

Search Orders: “The Nuclear Weapon in the Court’s Armoury”

Davies Collison Cave’s CPD Day 2025

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AGENDA

Introduction

Key legal principles relating to search orders

- Application
- Execution
- Discharge

The anatomy of a search order

Tips and traps: a guide for in-house lawyers

Introduction

What are search orders?

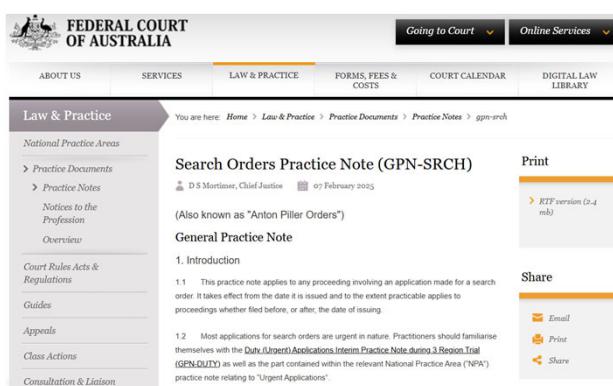
- Search orders (also known as Anton Piller orders) are essentially civil search warrants and they are a powerful evidence preservation tool in civil litigation.
- A search order directs the respondent to permit appointed persons to enter their premises and seize evidence material to the applicant's claim.
- The order is an extraordinary remedy in that it is intrusive, potentially disruptive, and usually made without notice and prior to the service of an originating process.
- The draconian nature of the order is why it has been referred to as a "nuclear weapon in the Court's armoury": *Bank Mellat v Nikpour* [1985] FSR 87, 92 (per Donaldson LJ).

A search order is an evidence preservation tool

- A search order is purely an evidence preservation tool – the seized material is kept with an independent lawyer and then the Court. Search orders do **not** ordinarily allow the applicant to inspect or even take custody of the material.
- Search orders cannot merely be used as an investigatory tool or an alternative for preliminary discovery.
- In **exceptional** circumstances, it may be possible to obtain leave to inspect seized documents, for example to ensure that pleadings have been adequately prepared and proper discovery given.

Jurisdiction

- Modern Australian practice is guided most commonly by the provisions in the *Federal Court Rules 2011* (Cth).



The screenshot shows the Federal Court of Australia website. The top navigation bar includes links for 'Going to Court' and 'Online Services'. The main menu has options like 'ABOUT US', 'SERVICES', 'LAW & PRACTICE', 'FORMS, FEES & COSTS', 'COURT CALENDAR', and 'DIGITAL LAW LIBRARY'. The 'LAW & PRACTICE' menu is currently selected. A sub-menu for 'Law & Practice' includes 'National Practice Areas', 'Court Rules Acts & Regulations', 'Appeals', and 'Consultation & Liaison'. The main content area displays the 'Search Orders Practice Note (GPN-SRCH)' document. It includes a 'Print' button, a 'Share' button with options for 'Email', 'Print', and 'Share', and a download link for the RTF version (2.4 mb). The document itself contains several paragraphs of legal text, including sections on the scope of the note and its application to search orders.

Key legal principles regarding search orders

Applying for search orders

Making an application

- Ordinarily, an application for search orders is an urgent, *ex parte* application.
- Practically, the application is made in the Federal Court by contacting the Associate to the Duty Judge on a confidential basis, and:
 - providing a copy of the interlocutory application for search orders and supporting material; and
 - requesting a hearing date for an *ex parte* hearing before the Duty Judge.

Applying for search orders

Requirements for grant of search order

FCR r 7.43:

- a. an applicant seeking the order has a ***strong prima facie case*** on an accrued cause of action; and
- b. the potential or actual ***loss or damage*** to the applicant will be serious if the search order is not made; and
- c. there is sufficient evidence in relation to a respondent that:
 - (i) the respondent possesses ***important evidentiary material***; and
 - (ii) there is a ***real possibility that the respondent might destroy such material or cause it to be unavailable*** for use in evidence in a proceeding or anticipated proceeding before the Court.

Applying for search orders

Strong prima facie case – two common examples:

- **Breach of confidence** – e.g., where a former employee of a company takes confidential information and establishes a rival company; and
- **Copyright infringement and trade mark infringement in the context of counterfeiting** – e.g., where a counterfeiter is producing and selling counterfeit clothing bearing infringing trade marks and artistic works which are copyright-protected.

Real possibility of destruction of evidence

- This requirement is intended to highlight the exceptional nature of the discretionary power.

Applying for search orders

Full, frank and fair disclosure

- An applicant seeking an order *ex parte* must make a full, frank and fair disclosure of all matters within its knowledge and which are material to the Court.
- What is a material fact is a matter which is relevant to the Court's determination. The matter must be material in the sense of being capable of having affected the court's decision, and not that it would have affected the decision.
- The case law counsels that affidavits in support of search orders should "err on the side of excessive disclosure".

