



# Supreme Court of Victoria

## Practice Note SC Gen 16

### Search Orders

#### 1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 This Practice Note supplements Order 37B of the *Supreme Court (General Civil Procedure) Rules 2015* relating to search orders (also known as Anton Piller orders, after *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55).
- 1.3 Order 37B has been made as part of an endeavour to harmonise Court Rules and orders in such applications across the Supreme Courts of all other States and Territories and the Federal Court.
- 1.4 This Practice Note addresses (among other things) the Court's usual practice relating to the making of a search order and the usual terms of such an order.
- 1.5 While a standard practice has benefits, this Practice Note and the example form of order contained in Form 37BA cannot limit the judicial discretion to make such order as is appropriate in the circumstances of the particular case.

#### 2. COMMENCEMENT

- 2.1 This Practice Note was issued on 30 January 2017 and commences on 30 January 2017 and will apply to all applications made or after that date.

#### 3. DEFINITIONS

- 3.1 Words and expressions in this Practice Note that are defined in Order 37B of the *Supreme Court (General Civil Procedure) Rules 2015* have the meanings given to them in that Order.

#### 4. SEARCH ORDERS

- 4.1 Ordinarily, a search order is made without notice and compels the respondent to permit persons specified in the order ('search party') to enter premises and to search for, inspect, copy and remove the things described in the order. The order is designed to preserve important evidence pending the hearing and determination of the applicant's claim in a proceeding brought or to be brought

by the applicant against the respondent or against another person. The order is an extraordinary remedy in that it is intrusive, potentially disruptive, and made without notice and prior to judgment.

- 4.2 A form of a search order without notice is contained in Form 37BA (the footnotes and references to footnotes in Form 37BA should not be set out in the order). The Form may be adapted to meet the circumstances of the particular case. It contains provisions which are aimed at achieving the permissible objectives of a search order, while minimising the potential for disruption or damage to the respondent and for abuse of the Court's process.
- 4.3 The search party must include an independent solicitor who will supervise the search and a solicitor or solicitors representing the applicant. It may be necessary that it include other persons, such as an independent computer expert, and a person able to identify things being searched for if difficulties of identification may arise. Ordinarily, the search party should not include the applicant or the applicant's directors, officers, employees or partners or any other person associated with the applicant (other than the applicant's solicitor).
- 4.4 The order should be clear about the maximum number of persons permitted to be in the search party. The number of people in the search party should be as small as is reasonably practicable. Form 37BA contemplates that they will be named in the order. This is desirable, but if it is not possible, the order should at least give a description of the class of person who will be there (e.g. 'one solicitor employed by A, B and Co.').
- 4.5 Consistently with Rule 37B.03(2), unless the Court otherwise orders, the affidavits in support of an application for a search order should include the following information:
  - (a) a description of the things or the categories of things in relation to which the order is sought;
  - (b) the address or location of any premises in relation to which the order is sought and whether they are private or business premises;
  - (c) why the order is sought, including why there is a real possibility that the things to be searched for will be destroyed or otherwise made unavailable for use in evidence before the Court unless the order is made;
  - (d) the prejudice, loss or damage likely to be suffered by the applicant if the order is not made;
  - (e) the name, address, firm, and commercial litigation experience of an independent solicitor, who consents to being appointed to serve the order, supervise its execution, and do such other things and give such undertakings as the Court considers appropriate; and
  - (f) if the premises to be searched are or include residential premises, whether or not the applicant believes that the only occupant of the premises is likely to be:
    - (i) a female; or
    - (ii) a child under the age of 18; or
    - (iii) any other person ('vulnerable person') that a reasonable person would consider to be in a position of vulnerability because of that

person's age, mental capacity, infirmity or English language ability; or

- (iv) any combination of (i), (ii) and (iii), and any one or more of such persons.

4.6 If it is envisaged that specialised computer expertise may be required to search the respondent's computers for documents, or if the respondent's computers are to be imaged (i.e. hard drives are to be copied wholesale, thereby reproducing documents referred to in the order and other documents indiscriminately), special provision will need to be made, and an independent computer specialist will need to be appointed who should be required to give undertakings to the Court.

4.7 The applicant's solicitor must undertake to the Court to pay the reasonable costs and disbursements of the independent solicitor and of any independent computer expert.

