

## **Guideline 8 - ACCC search powers: Procedures for the General Counsel, Legal and Governance or the TPA Compliance Officer and other senior staff**

*This is general reference material for your guidance in specific circumstances*

### **On arrival of Officers**

- Ask your security or front office staff if they know whether the Officers are in possession of a search warrant. If the Officers do not have a valid search warrant, you are not obliged to allow the Officers to enter the premises.
- If your security or front office staffs have sighted the search warrant, advise your security or front office staff that the Officers should be politely asked to wait in the reception area until you arrive. If the Officers refuse they should be taken to a suitable waiting room, where no documents or files are stored.
- If your security or front office staff advise you that the Officers do not possess a valid search warrant, advise your security or front office staff that the Officers should be asked to wait *outside* the premises, and that you will be there shortly.
- Contact your external legal advisers.

### **Procedure if there is *not* a valid search warrant**

- Ask for and check the Officers' identification. Officers are required to carry and produce photo identification. If possible, obtain a copy of this identification, or make a note of the details.
- Ask the Officers whether they are in possession of a search warrant.
- If the Officers are not in possession of a search warrant, advise them that until you have sought legal advice you are not in a position to determine whether they should be granted consent to enter the premises.
- If the Officers are in possession of a search warrant, check if there is a material irregularity in it. Material irregularities in a warrant may include:
  - it is not issued by a Magistrate;
  - it does not describe your premises;
  - it does not specify the kind of evidential material that is to be searched for under the warrant *and* a statement of the contraventions to which the warrant relates;
  - it does not name the inspector responsible for executing the warrant;
  - it is out of date, including where more than one week has elapsed since the issue of the warrant; or
  - the Officers have arrived outside of any time frame that is actually specified in the warrant,

If the warrant contains any of these material irregularities, politely advise the Officers that until you have sought legal advice you are not in a position to determine whether they should be granted consent to enter the premises.

- Obtain a copy of any authorisation that the Officers have to enter the premises and politely advise them that you will be in contact with the relevant Officer of the ACCC after you have had the opportunity to seek legal advice.
- Do not allow them to enter the premises.

### **Procedure if there is a valid search warrant**

- If the Officers are still waiting in a reception area upon your arrival, they should be escorted to a suitable waiting room, where no documents or files are stored. In no circumstances should the Officers be left unaccompanied, or allowed to wander at random.
- Ask for and check the Officers' identification (for example, wallet identification cards). Officers are required to carry photo identification. If possible, obtain a copy of this identification, or make a note of the details.
- You should then ask for a copy of the search warrant or other form of authorisation, and check its scope and validity. In the case of a search warrant issued under the ASIC Act, ask to see the original Notice to Produce Books. Note that only persons named in an authorisation or search warrant may search your offices. If there is a material irregularity in either document, you should politely explain that it is invalid and ask them to leave the premises.
- Question the Officers about the details of what they seek. Ascertain if any employees are suspected of involvement in the commission of the offence under investigation.
- Photocopy multiple copies of the authorisation or warrant to be distributed to each of the lawyers and other staff supervising the search, to be faxed as necessary.

### **Supervising the raid**

- If the external lawyers have not arrived, ensure that there are enough staff on hand to supervise each Officer individually as they undertake the search.
- Note that the Officers have the power to search, copy and seize the kind of evidential material specified in the warrant - including via access to electronic equipment (computers etc). An IT professional should be present to supervise and advise on the seizure of electronic images or equipment.
- You are required to provide the Officer with such assistance (including use of facilities) as is reasonable and necessary in the circumstances.
- The Officers may ask you or another staff member questions about the subject matter of the warrant. Failure to comply with this request is an offence. This does not mean that you should freely volunteer information to the Officers that is not in response to a direct question by them and that does not relate to the subject matter of the warrant. If you are unsure of whether you should or can answer any question or comply with any request of

the Officers prior to the arrival of your legal adviser, courteously advise the Officers that you wish to assist them in any way that you can, but that you wish to obtain the assistance of your legal adviser to be able to help them in the manner required. All responses should be brief, and factual. Do not volunteer your opinion.

- No staff should speak to any media. A media strategy (which may include a press release), will be prepared as necessary.
- Supervising staff should ensure that:
  - general notes are made of the conduct of Officers during the investigation. Particular notes should be made of any behaviour that appears generally unreasonable or unfair, and specifically behaviour which appears beyond what has been authorised
  - notes are made of all questions and requests made by Officers, and of responses given
  - Officers are not given unlimited access to files. They should only be allowed to examine those documents relevant to their investigation, as specified in the authorisation or search warrants. Supervisors should seek to exclude parts of documents that fall outside the scope of the investigation
  - privilege is claimed where appropriate
  - Officers are advised of the confidential nature of particular documents. If copies are taken of confidential documents they should be marked as such, and
  - all documents/records examined, copied or seized are carefully recorded and receipted. This should include a note of their files of origin.

### **Before the Officers leave**

Prior to the Officers' departure, legal staff should ensure that we have:

- a copy of all the documents copied by the Officers
- a copy of and receipt for all the original documents taken from your offices (note that not all regulatory agencies have the power to seize documents without a search warrant, including the Australian Taxation Authority)
- a note of all documents that were merely examined by the Officer
- claimed privilege in relation to any documents that are protected by legal professional privilege, and marked as confidential any documents taken or copied by Officers that are confidential.
- notes pertaining to any questions the Officers asked, and the responses given by employees (including copies of notes taken by the Officers)
- made a note of any act of an Officer that appears unreasonable, unfair or beyond authorisation, and

- made a note of all issues in dispute (including any obvious errors in the Officers' notes).

### **After the Investigation**

- Hold a meeting of all personnel involved in the investigation. A list of all documents examined, copied and taken must be compiled.
- A detailed factual report of the investigation should be prepared, including written statements from all persons in contact with the Officers. This should include a transcript of the questions posed by Officers and the responses given by employees. The report should be concise and contain all relevant facts. The author should not insert any of their own thoughts or comments when compiling the record.
- The company's external lawyers should be given the report and then asked to advise on what steps should be taken next. They should also follow up any incomplete matter or rectify any inaccuracies, with the relevant Officer's office. Taking pro-active measures should be a top priority.

### **What you should *not* do if there is a valid search warrant**

Do not:

- be forced by the Officers to deviate from these procedures.
- obstruct any Officer in any way. Be pleasant, but firm.
- leave any Officer unattended in any room or area where records, books and documents are kept.
- attempt to remove any Officer from the premises.