

MODEL OPERATING PROCEDURE

Forfeiture, return and access to seized things



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.

██████████ Port Officer
Corporate Services

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2. DEFINITIONS

IRC	Means Industrial Relations Court
Regulator	Means the Executive Director of SafeWork SA or their delegate .
Remedial Action	Means something done by the regulator that affords a remedy to manage risks created as a result of activities of a person conducting a business or undertaking.
PCBU	Means person conducting a business or undertaking as described in the <i>Work Health & Safety Act 2012 (SA)</i>
Property Officer	Is the person(s) appointed or delegated by the regulator to be responsible for the management of seized things.
SWSA	Means SafeWork SA
WHS Act	Means <i>Work Health & Safety Act 2012 (SA)</i>

3. PURPOSE

To provide guidance on the provisions of the WHS Act relating to the forfeiture, return and access to seized things.

4. POLICY SECTION

4.1 General information

Sections 175 and 176 of the WHS Act provide for inspector powers of seizure. Specifically, section 175 states that an inspector may seize any thing at a workplace if the inspector reasonably believes the thing is evidence of an offence against the WHS Act.

The things that may be seized include, but are not limited to:

- a substance or a sample of any substance;
- documents;
- a workplace or part of a workplace;

- plant; and
- a structure.

Refer to [Power of seizure MOP](#)

The seizure of things may also be effected by search warrant under s167 of the WHS Act. A procedure relating to Search is under development based on a HWSA MOP. It is a [DRAFT ONLY \(MOP SAFE 11/0808 Search Warrants\)](#)

4.2 Forfeiture of seized things

Section 179 of the WHS Act provides for the forfeiture of a seized thing.

The thing may be forfeited to the State if the regulator:

- cannot find the person entitled to the thing after making reasonable enquiries; or
- cannot return it to the person entitled to it, after making reasonable efforts,
For example: it may not be possible to return a thing if a person (owner) has ceased trading and is not contactable, or if the business from where a thing was seized has been liquidated or gone into liquidation and the liquidator/administrator does not require its return. In this scenario, or in any case where a person entitled to a thing does not want the thing returned, the regulator should request the person to relinquish their claim on a thing in writing and to consent to its disposal and or destruction;

or

- the regulator reasonably believes it is *necessary to forfeit* the thing to *prevent it being used to commit an offence* against the WHS Act.
For example: plant that is significantly damaged or faulty or not properly guarded may be forfeited if the regulator reasonably believes that it may be used and that its use will constitute an offence against the WHS Act. Plant that is unsafe due to wear and tear might also be forfeited, or a substance that is known to be highly hazardous and the use of which is prohibited or subject to strict controls and those controls are not in place or not evident at the place from where the plant or substance was seized.

Section 179(4) provides that if the regulator decides that a thing is to be forfeited, the person entitled to the thing must be notified by written notice unless the person cannot be found after reasonable enquiries or if it is impracticable or unreasonable to give the notice. [See [Appendix 1](#) for the written notice template].

In deciding whether to give notice of forfeiture and what level of enquiry and effort is reasonable or, if it is impracticable or unreasonable to give notice, the regulator must have regard to the nature, condition and value of the thing. Some things that may be considered relevant include:

- value (monetary, sentimental, proprietary) to the owner;
- value of the thing to the regulator in terms of potential liability from continuing to retain the thing;
- nature of the thing in terms of its ability to be returned;
- condition and potential for the thing to pose a risk to injury or illness; and
- condition in terms of its potential for use if returned.

Section 179(6) provides that any notice issued to a person informing them of a decision to forfeit a thing must state:

- the reason for the decision;
- the person's entitlement to apply for a review of the decision within 28 days after the date of the notice;
- how to apply for a review; and
- that the person may apply for a stay of the decision if they choose to apply for a review of the decision.

Section 179(8) provides that any costs reasonably incurred by the State in storing or disposing of a thing forfeited under s179(1)(c) may be recovered in a court of competent jurisdiction as a debt due to the State from the person who would be entitled to the thing if it was to be returned. The person

entitled to the thing means the person from whom it was seized unless that person is not entitled to possess it in which case it means the owner of the thing.

