

MODEL OPERATING PROCEDURE

Letters of warning

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1. DEFINITIONS

Legal Case Conference	Is a panel of SWSA persons convened as per the Case Conference SOP
PCBU	Means person conducting a business or undertaking as described in s.5 of the <i>Work Health & Safety Act 2012</i>
SWSA	Means SafeWork SA
WHS Act	Means the <i>Work Health & Safety Act 2012 (SA)</i>

2. PURPOSE

This procedure provides direction or guidance to SWSA officers in relation to issuing letters of warning in those circumstances where contraventions of the WHS Act or Regulations have been identified, but statutory enforcement action is deemed to not be appropriate.

3. POLICY SECTION

The National Compliance and Enforcement Policy¹ sets out the approach SWSA will take to ensure compliance and enforcement under the WHS Act and Regulations.

The WHS Act sets out the range of compliance and enforcement tools that are available to inspectors and SWSA, and the compliance and enforcement policy provides some explanation of the circumstances when each of the tools might be used, either alone or in combination.

Statutory powers to take enforcement action are discretionary powers. SWSA officers are not required by law to take enforcement action in any particular case, though in many cases where non-compliance with WHS legislation is identified some form of statutory enforcement action is desirable and appropriate. (This would include prosecution action, acceptance of an enforceable undertaking or the issuing of an infringement notice.)

There may be cases where SWSA determines that a statutory enforcement action is not appropriate in a particular case. In such cases, SWSA may believe it is necessary, for specific deterrence purposes, to make an administrative decision to issue a letter of warning. These letters provide a mechanism for:

- bringing to the attention of the relevant duty holder that their act and/or omission is considered to amount to a contravention of, or offence against, WHS legislation, and

¹ The National Compliance and Enforcement Policy was endorsed by Safe Work Australia Members on 29 July 2011 and by the Workplace Relations Ministers' Council on 10 August 2011.

- reminding the relevant duty holder of their legal obligations, and
- indicating that there is greater likelihood of future statutory enforcement action being taken by SWSA if the identified contravention continues or occurs again.

Letters of warning can also incorporate or refer to guidance and advice on how the duty holder can comply with the relevant obligation(s) contained within WHS legislation.

Letters of warning may be issued by SWSA at any point of time when dealing with the alleged contravention(s), for example:

- at the conclusion of an inspection and preliminary inquiries, when a reasonable belief has been formed that there has been a contravention (whether or not an improvement or prohibition notice has been issued by an inspector in the circumstances), and it is determined that the matter will not be further investigated or be subject to an expiation notice; or
- at the conclusion of a comprehensive investigation resulting in a brief of evidence and it is determined that the matter will not be the subject of prosecution or other statutory enforcement action such as an enforceable undertaking.

A letter of warning is a response to the currently known information about the specific circumstances applying at the time of consideration.

Relevant circumstances for deciding to issue a letter of warning at the conclusion of preliminary inquiries include:

- SWSA resources required for further action are allocated to other higher priority activity at the relevant time, or
- the circumstances into which inquiries were made are not deemed to be serious, or
- the relevant duty holder's prior record is such that an escalated enforcement response is not warranted in relation to the current alleged contravention.

Relevant circumstances for deciding to issue a letter of warning at the conclusion of a comprehensive investigation in a particular case include:

- there is sufficient evidence to establish that an offence has been committed, but it is not in the public interest to commence a prosecution,² or
- the relevant duty holder's prior record is such that an escalated enforcement response is not warranted in relation to the current alleged contravention.

There is no requirement for the duty holder to agree there is or has been a contravention prior to SWSA issuing a letter of warning.

As a matter of principle, it is not intended that repeated letters of warning be issued to the same duty holder in relation to future alleged contraventions of the same or similar nature.

A previous letter of warning and the circumstances leading up to its issue should be considered by SWSA when making decisions about statutory enforcement action in relation to subsequent alleged contraventions.