4.8 The independent solicitor is an important safeguard against abuse of the order.

4.9 The independent solicitor must not be a member or employee of the applicant's firm of solicitors. The independent solicitor should be a solicitor experienced in commercial litigation, preferably in the execution of search orders. The Law Institute of Victoria has been requested to maintain a list of solicitors who have indicated willingness to be appointed as an independent solicitor for the purpose of executing search orders, but it is not only persons on such a list who may be appointed. The responsibilities of the independent solicitor are important and ordinarily include the following:

- (a) serve the order and the documents referred to in Rule 37B.08(1)(b);
- (b) offer to explain, and, if the offer is accepted, explain the terms of the search order to the respondent;
- (c) explain to the respondent that he or she has the right to obtain legal advice;
- (d) supervise the carrying out of the order;
- (e) before removing things from the premises, make a list of them, allow the respondent a reasonable opportunity to check the correctness of the list, sign the list, and provide the parties with a copy of the list;
- (f) take custody of all things removed from the premises until further order of the Court;
- (g) if the independent solicitor considers it necessary to remove a computer from the premises for safekeeping or for the purpose of copying its contents electronically or printing out information in documentary form, remove the computer from the premises for that purpose, and return the computer to the premises within any time prescribed by the order together with a list of any documents that have been copied or printed out;
- (h) submit a written report to the Court within the time prescribed by the order as to the execution of the order; and
- (i) attend the hearing on the return date of the summons, and have available to be brought to the Court all things that were removed from the premises. On the return date, the independent solicitor may be

required to release material in his or her custody which has been removed from the respondent's premises or to provide information to the Court, and may raise any issue before the Court as to execution of the order.

- 4.10 Ordinarily, the applicant is not permitted, without the leave of the Court, to inspect things removed from the premises or copies of them, or to be given any information about them by members of the search party.
- 4.11 Ordinarily, a search order should be served between 9.00 am and 2.00 pm on a business day in order to permit the respondent more readily to obtain legal advice. However, there may be circumstances in which such a restriction is not appropriate.
- 4.12 A search order must not be executed at the same time as the execution of a search warrant by the police or by any other proper authority.
- 4.13 If the premises are or include residential premises and the applicant is aware that when service of the order is effected the only occupant of the residential premises is likely to be any one or more of a female, a child under the age of 18 or a vulnerable person, the Court will give consideration to whether:
  - (a) if the occupants are likely to include a female or child, the independent solicitor should be a woman or the search party should otherwise include a woman; and
  - (b) if the occupants are likely to include a vulnerable person, the search party should include a person capable of addressing the relevant vulnerability.
- 4.14 Any period during which the respondent is to be restrained from informing any other person (other than for the purposes of obtaining legal advice) of the existence of the search order should be as short as possible and not extend beyond 4.30 pm on the return date.
- 4.15 Appropriate undertakings to the Court will be required of the applicant, the applicant's solicitor and the independent solicitor, as conditions of the making of the search order. The undertakings required of the applicant will normally include the Court's usual undertaking as to damages. The applicant's solicitor's undertaking includes an undertaking not to disclose to the applicant any information that the solicitor has acquired during or as a result of the execution of the search order, without the leave of the Court. Release from this undertaking in whole or in part may be sought on the return date.
- 4.16 If it is demonstrated that the applicant has or may have insufficient assets within the jurisdiction of the Court to provide substance for the usual undertaking as to damages, the applicant may be required to provide security for the due performance of that undertaking. The security may, for example, take the form of a bank's irrevocable undertaking to pay or a payment into Court.
- 4.17 An applicant without notice for a search order is under a duty to the Court to make full and frank disclosure of all material facts to the Court. This includes disclosure of possible defences known to the applicant and of any financial information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia.

- 4.18 The order to be served should be endorsed with a notice which meets the requirements of Rule 66.10.
- 4.19 Form 37BA refers to privilege in paras 21 and 24. Section 128A of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2008* (Vic) govern, within those jurisdictions, objection to compliance on the self-incrimination ground. In particular section 128A(3)-(10) govern the procedure to be followed after objection is taken in accordance with paras 21 and 24 of Form 37BA.
- 4.20 At the hearing of the summons on the return date, the Court will consider the following issues –
- (a) what is to happen to any things removed from the premises or to any copies which have been made;
  - (b) how any commercial confidentiality of the respondent is to be maintained;
  - (c) any claim of privilege by the respondent;
  - (d) any application by a party; and
  - (e) any issue raised by the independent solicitor.

#### **AMENDMENT HISTORY**

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Note No 6 of 2010

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30 January 2017