



SEARCH ORDERS

GUIDELINES FOR THE INDEPENDENT SOLICITOR

Background

Search Orders (also known as Anton Piller Orders) are ex parte orders that a superior Court (Supreme Courts, Courts of Appeal, Federal Circuit Court and Federal Court) may make to preserve important evidence pending the hearing of an applicant's claim against the respondent to the orders, or another person.

These orders are an extraordinary remedy. They are intrusive orders that take the respondent by surprise.

The independent solicitor, who is appointed by the Court to supervise the search for evidence that is the subject of the orders, is an important safeguard against their abuse.

The independent solicitor should be a solicitor who is experienced in commercial litigation, preferably in the execution of Search Orders. They also must not be a member or employee of the applicant's legal firm, and should not be connected in any way to the applicant or the respondent. The independent solicitor attends to the execution of the search as a representative of the Court, to ensure that the search is conducted in accordance with the Court's orders.

Prior to the search

It is advisable to ensure that the applicant arranges to include in the search party a forensic IT specialist to search computers and other devices that are likely to fall within the scope of the orders. The independent solicitor should refuse to supervise a Search Order if the applicant refuses to do so: to read and copy the hard drive of any computer is a skilled task that the independent solicitor should not undertake.

Further, the Court will usually require an independent computer expert to give undertakings in relation to the search of computers and on no account should an independent solicitor provide these undertakings in lieu of an expert.

It may also be appropriate for the applicant's solicitor to arrange for an accredited translator to be present, if the first language of the respondent is not English.

As the independent solicitor:

- you should read and familiarise yourself with:
 - the applicable Court Practice Note
 - the checklist that accompanies these guidelines
 - the guidelines for the respondent that accompany these guidelines
 - section 128A of the *Evidence Act 1995*;
- you should avoid travelling with the applicant's search party to the premises on the day of the search to preserve your neutrality and independence; and
- you may wish to ask the applicant's solicitor if you can have an assistant solicitor accompany you on the search – to maximise the efficiency of the search, to ensure that you are properly resourced and to increase the pool of litigators in your firm experienced at supervising search orders.

Responsibilities of the independent solicitor

Under the current harmonised Federal Court and NSW Supreme Court Practice Notes, the independent solicitor is required to do the following:

Serve the Court documents

The independent solicitor must serve the orders, the originating application and statement of claim, the affidavits relied on in support of the application and any relevant notice of motion.

The orders should clearly identify the premises to be searched by reference to street address or location, as well as identifying whether they are private or business premises. In some cases you may be provided with additional information such as the Land Registry title and GPS location.



The Practice Note sets out that ordinarily Search Orders should be served between 9am and 2pm on a business day, in order to allow the respondent to obtain legal advice. However, the Practice Note acknowledges that there may be circumstances in which such timing is not appropriate.

On service of the Court documents the independent solicitor should:

- confirm that the person who opens the door is the respondent, and ask for the respondent by name if it is not;
- clearly identify themselves and everyone else in the search party to the respondent;
- explain why each person is present;
- bar from entry any person not specifically named in the orders; and
- ascertain from the respondent who else is at the property.

Offer to the respondent to explain the terms of the orders

The independent solicitor:

- must offer to explain and, if the offer is accepted, explain the terms of the Search Orders to the respondent, before the search is undertaken;
- is not obliged to explain the terms of the Orders if the respondent does not wish for that to happen;
- should explain that the purpose of the Search Orders is to preserve material that is relevant to the proceedings that may be found on the property, for use as evidence in a later trial;
- should tell the respondent that the Search Orders permit entry to the members of the search party to conduct a search at the subject property for the items listed in the Search Orders and for those items to be listed and then removed into the possession of the independent solicitor once the search is completed before the matter returns to Court; and
- should highlight the return date and time.

Explain to the respondent their right to obtain legal advice

The independent solicitor must explain to the respondent that they have the right to obtain legal advice. The independent solicitor should encourage

the respondent to do so, and allow the time prescribed in the Orders for this to be done. Usually, 2 hours is allowed.

