



Inspectors

1 What are the powers and functions of inspectors?

Inspectors are appointed by the relevant regulator under the WHS Act and have certain compliance and enforcement powers. Inspectors carry an identity card which should be shown to a person upon request.

The exercise of an inspector's functions and powers is subject to the directions of the regulator and any conditions attached to the inspector's appointment.

An inspector has the following functions and powers under the WHS Act:

- provide information and advice about compliance with the WHS Act
- assist in the resolution of:
 - WHS issues at workplaces
 - issues related to access to a workplace by an assistant to a WHS representative
 - issues related to the exercise or purported exercise of a union rights of entry under the WHS Act
- review disputed PINs (issued by HSRs)
- require compliance with the WHS Act through the issuing of notices
- investigate contraventions of the WHS Act and assist in the prosecution of offences
- attend coronial inquests in relation to work-related deaths and examine witnesses.

2 Answering questions and interviews

An inspector who enters a workplace when exercising their functions and powers may require a person:

- to tell the inspector who has custody of, or access to, a document
- who has custody of, or access to, a document to produce that document to the inspector while the inspector is at that workplace or within a specified period. Such a requirement must be made by written notice unless the inspector requires immediate access to the document
- at the workplace to answer any questions put by the inspector (i.e. participate in an interview).

An interview conducted by an inspector at a workplace must be conducted in private if:

- the inspector considers it appropriate, or
- the person being interviewed so requests.

This request can be made before or during an interview. A person may still be represented in the interview (even if it is conducted in private).

A person must not, without reasonable excuse, refuse or fail to comply with a requirement of an inspector to answer questions, provide information and/or documents and/or participate in an interview.

Additional power of regulator to obtain information

If the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of WHS Act, or that will assist the regulator to monitor or enforce the WHS Act, the regulator may, by written notice served on the person, require the person to do one or more of the following:

- give the regulator, in writing signed by the person (or in the case of a body corporate, by a competent officer of the body corporate) and within the time and in the manner specified in the notice, that information of which the person has knowledge (for example, a written statement)
- produce to the regulator, in accordance with the notice, those documents
- appear before a person appointed by the regulator on a day, and at a time and place, specified in the notice (being a day, time and place that are reasonable in the circumstances) and give either orally or in writing that evidence and produce those documents (i.e. attend an interview)¹.

The regulator must not make a requirement for a person to appear and attend an interview unless the regulator has taken all reasonable steps to obtain the information from the person in writing or through the production of documents, and has been unable to do so.

The notice must:

- state that the requirement is made under section 155 of the WHS Act
- contain a statement to the effect that a failure to comply with a requirement is an offence, and
- if the notice requires the person to provide information or documents or answer questions:
 - contain a statement about the effect of sections 172 (self incrimination) and 269 (legal professional privilege), and
 - state that the person may attend with a legal practitioner.

A person must not, without reasonable excuse, refuse or fail to comply with a requirement of the regulator under these provisions.

3 Self incrimination

A person is not excused from answering a question or providing information or a document to an inspector on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.

However, the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

Warning to be given

Before requiring a person to answer a question or provide information or a document, an inspector must:

- identify himself or herself by producing the inspector's identity card or in some other way
- warn the person that failure to comply with the requirement or to answer the question, without reasonable excuse, would constitute an offence
- warn the person that they are not excused from answering a question or providing information or a document to an inspector on the grounds of self incrimination (but that the answer, information or document is not admissible in proceedings against the individual)
- advise the person that the WHS Act does not affect legal professional privilege.

If the inspector does not give the above warning, it is not an offence for an individual to refuse to answer a question or provide information or a document to an inspector on the grounds of self incrimination.

Irrespective of the above, an inspector may obtain and use evidence given to the inspector voluntarily.

4 Providing documents and other information

An inspector who enters a workplace when exercising their functions/powers may require a person who has custody of, or access to, a document to produce that document to the inspector while the inspector is at that workplace or within a specified period. Such a requirement must be made by written notice unless the inspector requires immediate access to the document.

Power to copy and retain documents

An inspector may:

- make copies of, or take extracts from, a document given to the inspector
- keep that document for the period that the inspector considers necessary.

While an inspector retains custody of a document, the inspector must permit the following persons to inspect or make copies of the document at all reasonable times:

- the person who produced the document
- the owner of the document
- a person authorised by a person referred to above.

¹ Section 155 of the WHS Act

Power to seize evidence

An inspector who enters a workplace may:

- seize anything (including a document) at the place if the inspector reasonably believes the thing is evidence of an offence under the WHS Act
- take and remove for analysis, testing or examination a sample of any substance or thing without paying for it.

An inspector who enters a place with a search warrant may seize the evidence for which the warrant was issued.