4.3 Return of seized things

Section 180(1) allows the person who is entitled to a thing seized to apply to the regulator for its return (if it has not been forfeited) if it has not been returned after six months of its seizure.

In this section, the person entitled to a thing means the person entitled to possess the thing or the owner of it.

Section 180(2) states that the regulator must return the thing to the applicant unless the regulator has reasonable grounds to retain the thing.

Pursuant to s223 of the WHS Act, a decision made by the regulator under section 180 is an externally reviewable decision and the regulator must be able to clearly demonstrate that the grounds upon which forfeiture is made are reasonable grounds.

- See [Internal Review SOP](#)

Reasonable grounds might be, for example, that the thing may be required as evidence for an inquiry or legal proceedings. Regard should be had to the evidentiary value in retaining the thing and regard for alternative ways of maintaining the evidentiary necessity e.g. photographs, expert evidence. Reasonable grounds might also be to retain the thing for testing, examination or analysis.

If the regulator decides to return the seized thing, conditions may be imposed as considered appropriate by the regulator to eliminate or minimise any risks to work health or safety related to the thing [s180(3)].

Regulator policy

Any condition(s) placed on return of a thing will be in writing via an improvement or prohibition notice signed by an appointed inspector. Whilst a letter signed by the regulator would suffice, the conditions noted in the letter are not enforceable.

The decision to impose conditions on the return of a seized thing is a reviewable decision and the regulator must be able to demonstrate that the conditions imposed are appropriate in order to eliminate or minimise any risks to work health and safety related to the thing.

4.4 Access to seized things

Section 181 allows the owner of the thing, the person from whom it was seized, or the person authorised by either of these people to have access to the thing at all reasonable times to inspect it, or, in the case of documents, to make copies.

The requirement for the regulator to permit access applies until such time as the thing is either forfeited or returned.

The requirement to allow access does not apply if it is impracticable or unreasonable to allow access for examination or copying. For example, the thing may be at a laboratory for forensic analysis or at a testing facility for destructive testing and access may not be practicable because of the location of the thing; i.e. at the premises of a third party and/or perhaps at a distant location or in another State or because the testing/analysis is in progress and allowing access would be unreasonable at the time of the request.

Other examples of where it may be impracticable or unreasonable to allow access might be if the person applying for access is considered to be a risk to their own or an inspector's personal health and safety, or a risk to the integrity of the seized thing.

5. PROCEDURE SECTION

Responsibility	Description
<p>Inspector and/or Property Officer</p>	<p>Forfeiture of seized things</p> <p>Decide if a seized thing is to be forfeited. There are three grounds upon which you may seek forfeiture of a thing, namely:</p> <ul style="list-style-type: none"> (a) you <i>cannot find the person entitled</i> to the thing after making reasonable enquiries; or (b) you <i>cannot return it</i> to the person entitled to it, after making reasonable efforts; or (c) you reasonably believe it is <i>necessary, to prevent it being used to commit an offence</i> against the WHS Act. <p>You must make reasonable effort to find the person entitled to the thing and to return the thing [for (a) and (b)], unless it would be unreasonable to make the enquiries to find the person or to make efforts.</p> <p>For example, the effort and the level of inquiry would be less for a piece of plant that is mass produced, of low monetary value, significantly damaged and rendered unusable versus a piece of plant that is perhaps imported, one of a few, in good condition, useable and of high monetary value.</p> <p>If you decide it is necessary to forfeit the thing, pursuant to s179(1)(c);</p> <ul style="list-style-type: none"> • consult with your principal inspector and manager; and • convene a legal case conference <p style="padding-left: 40px;">see Case Conference SOP</p> <p>The legal case conference should consider:</p> <ul style="list-style-type: none"> • the need to retain the thing as evidence • the legal ramifications of returning the thing • the impact on the owner or person entitled to the thing if the thing is not returned • the Police, Coroner’s other regulators need for the thing (eg OTR, OCBA, EPA) • the impact on work health and safety or public safety if the thing is returned; and • any enforcement actions proposed by the regulator <p>If the decision is made to forfeit the thing, prepare a written notice to be given to the person from whom it was seized or the owner, to inform them of the forfeiture.</p> <p>Section 179(6) prescribes that the notice of forfeiture must contain certain information. See Appendix 1 for the <i>Notice of Forfeiture</i> template.</p> <p>Section 179(5)(a) provides that a <i>Notice of Forfeiture</i> does not need to be provided if you can not find the person entitled to the thing after you have made reasonable inquiries to find them, or if pursuant to s179(5)(b), it is impracticable or unreasonable to give the Notice.</p> <p>Forward the completed <i>Notice of Forfeiture</i> through your line management for review and progression to the Regulator or delegate for consideration, approval and signature.</p> <p>NOTES:</p> <ul style="list-style-type: none"> ○ Forfeiture is a reviewable decision. If a decision is made to forfeit a thing, accurate and comprehensive records of the decision process must be kept and you must be able to demonstrate that the decision to forfeit was made

