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## SEARCHES BY THE COMMERCE COMMISSION

JANUARY 2010

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### Immediate action

SOMEONE TAKE CHARGE.

- Ask the Officer to produce identification.
- Inspect the search warrant and keep a copy.
- Ask the Officer if they are willing to wait until legal advisers arrive. (They do not have to wait, and are unlikely to do so.)

CHECK THAT:

- the warrant refers to the correct legal name of the business;
- the warrant specifies the conduct which is alleged to constitute the breach, e.g. "conduct that constitutes or may constitute a contravention of s.27 via s.30 of the Commerce Act 1986";
- the Officer undertaking or controlling the search is the person authorised in the warrant to undertake the search;
- the address of the business premises is correctly stated in the warrant; and
- the warrant is signed and dated not more than 30 days earlier.

If any of the above is incorrect, advise the Officer and do not permit the search to proceed.

If in any doubt, obtain immediate legal advice.

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### During the search

- Ask the Officer to confirm that all people accompanying him/her are in the Officer's team and obtain from him/her their names. Keep a record of their names.
- Assign a company representative to stay with each member of the investigating team.
- Ask the Officer for particulars of the allegation: what, when, by whom? Note: The Officer is not obliged to provide you with a response and may continue the search without giving a response.
- Restrict the search to the areas occupied by the company named in the warrant, e.g. if part of your premises is used by another company (whether within or outside the company group), restrict the search to the part of the premises occupied by the company named in the warrant.
- Advise the Officer and his/her team who they should refer any enquiries to during the search.
- Consider the location of any privileged material as it does not have to be provided. If the search permits cloning computers, consider whether adequate safeguards are in place to ensure privileged material is protected from disclosure to the Commission. Bell Gully has a procedure to implement to permit cloning to proceed and also protect privilege that should be used.
- Inform colleagues of the search and of their obligations to provide reasonable assistance, but that they need not provide oral information. Read out "General points" 2, 3, 5, 7 and 8 (see over). Note: This can be done conveniently in a group, with the Officer and his/her team present.
- Inform your legal adviser at Bell Gully.
- Do not ring around your competitors to advise of the search. If the allegation is of collusion, this could constitute circumstantial evidence.

Deal with the Commission team co-operatively and with as little aggression as possible. It is important to establish early a working relationship that will assist in achieving a cross-flow of information

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### Follow-up action

PRIOR TO THE DEPARTURE OF THE OFFICER AND HIS/HER TEAM:

- Request that all items seized are listed on an Exhibit Schedule showing the location from where the item was removed and where it will be held (see also "General points").
- Check the Exhibit Schedule before signing off acceptance of a copy.
- Establish which Officer is in charge of the matter overall and to whom any further enquiries should be addressed; likewise, advise the Officer who in your business he/she should refer any further enquiries to.
- Clarify when responses (if any) will be provided.

## AFTER DEPARTURE OF THE OFFICER AND HIS/HER TEAM:

- Prepare a written summary of the events and attach copies of the warrant and Exhibit Schedules.
- Seek legal advice on follow-up action regarding:
  - requests for official information;
  - requests for confidentiality;
  - details of the allegation; and
  - how to proceed.

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## General points

The power of the Commission to enter and search can only be exercised once within 30 days of issue of the warrant and at a time that is reasonable.

- 1) The power is one of searching. It does not include the power to cross-examine or require oral information to be provided.
- 2) The power includes the right to remove documents or any article or thing that the person executing the warrant believes on reasonable grounds may be relevant and also, in the same circumstances, to take copies of documents or extracts from documents.
- 3) Before the search is completed, the person executing the warrant must leave in a prominent place on your premises a schedule of documents, article or things that have been removed. If this is not practicable, or if you consent, instead of leaving a schedule on the premises, the Schedule can be sent to you within seven days. The schedule must set out the documents, articles or things removed, the location from where they were removed and where they are being held.
- 4) The Commission team has no power to remove any documents or records other than documents or records that are relevant to the alleged breach.
- 5) Where the Commission seeks further evidence or information from your business or any colleague, it must serve a separate notice requiring that evidence or information to be provided.
- 6) The relevant section requires that the evidence or information is to be provided in writing.
- 7) There are substantial penalties of up to \$10,000 for an individual and up to \$30,000 for a company for refusing to comply with a notice to provide information or for providing any information that is false or misleading.
- 8) Any written advice given to you by your legal advisers relating to any issue (not just the current investigation) and requests for such advice are likely to be privileged and may be removed by you without being sighted by the Commission team. If there is such material (which is often on computer hard drives), you should discuss it with your legal advisors before giving the Commission team access to it. A practical solution is often for such information to be held by an independent barrister in the interim.

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## Contact details

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