If invited to do so, the independent solicitor may discuss the Orders with the respondent's solicitor. It is important that soft copies of all Court documents are available for transmission to the respondent's solicitor if this is requested. At the very least, the independent solicitor should have copies of the documents on a USB to enable them to be downloaded and transmitted if requested.

If, as a result of advice being obtained, the respondent wishes to make an application to the Court, you should encourage them to do so promptly.

If the respondent indicates that they do not intend to obtain legal advice, you should make it clear that it is not your role to advise them of their legal rights and that they run the risk of a contempt action if they do not act in accordance with the Orders.

Sometimes the respondent will ask the independent solicitor for assistance to obtain legal advice. Before the search it is advisable to make enquiries of local practitioners who may be available and experienced to perform this role and for their names to be offered to the respondent if requested on the day.

Inform the respondent about legal professional privilege and the privilege against self-incrimination

Issues relating to claiming privilege commonly arise. The independent solicitor should explain the availability of the privilege against self-incrimination as well as client legal privilege in general terms that will be readily understood by a non-lawyer. For example:

If you are aware of anything that might be revealed during the search that could incriminate you or may expose you to a civil penalty, you may claim a 'privilege' that will prevent the disclosure or production of that information to the search party and to the applicant, at least until a judge orders otherwise.

Incriminating information in this context is information that could expose you to the possibility of a criminal charge, or a fine or disqualification of office, such as a company directorship.

As to legal professional privilege, the independent solicitor should explain in broad terms that privilege



may attach to communications between the respondent and his or her legal advisors and that any documents that the respondent wishes to claim privilege for should be identified and stored separately from other material removed from the subject property. For example:

You may also claim a privilege over any documents that contain legal advice. The privilege exists to preserve the confidentiality that exists between you and your lawyer over any legal advice you may have obtained.

Please identify to me any items you wish to claim any privilege over (whether the privilege to protect you against self-incrimination and the privilege that protects your legal advice), and I will separate those items from the rest of the items that will be removed from the premises under the terms of the Search Order. I will place those items in a sealed box or envelope which I will mark “privileged”.

Please also tell me if any privileged items exist on computers (or other electronic devices) so that I can make arrangements with the independent computer expert accompanying the search party today to separate those items electronically in a way that will preserve the privilege for now.

This will ensure that those items will not be seen by the search party unless the Court determines that your claim for privilege cannot be upheld. It is for the Court, not me to determine whether your claim for privilege can be maintained. Until determined, those items will not be looked at by anyone other than you or your own lawyer, but they will be provided to the Court on the return date that is indicated on the Search Order papers. You will need to seek legal advice if you wish to pursue any such claims of privilege. Your own lawyer may press those claims on your behalf in Court.

If the applicant’s solicitors has chosen to complete the Law Society’s template “Guidelines for the Respondent” (available on the Law Society’s website) a copy of those Guidelines can be provided to the respondent.

Supervise the carrying out of the Search Orders

It is not the independent solicitor’s role to assist in the search. The search for and identification of the property to be removed is to be carried out by the search party and the computer expert under the supervision of the independent solicitor.

It is the independent solicitor’s role to supervise the search. Therefore, you should observe both the applicant’s party (to ensure that material seized does not go beyond the terms of the Search Order) and the respondent (to ensure that all material covered by the Search Orders is able to be seized). You should record all that transpires during the search and for this purpose take detailed notes.

Remove material from the premises

Before removing anything from the premises the independent solicitor must make a list of the items to be removed: see *Guidelines for Independent Solicitors*.

A sticker should be placed on each item to be removed, numbered consistently with the list.

Before removing anything from the premises the independent solicitor should give the respondent a reasonable opportunity to review the list and sign their name after a declaration in the following terms:

I have been given a reasonable opportunity to check the correctness of this list and confirm that the items listed are to be removed by [name of independent solicitor] in accordance with the terms of the Search Order in these proceedings dated [date].

The independent solicitor must provide the parties with a copy of the list. If a photocopy of the signed list cannot be provided to the parties on the day because there are no suitable copying facilities at the premises, the independent solicitor must forward copies as soon as practicable after completion of the search.

