.

The person issued with a notice that includes directions to remedy a contravention or serious risk in a particular way or choice of ways, has the right to request an internal review of the notice if they feel there is a more appropriate means to remedy the contravention or serious risk.

- **Do** remember that if a direction is included in your notice, the person to whom the notice is issued must comply with it.
- **Do** discuss with the person the approach they would like to take to remedy the contravention or serious risk matter before issuing a direction.
- **Do** make sure a direction is worded clearly and unambiguously so the person to whom the notice is issued can comply with it.
- **Do** consider whether it would be better to provide guidance on ways to remedy the contravention in the form of a **recommendation**. These can also provide guidance on how to comply with the notice, but are not mandatory to comply with.
- **Do not** simply restate the legal obligation owed by the person as a direction – the purpose of a direction is to specify what must be done to comply with that legal obligation.

Recommendations in improvement and prohibition notices

The WHS Act also allows for recommendations to be included in improvement or prohibition notices.

The key difference between recommendations and directions is that **recommendations are not mandatory** for the person issued the notice to comply with.

Recommendations guide the person to whom a notice has been issued to a proper consideration of how best to remedy a contravention or serious risk.

Recommendations are appropriate where a range of possible approaches is available to remedy a breach and the inspector is not seeking to direct that a particular remedy is to be implemented. For example, an inspector may recommend that a PCBU consider relevant Codes of Practice, guidance

material or relevant Australian Standards, or that a PCBU engage a technical expert to assist with compliance.

- **Do** take care to make clear the difference between a direction and a recommendation in your notice.
- **Do** make sure the information and guidance provided in your recommendation is relevant to both the workplace and the matter giving rise to the notice.

10. APPENDIX 3 – GUIDANCE - ISSUE (GIVING) OF NOTICES

An improvement notice is issued to a **person** who has a duty under the WHS Act or regulations; a prohibition notice is issued to a **person** who has control over an activity; and a non-disturbance notice is issued to a **person** with management or control of a workplace.

Person: Means any natural person (individual human being) or artificial body of people (body corporate), having rights and duties before the law.

When searching an organisation's details on the Australian Business Register (ABR) website, the *Entity Name* is considered to be the person for the purpose of this definition.

Section 209 of the WHS Act provides the following options when issuing or giving notices:

- Delivering it personally to the person; or sending it by post, facsimile or electronic transmission to the person's last known place of residence or business; or
- Leaving it for the person at the person's usual or last known place of residence or business with a person who is apparently over 16 years of age and who apparently resides or works there; or
- Leaving it for the person at the workplace to which it relates with a person who is or appears to be the person with management or control of the workplace.

The following information is provided as guidance on the correct method of issuing or giving notices, particularly in relation to the difference between **Delivering it personally** and **Leaving it for the person** methods.

Delivering it personally method applies as follows:

- handing it directly to a natural person who is named in the notice (e.g. a self-employed person or a worker); or
- handing it directly to an "officer"¹ of the body corporate if a body corporate is named in the notice).

¹ Section 4 of the WHS Act defines "**officer**" as meaning:

- an officer within the meaning of Section 9 of the *Corporations Act 2001* (Commonwealth)¹ other than a partner in a partnership;
- an officer of the Crown (other than a Minister of a State or the Commonwealth acting in that capacity) within the meaning of s247 of the WHS Act ; or
- an officer of a public authority (other than an elected member of a local authority acting in that capacity) within the meaning of s252 of the WHS Act.

Generally, directors of corporations, and those who make or participate in making decisions affecting the whole or a substantial part of the business or undertaking of the Crown or a public authority are considered officers.

The Corporations Act 2001 (Commonwealth), at Section 9, provides that **officer** of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:
 - i. who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - ii. who has the capacity to affect significantly the corporation's financial standing; or
 - iii. in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or

Often inspectors deal with a management representative of a body corporate (who is not an officer) and hand a notice naming the body corporate to that management representative. In these cases, the **Leaving it for the person** method applies.

Examples of use

Example 1: An inspector conducts an inspection at the workplace of ABC Pty Ltd where he meets with Sam Jones, Management Representative. In this case, Sam Jones is neither the PCBU that owes the relevant duty, nor an officer of the PCBU. **Leaving it for the Person** is the relevant method if the notice naming ABC Pty Ltd is given to Sam Jones.

Example 2: An inspector conducts an inspection in relation to asbestos removal work. The authorised asbestos removalist is a natural person with a registered business name John Citizen, (trading as) JC Asbestos Removalists. In this case John Citizen is a natural person and the PCBU with the relevant duty and who has control over the activity. If John Citizen is available at the time the inspector concludes their inspection, **Delivering it Personally** to him is the relevant method of issuing or giving the notice. If John Citizen is not available at the time and the notice is given to person who is or appears to be in management and control of the workplace or given to a person who is apparently over 16 years of age and who apparently works there, **Leaving it for the person** is the relevant method.

Example 3: An inspector conducts an inspection at the workplace of XYZ Pty Ltd where he meets and deals with the Managing Director, Jane Smith. As Jane Smith is an officer of the body corporate, **Delivering it Personally** is the relevant method if the notice naming XYZ Pty Ltd is given to Jane Smith.

Note: Section 201B of the Corporations Act contains rules about who is a director of a corporation.

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- (e) an administrator of a deed of company arrangement executed by the corporation; or a liquidator of the corporation; or a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

11. APPENDIX 4 - GUIDANCE - MAKING MINOR CHANGES TO NOTICES

“Minor changes” to a notice

The Oxford dictionary defines “minor” as something of lesser importance, seriousness, or significance. Therefore it is considered that anything that affects the substance of an inspector’s notice is not be deemed a “minor” change.