An inspector may also seize anything else at the place if the inspector reasonably believes:

- the thing is evidence of an offence against the WHS Act, and
- the seizure is necessary to prevent the thing being hidden, lost or destroyed or used to continue or repeat the offence.

Power to seize dangerous workplaces and things

If an inspector who enters a workplace reasonably believes that:

- the workplace or part of the workplace
- plant at the workplace
- a substance at the workplace or part of the workplace
- a structure at a workplace
- is defective or hazardous to a degree likely to cause serious injury or illness or a dangerous incident to occur

the inspector may seize the workplace or part of the workplace, the plant, the substance or structure.

Receipts and access to seized things

As soon as practicable after an inspector seizes a thing, the inspector must give a receipt for it to the person from whom it was seized. However, if it is not practical to provide the receipt to the person the inspector must leave the receipt in a conspicuous position and in a reasonably secure way at the place of seizure.

The receipt must describe generally each thing seized and its condition. A receipt is not required if it is impracticable or would be unreasonable to give the receipt (given the thing's nature, condition and value).

5 Notices

Prohibition Notices

An inspector can issue a Prohibition Notice if they 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 inspector may issue directions prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.

The directions may be given orally, but must be confirmed by written notice (a Prohibition Notice) issued to the person as soon as practicable. A person who receives such a direction or prohibition notice must comply.

A Prohibition Notice must state:

- that the inspector believes that grounds for the issue of the notice exist and the basis for that belief
- briefly, the activity that the inspector believes involves or will involve the risk and the matters that give or will give rise to the risk, and
- the provision of the WHS Act that the inspector believes is being, or is likely to be, contravened by that activity.

A Prohibition Notice may include directions on the measures to be taken to remedy the risk, activities or matters to which the notice relates, or the contravention or likely contravention.

A Prohibition Notice that prohibits the carrying on of an activity in a specified way may do so by specifying:

- a workplace, or part of a workplace, at which the activity is not to be carried out
- anything that is not to be used in connection with the activity
- any procedure that is not to be followed in connection with the activity.

Improvement Notices

An inspector can issue an Improvement Notice if they reasonably believe a person:

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

The Notice will require the person to:

- remedy the contravention
- prevent a likely contravention from occurring, or
- remedy the things or operations causing the contravention or likely contravention.

An Improvement Notice must state:

- that the inspector believes the person:
 - is contravening a provision of WHS Act, or
 - has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated
- the provision the inspector believes is being, or has been, contravened
- briefly, how the provision is being, or has been, contravened
- the day by which the person is required to remedy the contravention or likely contravention (which must be a reasonable period in all the circumstances).

An Improvement Notice may include directions concerning the measures to be taken to remedy the contravention or prevent the likely contravention, or the matters or activities causing the contravention or likely contravention, to which the notice relates.

The person to whom an Improvement Notice is issued must comply with the notice within the period specified in the notice. However, it is possible for an inspector to extend the compliance period for the Notice (provided the compliance period has not already expired.)

Non Disturbance Notices

An inspector may issue a Non-disturbance Notice to the person with management or control of a workplace if the inspector reasonably believes that it is necessary to do so to facilitate the exercise of his or her compliance powers. A Non-disturbance Notice may require the person to:

- preserve the site (including any plant, substance, structure or thing associated with the site) at which a notifiable incident has occurred for a specified period, or
- prevent the disturbance of a particular site (including the operation of plant) in other circumstances for a specified period that is reasonable in the circumstances.

A non-disturbance notice must specify the period (of no more than 7 days) for which it applies and set out the following information:

- obligations of the person to whom the notice is issued
- measures to be taken to preserve a site or prevent disturbance of a site
- penalty for contravening the notice.

A Non-disturbance Notice does not prevent any action:

- to assist an injured person
- to remove a deceased person
- that is essential to make the site safe or to prevent a further incident
- that is associated with a police investigation
- for which an inspector has given permission.

A person must not, without reasonable excuse, refuse or fail to comply with a non-disturbance notice issued to the person.

6 Obligations of persons in relation to inspectors

In addition to complying with requests and notices issued by an inspector, as outlined above, there are also some specific obligations that all persons must adhere to in relation to inspectors under the WHS Act.

The following are offences under the WHS Act:

- intentionally hinder or obstruct an inspector in exercising his or her compliance powers or induce or attempt to induce any other person to do so
- directly or indirectly assault, threaten or intimidate, or attempt to assault, threaten or intimidate an inspector or a person assisting an inspector
- holding oneself out, in any way, to be an inspector, when a person is not an inspector.

The purpose of the document is to provide guidance on relevant provisions of the *Work Health and Safety Act 2011* (NSW) (WHS Act) and *Work Health and Safety Regulation 2011* (NSW) (WHS Regulation). This document should be read in conjunction with those laws. It does not constitute nor should it be relied on for the purposes of legal advice.