SWSA may seek to introduce evidence of the circumstances resulting in a previously issued letter of warning in any subsequent proceedings against the relevant duty holder. This will be considered on a case-by-case basis and take account of any legal advice obtained at the time. One possible circumstance where this may occur is where the regulator seeks to rebut the duty holder's claim during a plea of guilty that they have otherwise been of good character in relation to compliance or that they were unaware of the previous matter.

² Prosecution guidelines set out relevant public interest criteria.

SWSA will not publicise individual letters of warning, but may use de-identified letters or statistics on the use of these letters for the purposes of reporting or in information, education or training activities. Section 271 of the WHS Act (Confidentiality of Information); and SWSA's Confidentiality Policy³ apply to the information contained in the letters. For example, an inspector or other SWSA employee should not notify a PCBU if one of the PCBU's workers has been issued a letter of warning. (This does not preclude an inspector raising the issue which triggered such a letter with the PCBU if action by the PCBU is considered necessary to deal with the issue.)

Duty holders who receive a letter of warning should be advised they may seek reconsideration of SWSA's administrative decision to issue a letter of warning. Where the relevant duty holder responds with comment about the letter, appropriate consideration should be given by SWSA to determine what, if any, action is to be taken in response.

Duty holders should also be advised that the letter of warning reflects SWSA's response to the specific circumstances based on currently known information, and that should relevant new information and evidence come to the regulator's attention the letter may be withdrawn and/or other enforcement action considered.

4. PROCEDURE

Responsibility	Description
Inspector	<p>Recommendation</p> <p>Upon being satisfied that an inspection and preliminary inquiries or a comprehensive investigation has identified sufficient evidence to allege a contravention or offence having been committed, consider whether a letter of warning would be the most appropriate response (instead of statutory enforcement action).</p> <p><i>(In SWSA, the decision to issue a letter of warning is usually made and/or approved at case conference).</i></p> <p>Consult with your manager and/or prepare a case conference document outlining the reason(s) why a letter of warning is the most appropriate response in the current circumstances.</p> <p><i>(Note: For the purposes of this procedure, improvement or prohibition notices issued by an inspector in relation to the circumstances giving rise to the inspection and/or investigation are considered remedial compliance action and not enforcement action.)</i></p>
Inspector's Manager and/or Case Conference Team	<p>Decision</p> <p>Decide if, in the circumstances, a letter of warning is the appropriate response (or whether statutory enforcement action is more appropriate).</p> <p>Inform the inspector who made the recommendation of the decision.</p>
Inspector	<p>Prepare and send the letter of warning</p> <p>Prepare the letter of warning and forward the letter to your manager for signature and posting</p>
Inspector	<p>Record keeping</p> <p>Place a copy of the letter in any hard file; or for electronic only files, attach a copy of the letter to the relevant InfoNET file.</p> <p>Record the sending of the letter on InfoNET by selecting the '<i>Letter of warning</i>' activity</p> <p>If comment is subsequently received from the relevant duty holder about the letter, acknowledge receipt of the comment and record the comment contemporaneously and on InfoNET.</p>

³ See MOP 12/0039 Confidentiality Policy

	<p>Refer the comment to a Legal Case Conference for determination on what action SWSA will take about the received comment.</p> <ul style="list-style-type: none"> • See Case Conference SOP
Legal Case Conference Team	<p>Dealing with comment received</p> <p>If comment is subsequently received from the duty holder about the letter, consider the comment and determine whether SWSA will:</p> <ul style="list-style-type: none"> • confirm the letter of warning; • amend and reissue the letter of warning; • withdraw the letter of warning and take no further action; or • withdraw the letter of warning and take statutory enforcement action against the duty holder in relation to the alleged contravention.
Inspector	<p>Action the legal case conference reconsideration decision and update records accordingly.</p>

5. FURTHER INFORMATION

- National Compliance & Enforcement Policy
- MOP 12/0039 Confidentiality Policy

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.

Author/Document Owner: Operational Support

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- V1 – 27 Nov 2012
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