	<p>on reasonable grounds.</p> <ul style="list-style-type: none"> ○ Do not arrange for forfeiting of the thing until the expiration of 28 days after the forfeiture notice was signed and/or all review avenues by the owner of the thing have been exhausted ○ For matters that proceed to prosecution, and a thing has been approved for forfeiture, and has not yet been forfeited, do not send the notice for forfeiture of a thing until after the expiration of the 28 day court appeal process has passed.
Inspector and Property Officer	<p>Inspector – Forfeiture of small exhibits will be managed by the inspector. If a (medium to large) thing that is stored in an evidence facility is to be forfeited, advise property officer in writing (email) to facilitate forfeiture.</p> <p>Property officer – On receiving written advice a (medium to large) thing is to be forfeited, manage such forfeiture.</p>
Business Services Team	<p>If SafeWork SA has reasonable costs associated with storage or disposal of a thing, SafeWork SA's Property Officer, in conjunction with the SafeWork SA Business Services Team, will calculate, document and evidence these costs, and take steps to recover costs as necessary [s179(8)].</p>
Inspector and or Property Officer	<p>Applications for the return of seized things</p> <p>Section 180(1) gives the person who is <i>entitled</i> to a thing seized the right to <i>apply</i> for its return if it has not been forfeited or returned to them after 6 months of its seizure. An application (request) for a thing to be returned must be from the <i>person entitled</i> to the thing or the <i>owner</i> of the thing or a person authorised by one or the other.</p> <p>The rear of the SWSA evidence management receipt outlines a person's right to apply for the return of a thing six months after it was seized. The receipt also notes the seizing inspector should be contacted if the person entitled to the thing wishes to apply for the things return.</p> <p style="text-align: center;"><i>See Evidence Management Receipt template in Power of Seizure (MOP)</i></p> <p>Upon receipt of an application for the return of a thing, the inspector or their line manager will seek a legal case conference. A seized thing will not be returned or forfeited without approval made at a legal case conference.</p> <ul style="list-style-type: none"> ○ See Case Conference SOP <p>The legal case conference should consider:</p> <ul style="list-style-type: none"> ○ the need to retain the thing as evidence ○ the legal ramifications of returning the thing ○ the impact on the owner or person entitled to the thing if the thing is not returned ○ the Police, Coroner's other regulators need for the thing (eg OTR, OCBA, EPA) ○ the impact on work health and safety or public safety if the thing is returned; and ○ any enforcement actions proposed by the regulator <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p>Any seized thing related to a fatality matter will not be returned or forfeited until the Coroner via the Investigations Team Manger advises that the thing is not or is no longer required by the Coroners Court.</p> </div> <p>If the decision is made to not return a thing, the template letter at Appendix 3 shall be completed and forwarded to the person entitled to the thing.</p> <p>If a decision is made to return a thing with conditions pursuant to s180(3), the template letter at Appendix 4 shall be prepared for the regulator's signature and posting to the person entitled to the thing.</p>