Take custody of all things removed from the premises until further order

The independent solicitor should take all items (apart from computers) back to their office. They must not under any circumstance provide any of the items to the applicant’s lawyers.

The independent solicitor must ensure that the items are kept in a safe place: they have been removed pursuant to Court Order and the independent solicitor is responsible for them until further Order.

If the search party does not include an independent computer expert, and the independent solicitor



considers it necessary to remove a computer from the premises for safekeeping or for the purpose of copying its contents electronically and printing out information in documentary form, they should refer to the precise terms of the Search Order. The Example Form of a Search Order, attached to the Practice Note, permits the independent solicitor to remove the computer from the premises for that purpose and cause that purpose to be achieved.

Prepare written report to the Court and attend Court on the return date of the Orders

The independent solicitor's report should be contained in an affidavit, in numbered paragraphs, and address the following:

- chronology of appointment;
- instructions and list of materials/documents received from the applicant's lawyers;
- brief details of preparation undertaken (including any pre-search briefing);
- confirmation that the terms of the Search Orders and the undertakings given to the Court were read and understood;
- the date the Search Orders were made, the time of commencement of the search and the address at which it was carried out;
- details of all those present and what was said at the time of serving the Court documents;
- confirmation of the solicitor's recommendation to the respondent to obtain legal advice and what occurred thereafter;
- summary of explanation of Search Orders;
- summary of all aspects of the search - the time allowed for obtaining legal advice, the precise locations searched, when each room was searched and by whom, the property removed, any communication with the respondent and other persons, including of any phone calls and email communications during the search;
- all items searched for, how they are identified and referred to;
- summary of liaison with the independent computer expert, identification of items searched, any equipment removed and the whereabouts of those items after the conclusion of the search;

- observations about the search, in particular whether it was done in conformity with the Search Orders, and the attitude of the respondent throughout; and
- the time and date of production to the Court of the labeled items removed from the premises.

The independent solicitor must attend the hearing on the return date, and take to 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 the execution of the Order. The Court may require further information as to the execution of the Order.

Practical matters and issues for consideration

Pre-search briefing

If time permits, it is recommended that the independent solicitor meets with the applicant's lawyers and the search party. This meeting should be held at a neutral location such as at office of the independent solicitor. The meeting could take place before or after the Search Orders are made.

This meeting provides an opportunity for the independent solicitor to make the following clear to the applicant and search party:

- that they may not disclose the existence of the Search Orders to anyone until at least 4.30pm on the return date;
- that the independent solicitor's role is limited to supervision of the search and execution of the Search Orders, that the independent solicitor has a duty to report all that transpires to the Court in the post-search report and that the independent solicitor will attend Court on the return date to provide any additional information in Court as may be required; and
- no item searched for will be handed to anyone in the search party at the time of the search. All items removed will remain securely in the office of the independent solicitor, until further order of the Court.



Before the search starts

It is the duty of the applicant to inform the Court as to whether the premises to be searched are private or business and of the likelihood of there being vulnerable persons, such as children, present. If the property to be searched is residential and this fact has not been disclosed to the Court, the search should be halted and arrangements made to contact the duty judge.

Whenever the property to be searched is residential there is a likelihood of persons being present who are not subject to the terms of the Search Orders. They are entitled to a measure of protection against the intrusive nature of the search. If at all possible, children should not be present and you should ensure that time is allowed for the respondent to make suitable arrangements for children to be removed into the care of others before the search starts. An order for postponement of the search while vulnerable persons are removed may be appropriate.

If the premises are occupied by a woman and young children and this has not been disclosed to the Court, you should ascertain if the premises are their home and if so recommend that the duty judge be contacted.

The independent solicitor has no power to force entry and cannot enter the premises if the respondent refuses to allow the search party to enter. If you (or any other member of the search party) are threatened with violence, the search should be postponed and the search party should withdraw from the property until the threat of violence is withdrawn or, in exceptional cases, the police are called to deal with any real threats or intimidation. In this circumstance the independent solicitor should report by email to the judge's associate, copied to the applicant's solicitor, what transpired on attempted entry.