Inspectors may modify notices in circumstances where the change is not of sufficient seriousness or importance to warrant writing up an entirely new notice. This is to prevent a situation where a notice may be invalidated by a small error.

The WHS Act provides for inspectors to make minor changes to a notice where;

- it needs clarification, or
- where errors or references need to be corrected, or
- to reflect changes of address or other circumstances.

Section 206 of the WHS Act is a prescriptive section, which means that the changes to a notice that an inspector is empowered to make under this section are limited to the categories listed above.

This is made explicit by s. 207 of the WHS Act which provides that, except as provided for in s.206, a notice issued by an inspector may only be varied or cancelled by the regulator. (This is in addition to any action taken under Part 12 of the WHS Act where a notice may be varied or cancelled by Internal Review.)

Examples of minor changes **to improve clarity** include:

- simplifying the language used;
- clarifying jargon or abbreviations;
- clarifying whether a direction or recommendation was given in a notice; or
- identifying a particular area of the workplace an inspector referred to in a prohibition or non-disturbance notice

Examples of minor changes **to correct errors or references** include:

- correcting a spelling error;
- correcting the identification of a remote geographical location by co-ordinates;
- correcting an incorrectly recorded address (such as ‘243 High Way’ rather than ‘233 High Way’ or ‘the corner of Low St and Cross Road’ instead of ‘125 Low St’);
- correcting where the wrong Australian Standard number is referenced or the wrong section or page number of a standard or code of practice has been quoted; or
- correcting irregularities or defects in the notice that do not cause substantial injustice to the person issued the notice (refer below to section on Validity of Notices);

Examples of minor changes **to reflect changes of address or other circumstances** include:

- changing an address; or
- a change to an Australian Business Number.

12. APPENDIX 5 - GUIDANCE – DECIDING WHETHER TO EXTEND THE COMPLIANCE DATE ON AN IMPROVEMENT NOTICE

While discretion is to be exercised by an inspector on the basis of relevant information, the following details how to make a decision relating to a request for an extension of time to comply with an improvement notice. The aim of the guidance is to ensure consistency in decision-making by individual inspectors and across all inspectors who consider these requests.

The request for extension of time should only come from the person (or their representative) to whom the original improvement notice was issued.

The request should only be considered if the request is made prior to the compliance date specified in the original improvement notice.

If the request is made after that date, the person making the request should be advised that the inspector is not able to consider the request, but also that the request and any accompanying information will be considered by the regulator when considering what, if any, action is to be taken in response to failure to comply with the improvement notice by the due date.

The following factors should be considered (if applicable in the particular case) when deciding whether to extend the compliance date specified in an improvement notice:

- the explanation provided as to why the applicant is unable to meet the existing compliance date;
- whether the initial compliance date specified in the notice was reasonable at the time it was established, and whether that compliance date was discussed with the applicant in terms of ability to achieve compliance;
- whether an extension of time would create an unacceptable risk to health and safety;
- whether the applicant proposes to institute any interim measures to control risk if an extension was granted, and the suitability of such measures;
- whether the applicant has taken appropriate steps to attempt to comply within the time period specified in the notice;
- whether the applicant is genuinely seeking to comply with the requirements of the notice, or whether it is delaying compliance with the notice;
- whether the application for extension was made promptly once it was apparent that compliance would not be achieved by the specified date;
- the existence of supporting material, including material from third parties (contractors, suppliers etc) relevant to the application;
- where the applicant nominates an alternative compliance date, the material on which that alternative date was selected and its suitability;
- whether granting an extension will provide an appropriate incentive for the applicant to achieve compliance; and whether there would be any adverse impact on health and safety in refusing an extension of time on the notice.

The inspector may need to make further inquiries of the applicant or other relevant persons (either at the workplace or otherwise) to consider the request.

13. APPENDIX 6 - GUIDANCE - VALIDITY OF NOTICES: FORMAL IRREGULARITIES AND DEFECTS

The position at common law is that a defect in a statutory notice will not invalidate the notice unless the defect has the effect that the notice:

- does not fulfil its statutory purpose;
- fails to meet a requirement made essential by the legislation; or
- could reasonably mislead the recipient as to what is necessary to comply with it.

The following are circumstances that could cause injustice and, therefore, invalidate a notice:

- an inspector was working outside of their powers under the WHS Act;
- the notice was issued to wrong person;
For example, referring to ABC P/L instead of ABC Pty Ltd would not, in itself, invalidate the notice. However, if the company name is ABC Paper Pty Ltd, and you use ABC Pty Ltd, these could be separate legal entities and, as such, it could be regarded as causing substantial injustice to ABC Pty Ltd.
- there are no reasons specified for the inspector's reasonable belief that the notice is necessary;
- an incorrect section of the WHS Act or regulation is cited in the notice; NB: presumably therefore, when s 206(1)(b) states that an inspector may make minor changes to a notice to correct errors or references, it does not extend to an error of this type.
- If an incorrect provision of the WHS Act or Regulations has been cited in an improvement notice, it could be regarded as causing substantial injustice because the person named in the notice may not be in contravention of that provision;
- there is no specified time-frame in the (improvement or non-disturbance) notice;
- the notice is misleading and not capable of modification as a minor change provided under s.206(1) of the WHS Act; or
- the notice was not issued or given to the relevant person by one of the means specified in s.209 of the WHS Act.



Work Health and Safety Act 2012 (SA)

Section 207

AUTHORISATION TO VARY OR CANCEL A NOTICE

LIST OF DELEGATES

Click [here](#) to access the table of delegates under the WHS Act and search for s207.