Investigations Team	Will liaise with the Coroners office in relation to the retention, forfeiture or return of any seized thing that relates to a fatality or a fatality investigation prior to such retention, forfeiture or return
Regulator	<p>Retaining seized things</p> <p>Pursuant to s180(2), the regulator may retain a thing seized if they have <i>reasonable grounds</i> to do so.</p> <p>The regulator may retain a thing, for example, as evidence for any proposed Coronial, criminal or civil proceedings, or until a decision is made on whether proceedings will be initiated.</p> <p>The regulator may also retain the thing for testing, examination or analysis by an expert, for example.</p> <p>In the event that destructive testing is to be carried out, the owner of the thing must be notified in writing and invited to attend such testing.</p> <ul style="list-style-type: none"> • Technical Investigations SOP • Expert witnesses SOP
Regulator	<p>Retention and forfeiture to prevent the thing being used to commit an offence</p> <p>The Regulator may retain and forfeit a thing if they reasonably believe it is necessary to prevent it being used to commit an offence against the WHS Act.</p> <p>The Regulator shall consider any Notice of Forfeiture forwarded by the Investigation Team from a team manager and subsequent legal case conference, and sign such notice if satisfied the forfeiture is necessary and lawful.</p>
Inspector and or Property Officer	<p>Return of seized things generally and outside an s180(1) request</p> <p>If you do not have reasonable grounds for retaining a seized thing, you must return it to the person entitled to it.</p> <p>Pursuant to s180(3), in returning a seized thing, the regulator may impose any conditions that the regulator considers appropriate in order to <i>eliminate</i> or <i>minimise</i> any risks to work health and safety related to the thing. Note that these conditions are not enforceable.</p> <p>Where there is a risk to work health and safety or public safety, the inspector or person returning the thing shall issue an improvement or prohibition notice on the thing prior to it's return.</p> <p>A decision to retain the thing or to impose conditions or to issue an enforcement notice when returning a seized thing are reviewable decisions. Your reasons for retention of the thing or imposing any conditions should be supported and documented.</p> <p>NOTE: Any conditions will be determined by a legal case conference. See: Case Conference SOP</p> <p>The risks that the conditions are designed to eliminate or minimise should be clearly articulated and supported by evidence where possible.</p> <p>SafeWork SA will require evidence that a person is the owner or entitled to a thing prior to its return. Evidence could be, for example:</p> <ul style="list-style-type: none"> ○ Personal knowledge ○ Email ○ Signed Confirmation of Authority Form

<p>Inspector and or Property Officer</p>	<p>Access to a seized thing</p> <p>Pursuant to s181(1), the following persons are entitled to inspect a seized thing at all reasonable times and, if it is a document, to make copies:</p> <ul style="list-style-type: none"> • the person from whom the thing was seized; • the owner of the thing; and • a person authorised by either of the above <ul style="list-style-type: none"> ○ <i>With respect to an authorisation, the WHS Act does not specify such authorisation be in writing. It is best practice if a written authorisation is obtained to protect the inspector or property officer from allegations of allowing access by unauthorised persons.</i> <p>Access to a seized thing by these persons for inspection or copying does not apply if it is impracticable or unreasonable. For example, access may be impracticable if a thing has been tendered as evidence before a court. An example of unreasonableness is the request for immediate access of a thing that is stored off site.</p> <p>A decision to refuse access is not a reviewable decision under the WHS Act.</p> <p>If access is given, you must ensure that the access is supervised at all times and that the integrity of the thing seized is not altered or tampered with in any way.</p> <ul style="list-style-type: none"> ○ <i>See WKP 06/0454 Exhibit Property SOP</i>
<p>Inspector, Property Officer & Regulator</p>	<p>Disposal of a seized thing</p> <p>If the regulator issues a notice of forfeiture of a seized thing, and the person entitled to it, or the person from whom it was seized, or the owner has not sought a review of the decision for it to be forfeited, the regulator may dispose of the thing when it is no longer required as evidence. If a review of decision has been sought that results in a decision that the thing cannot be forfeited, the thing must be returned to the person entitled to the thing.</p> <p>The three scenarios that may occur are that the person entitled to the thing:</p> <ol style="list-style-type: none"> 1. does not respond to the notice; 2. agrees with the forfeiture of a thing; or 3. the person appeals the notice of forfeiture. <p>In the instance of item 3 above occurring, the review of the decision will either:</p> <ol style="list-style-type: none"> a) uphold the notice and the thing will be forfeited; or b) revoke the notice and the thing must be returned to the person entitled to the thing <p>Once a Notice of Forfeiture has been issued, the person entitled to it and or the owner, subject to any appeals, lose any rights or entitlements to it, and the regulator may continue to store or dispose of the thing.</p> <p>Under s179(8), any reasonable costs incurred by the regulator to store or dispose of a thing that has been forfeited may be recovered in a court of competent jurisdiction as a debt due to the State from the person entitled to the thing.</p> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p>SWSA Business Services Team will manage the debt recovery process</p> </div> <p>Before disposing of a thing consideration should be given to:</p> <ul style="list-style-type: none"> • the time period applying to any appeal processes relevant to the thing. • whether the item may continue to be required for regulatory purpose e.g. for training purposes or as evidence in legal proceedings; • any safety and/or environmental precautions that need to be taken for the disposal of the thing; and