The respondent is obliged to provide entry only to those people named in the Search Orders. If the applicant has alerted the media and they are in attendance at the time of the search, they are not permitted to take part nor to observe the search and the respondent is entitled to deny the media entry. Furthermore, for the applicant to have alerted the

media may be in contempt of the Search Orders, a condition of which is confidentiality. The applicant, search party and the respondent are not permitted to disclose any details of the Search Orders until at least 4.30pm on the return date of the Search Orders, with the exception that the respondent may obtain legal advice.

Privilege

If the respondent does not obtain legal advice during the search, or if there is a claim for privilege over material stored on an electronic device, it may be safer for the respondent to claim privilege over all of the material to be removed.

The respondent may be advised by his or her own lawyer to gather privileged material and deliver that material into the lawyer's safe custody, rather than have the privileged information handed to the independent solicitor. Where the respondent's own lawyer is present during the execution of the Search Orders and undertakes to provide safe custody of the privileged material, this should be encouraged. It is better for the independent solicitor to allow the respondent's own lawyer to take custody of the privileged material so long as the items removed are identified and signed for in the same way as the balance of material removed from the premises and the respondent's own lawyer is retained to represent the respondent in the matter and specifically on the return date.

The respondent's own lawyer will then be required to deliver the privileged material to the Court on the return date.

If the respondent's own lawyer is not present, the privileged material will have to be handed to the independent solicitor in a separately marked envelope or package.

If there is any doubt, any documents that might be privileged should be the subject of a claim. This allows the search to proceed without delay, and the claim to be determined by the Court at a later date. It is not the role of the independent solicitor to explain to the respondent how to claim the privilege. If the respondent should make any statements that would



tend to incriminate him or herself, the independent solicitor is obliged to record those statements in the report to the Court.

The independent solicitor should list privileged communications separately from other, non-privileged items and place the privileged communications in an envelope marked as such: see further below.

Dispute about the terms of the Orders

If there is a dispute as to the scope of the Search Orders, clarification should first be sought from the applicant's solicitor. If this cannot be done efficiently during the search, you should make careful notes of the exchanges and the disputes, list the disputed property and clearly separate this from the uncontested items, to be determined by the Court at the hearing on the return date.

If in doubt, remove all disputed items for delivery to the Court to enable the Court to make a determination in relation to any materials in dispute.

Completion of the search within the permitted time frame

If the search cannot be completed within the time allowed by the terms of the Orders, the independent solicitor should seek an estimate from the applicant's solicitor as to how much longer is likely to be needed and, if appropriate, seek from the respondent an extension of time to complete the search. If no solution can be negotiated, the independent solicitor should seek an extension of time from the duty judge. All exchanges should be noted and included in the independent solicitor's search report.

All communications between the respondent and the applicant's solicitors during the search should be conveyed through the independent solicitor.

What if something goes wrong?

Neither the Rules nor the Practice Note address issues that may arise in the execution of the search, such as any dispute as to the identity or remit of the premises the subject of the search, what powers the independent solicitor has if they think that the search party has overstepped the bounds of the Search Orders, or the respondent has been obstructive.

However, there is authority for the proposition that the Court will appreciate a solicitor who acts reasonably and with common sense, and looks to negotiate a compromise solution.

The independent solicitor's role is to ensure, so far as is possible, that the Court's Orders are implemented. While the independent solicitor is not given a specific power to halt the search, there is no doubt that the independent solicitor can make his or her opinion on any issue known to the applicant's lawyers and may recommend a course of action such as (in an appropriate case) the suspension of the execution of the Search Orders and the re-listing of the matter before the Court.

If a search is suspended, the independent solicitor must remind the respondent that they are subject not only to an injunction restraining their conduct but specific Orders concerning destruction or deletion of records. The Practice Note should be complied with in relation to any documents or other records that have been collected at the time of the suspension: that is, they should be itemised, signed for by the respondent and removed into the safe custody of the independent solicitor.