Applying for, and executing, search orders

Search party

Applicant's Lawyer

- The search is to be conducted by the applicant's external solicitors.

Independent Lawyer

- The search party must include an independent lawyer who will supervise the search and a lawyer or lawyers representing the applicant.
- The independent lawyer has several important responsibilities, e.g., serving the order, supervising the carrying out of the order, and submitting a report to the Court as to the execution of the order.

Applying for, and executing, search orders

Search party: Others?

Independent Computer Expert

- An independent computer expert will be required if it is envisaged that the respondent's computer(s) will need to be searched, or if the respondent's computers are to be imaged.

Person to address vulnerabilities

- If the search 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 consider whether: the search party should include a woman; and should include a person capable of addressing the relevant vulnerability.

Applying for, and executing, search orders

Undertaking as to damages

- Appropriate undertakings to the Court will be required of the applicant, the applicant's lawyer, the independent lawyer, and any independent computer expert, 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 lawyer's undertaking includes an undertaking not to disclose to the applicant any information that the lawyer has acquired during or as a result of the execution of the search order, without the leave of the Court.

Applying for, and executing, search orders

The need for private investigation

- A private investigator may be needed to find out:
 - Whether there are any children, females or vulnerable persons in the search premises; and
 - Whether the respondent or respondents will be home to accept service. This is important to determine when the search order can be executed, because the Federal Court Practice Note states that, ordinarily, a search order should be served between 9:00am and 2:00pm on a business day in order to permit the respondent more readily to obtain legal advice.

Discharge of search orders

- After a search order has been made by the Court, and even after it has been executed by the applicant via the search party, there is a risk that the search order will be set aside or discharged by the Court.
- Before a search order has been executed, it may be set aside on the basis that the grounds for making the order were not satisfied.
- After a search order has been executed, the Court may set aside the orders *ab initio* if there has been bad faith or material non-disclosure.
- Finally, even if the Court finds that there was material non-disclosure, the Court retains a discretion to not set aside search orders.

The anatomy of a search order

Matter details and penal notice

PENAL NOTICE

No. of 20

Federal Court of Australia
District Registry: [State]
Division: [Division]

[Name of First Applicant] [if 2 or more add "and another" or "and others"]

Applicant[s]

[Name of First Respondent] [if 2 or more add "and another" or "and others"]

Respondent[s]

TO: [name of person against whom the order is made]

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THE ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

TO: [name of person against whom the order is made]

This is a 'search order' made against you on [insert date] by Justice [insert name of Judge] at a hearing without notice to you after the Court was given the undertakings set out in Schedule B to this order and after the Court read the affidavits listed in Schedule C to this order.

Introduction, including "Return Date"

Introduction

1. (a) the application for this order is made returnable immediately.
- (b) the time for service of the application, supporting affidavits and originating process is abridged and service is to be effected by *[insert time and date]*.
2. Subject to the next paragraph, this order has effect up to and including *[insert date]* ('the Return Date'). On the Return Date at *[insert time]* am/pm there will be a further hearing in respect of this order before Justice *[insert name of Judge]*.
3. You may apply to the Court at any time to vary or discharge this order; including, if necessary, by telephone to the judge referred to in the immediately preceding paragraph (phone No.) or to the Duty Judge (phone No.).
4. This order may be served only between *[insert time]* am/pm and *[insert time]* am/pm [on a business day]^[2]

Entry, search and removal

Having permitted members of the search party to enter the premises, you must:

- (a) permit them to leave and re-enter the premises on the same and the following day until the search and other activities referred to in this order are complete;
- (b) permit them to search for and inspect the listed things and to make or obtain a copy, photograph, film, sample, test or other record of the listed things;
- (c) disclose to them the whereabouts of all the listed things in the respondent's possession, custody or power, whether at the premises or otherwise;
- (d) disclose to them the whereabouts of all computers, computer disks and electronic information storage devices or systems at the premises in which any documents among the listed things are or may be stored, located or recorded and cause and permit those documents to be printed out;
- (e) do all things necessary to enable them to access the listed things, including opening or providing keys to locks and enabling them to access and operate computers and providing them with all necessary passwords;
- (f) permit the independent lawyer to remove from the premises into the independent lawyer's custody;

Restrictions on entry, search and removal

12. Before permitting entry to the premises by anyone other than the independent lawyer, you, for a time (not exceeding two hours from the time of service or such longer period as the independent lawyer may permit):-

- (a) may seek legal advice;
- (b) may ask the Court to vary or discharge this order;
- (c) (provided you are not a corporation) may gather together any things which you believe may tend to incriminate you or make you liable to a civil penalty and hand them to the independent lawyer in (if you wish) a sealed envelope or container; and
- (d) may gather together any documents that passed between you and your lawyers for the purpose of obtaining legal advice or that are otherwise subject to legal professional privilege or client legal privilege, and hand them to the independent lawyer in (if you wish) a sealed envelope or container.