	<p>Endorsement for the decision to dispose of the thing should be obtained via a legal case conference and the same considerations listed on page 4 of this procedure should be discussed.</p> <p>A legal case conference can be convened at any time if assistance to resolve these questions is required. See Case Conference SOP</p> <p>The detailed processes for the actual disposal of a thing and the associated documentation are detailed in the SWSA Exhibit Property SOP.</p> <p>See Evidence Management SOP</p>
<p>Legal Case Conference Team</p>	<p>Will consider and endorse any decision to dispose of a thing upon being satisfied that:</p> <ul style="list-style-type: none"> • all steps to provide notice of forfeiture of the thing have been lawful and completed, and • the owner or person entitled to the thing has accepted forfeiture of the thing in writing; or • the owner or person entitled to the thing has not sought review of the notice of forfeiture within the statutory timeframe; or • all avenues of appeal have been exhausted by the the owner or person entitled to the thing
<p>Inspector & Property Officer</p>	<p>Record keeping</p> <p>Accurate written records of all the relevant details of any seizure, handling, storage, transport, access to, and disposal of, a seized thing are required. For example, when seizing a thing, the written records of the seizure should include:</p> <ul style="list-style-type: none"> • the person affecting the seizure; • the date and time of seizure; • the place where the thing was seized from; • name and contact details of the person from whom it was seized; • a description of the thing(s) seized; • the condition of the thing(s) seized; • photographs or video images of the seized thing; • the reasons for the seizure; • the method or means by which it was seized, secured and transported; • the place where it will be stored; • persons who accessed the thing; and • any other information relevant to demonstrate that the chain of continuity and that the integrity of the thing has been maintained. <p>These written records will be found in:</p> <ul style="list-style-type: none"> • case conference records • InfoNET records • inspector field notes • evidence management receipts • property officer notes • photograph logs <p>Procedures related to this section</p> <p>Investigation SOP</p> <p>Digital Evidence SOP</p>

6. FURTHER INFORMATION

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

7. REVIEW

This MOP must be reviewed 2 years after the last issue date and must be immediately modified if practices and/or procedures change.

Document Owner: Principal Skills Support Officer – Resources
Corporate Services

Contact: 

Version Control Information

- V1 – Approved Feb 2012
- Issue 1 – 6 Nov 2012
- V2 – 13 Nov 2012
- V3 – 29 May 2014
- V4 – 7 April 2016



Work Health and Safety Act 2012 (SA)

Section 179(4)

NOTICE OF FORFEITURE OF SEIZED THINGS

Date of Notice:	<insert>		
The thing/s described below is/are forfeited to the State of South Australia:			
Owner's legal name:	<insert>		
ABN/ACN:	<insert>		
OWNER'S ADDRESS:	Street / Lot / Hd number & name: <insert> Suburb / Town: <insert> Postcode: <insert> State: <insert>		
Description & Reason for forfeiture:	I, <insert>, reasonably believe it is necessary that the <insert> Seized under sections 175 and/or 176 of the <i>Work Health and Safety Act 2012 (SA)</i> (the Act), is/are forfeited so as to prevent it from being used to commit an offence against the Act.		
	The reasons for the decision are: <insert>		
Name of regulators delegate:	<insert>	Phone:	<insert>
Delegates signature:		Office:	<select>

IMPORTANT INFORMATION

REVIEW RIGHTS FOR NOTICE OF FORFEITURE

Section 179(6) of the *Work Health and Safety Act 2012* (SA) provides that a person may apply for a decision to forfeit a thing to be reviewed.

If you wish to apply for a review of the decision to forfeit a thing, the application must be made to the Senior Judge of the Industrial Relations Court within 28 days after the 'Date of Notice' as detailed at the top of the notice.

The application must:

- be in writing,
- contain your name, address and telephone number,
- set out clearly the reasons why the review is sought, and
- include a copy of the forfeiture of seized things notice for which review is being sought

For information on lodging your application for review of the decision to forfeit a thing, please telephone the Registry of the South Australian Industrial Relations Court on [REDACTED] or attend the Court Registry on Level 6 Riverside Centre, North Terrace, Adelaide.

This notice is stayed. Stayed means everything maintains its status quo before the decision to forfeit was made. Therefore, the item remains where it was prior to SafeWork SA making the original decision to forfeit the thing. The review body also has the ability to grant a stay in any event to preserve the subject or item of the thing of any review.



Government of South Australia
SafeWork SA

Work Health and Safety Act 2012 (SA)

Section 179(4)

LIST OF DELEGATES

Click [here](#) to access the table of delegates under the WHS Act and search for S179(4)

A delegate's authorisation under this section cannot be further delegated.

Your ref :
Our ref : [Recfind or filecode]

[dd Month yyyy]

[addressee]
address 1
address 2
address 3

<select>
<select>, World Park A
Keswick SA 5035

PO Box 465
Adelaide SA 5001

DX 715 Keswick
Contact [your name]
Phone (08) [insert]
Fax (08) [insert]
Email [insert]@sa.gov.au

ABN 50-560-588-327

Dear [Name]

RE: APPLICATION FOR RETURN OF [DETAILS OF THE THING]

Thank you for your <select> application <select> for return of a thing, specifically [details of the thing] that was seized on [date] at [location].

SafeWork SA has considered the circumstances relevant to the return or retention of the thing, and has decided that reasonable grounds to retain the thing exist.

The reasonable grounds to retain the thing are: [insert].

You may have a right to an external review of this decision. If you are not satisfied with the decision made to retain the thing, you can apply to the Senior Judge of the Industrial Relations Court for a review of the decision. The Registry of the Industrial Relations Court has information and advice on the criteria and process for applying for an External Review of decisions made by SafeWork SA. The Court can be contacted on telephone [redacted], or Internet <http://www.industrialcourt.sa.gov.au/>

The application to the Court must be made within 28 days from the date of this notice.

Please contact [name] on telephone (08) [desk number] if you wish to discuss this matter further.

Yours sincerely

[name]
Delegate of the Regulator
SAFEWORK SA

Your ref :
Our ref : [Recfind or filecode]

[dd Month yyyy]

[addressee]
address 1
address 2
address 3

<select>
<select>, World Park A
Keswick SA 5035

PO Box 465
Adelaide SA 5001

DX 715 Keswick
Contact [your name]
Phone (08) [insert]
Fax (08) [insert]
Email [insert]@sa.gov.au

ABN 50-560-588-327

Dear [Name]

RE: APPLICATION FOR RETURN OF [DETAILS OF THE THING]

Thank you for your <select> application <select> for return of a thing, specifically [details of the thing] that was seized on [date] at [location].

SafeWork SA has considered the circumstances relevant to the return or retention of the thing, and has decided to return the thing with conditions.

The conditions are:

1. [overtyping text eg as detailed on WHS prohibition Notice number xxxxxx, hit enter to go to next number if applicable]

You may have a right to an external review of this decision. If you are not satisfied with the decision made to return the thing with conditions, you can apply to the Senior Judge of the Industrial Relations Court for a review of the decision. The Registry of the Industrial Relations Court has information and advice on the criteria and process for applying for an External Review of decisions made by SafeWork SA. The Court can be contacted on telephone [REDACTED] or Internet www.industrialcourt.sa.gov.au/.

The application to the Court must be made within 14 days on which the decision first came to the applicant's notice.

Please contact [name] on telephone (08) [desk number] if you wish to discuss this matter further.

Yours sincerely

[name]
Delegate of the Regulator
SAFEWORK SA