Computers

20. (a) If it is expected that a computer will be searched, the search party must include a computer expert who is independent of the applicant and of the applicant's lawyers ('the independent computer expert').

(b) Any search of a computer must be carried out only by the independent computer expert.

(c) The independent computer expert may make a copy or digital copy of the computer hard drive and remove that copy or digital copy from the premises.

(d) The independent computer expert may search the computer or the copy or digital copy of the computer hard drive at the premises and/or away from the premises for listed things and may copy the listed things electronically or in hard copy or both.

(e) The independent computer expert must as soon as practicable and, in any event, prior to the hearing on the return date, deliver the copy or digital copy of the computer hard drive and all electronic and hard copies of listed things to the independent lawyer, together with a report of what the independent computer expert has done including a list of such electronic and hard copies.

(f) The independent lawyer must, at or prior to the hearing on the return date, deliver to the Court all things received from the independent computer expert and serve a copy of the latter's report on the parties.

Provision of information

23. Subject to paragraph 24 below, you must:

(a) at or before the further hearing on the Return Date (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing as to:

(i) the location of the listed things;

(ii) the name and address of everyone who has supplied you, or offered to supply you, with any listed thing;

(iii) the name and address of every person to whom you have supplied, or offered to supply, any listed thing; and

(iv) details of the dates and quantities of every such supply and offer.

(b) within [] working days after being served with this order, make and serve on the applicant an affidavit setting out the above information.

Schedule A: Premises

The premises located at [insert address or addresses] including any vehicle or vehicles under the respondent's control on or about those premises.

Listed Things

1. []

2. []

3. []

Search Party

1. The independent lawyer: [insert name and address]

2. The applicant's lawyer or lawyers:

(a) [insert name and address] [or description e.g. a partner or employee lawyer of A, B and Co].

(b) [insert name and address] [or description e.g. a partner or employee lawyer of A, B and Co].

(c) [insert name and address] [or description e.g. a partner or employee lawyer of A, B and Co].

3. Other members of the search party:

(a) [insert name and address] in the capacity of [e.g. an independent computer expert]

(b) [insert name and address] in the capacity of [insert capacity]

Schedule B: Undertakings Given to the Court

1. The applicant undertakes to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.
2. The applicant will not, without leave of the Court, use any information, document or thing obtained as a result of the execution of this order for the purpose of any civil or criminal proceeding, either within or outside Australia, other than this proceeding.
3. The applicant will not inform any other person of the existence of this proceeding except for the purposes of this proceeding until after 4:30pm on the Return Date.

Schedule C: Affidavits Relied On

Name of deponent	Date affidavit made
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(1) []	[]
(2) []	[]
(3) []	[]

Name and address of applicant's lawyers

The Applicant's lawyers are:

[Insert name, address, reference, email address, fax and telephone numbers both in and out office hours].

Tips and traps: a guide for in-house lawyers

Thorough investigation, planning and preparation

- A very thorough internal investigation is needed to find out what the prospective respondent has done, and whether each of the requirements for the grant of a search orders can be satisfied.
- Private investigation may be necessary.
- It may also be necessary to engage: an independent computer expert if it is likely that computers will need to be searched or imaged; and a support person if the respondent has vulnerabilities.
- The state law societies keep lists of solicitors willing to be appointed as an independent lawyer in the execution of search orders.

Evidence preparation

- Affidavits in support of an application for a search order should include, e.g.:
 - Evidence which goes to the strong *prima facie* case against the respondent.
 - A description of the things or category of things in relation to which the order is sought.
 - Why the search 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 unless the order is made.
 - The prejudice, loss or damage likely to be suffered by the applicant if the order is not made.

Practical & business considerations

Costs and business disruption

- Applying for, executing, and resisting the discharge of search orders can be costly and lead to some business disruption.

Media concerns

- Due to the intrusive nature of search orders, it is possible that the matter will draw media attention.

Alternative relief?

- If there is no real risk of destruction, an order for preliminary discovery may give the applicant what it is looking for.

Tips regarding execution

Have a detailed plan or schedule for the day of execution

- Establish an agreed meeting point and way of contacting each search party member.
- Familiarise yourself with the FCA's Practice Note.
- Take detailed notes about execution of the search order.
- Great communication between the applicant's lawyers is essential for concurrent, multi-premises searches.

Thank you