COMPETITION & REGULATION UPDATE

What to do if the ACCC come knocking: Practical tips for handling “dawn raids” by the ACCC

INTRODUCTION

In our third and final article on the Australian Competition & Consumer Commission’s (ACCC) coercive information-gathering powers, we examine the ACCC’s search and seizure powers under warrant (commonly known as “dawn raids”) and suggest some practical tips for companies facing an unexpected visit by the ACCC. Our first article in this series can be read here and our second article can be read here.

DAWN RAIDS: ACCC’S SEARCH AND SEIZURE POWERS

A “dawn raid” is an unannounced visit by the ACCC, usually to a company’s head office or other premises but possibly also to employees’ homes. The ACCC has powers to enter and search premises and seize materials where it has reasonable grounds to believe that there is evidentiary material on the premises that is relevant to a contravention, or possible contravention, of the Competition and Consumer Act (CCA). The ACCC must obtain a search warrant prior to entering premises (or obtain consent from the company).

Dawn raids are most commonly used in cartel investigations. While dawn raids are historically very rare in Australia, the focus of ACCC enforcement activities on detecting and prosecuting cartels, the criminalisation of cartels in Australia, and the increasing use of dawn raids by overseas regulators in their investigations of suspected cartels suggest that complacency is inadvisable. Rather than being taken by surprise by a “dawn raid”, it is important that your company has clear guidelines for employees to follow if the ACCC turns up at your offices.

In this update we describe the steps you should take if the ACCC arrives unexpectedly with a search warrant for your company’s premises.

PRACTICAL TIPS FOR DEALING WITH DAWN RAIDS

Do not obstruct entry of the ACCC onto the premises. The staff who are likely to first interact with the ACCC when they arrive at the company’s premises should have clear instructions about what to do if a warrant is executed against the company. These staff may be receptionists, front office staff, branch office staff, site managers or retail managers. They should:

- Ask to see the search warrant, and take a copy.
- Ask to see the ACCC inspector’s identity card and take a copy of that identification. If the inspector fails to produce an identity card upon request, staff may refuse entry. Staff should also ask to see the identification of all persons assisting the inspector.
■ Ask the ACCC officers to wait in a meeting room until a senior manager or lawyer of the company arrives. If the ACCC officers refuse to wait, permit them to enter, however make a note of why they refused to wait.

■ Remain calm and courteous.

Do not impede or obstruct the search (unless the ACCC inspector fails to produce a warrant and identity card). Failure to comply with a warrant is a serious offence under the CCA. Refusing to answer questions or to provide reasonable facilities and assistance in relation to the warrant is punishable by a fine of $5,400.

Do call senior managers and lawyers. Staff should immediately call senior management and the company’s lawyers (either in-house legal counsel or external lawyers) to inform them of the ACCC’s presence and the search warrant. Staff should inform the company’s management and lawyers of the number of ACCC officers present, so that they can arrange for sufficient company representatives to be present to monitor each ACCC officer’s search. Ensure that the staff who are likely to first interact with the ACCC have up-to-date contact details for the company’s management and lawyers.

Do fully inform the company’s lawyer of the contents of the warrant. Staff should provide the company’s lawyer with a copy of the search warrant. The lawyer will determine whether the search warrant is valid and advise on the scope of the permitted search and how the company should comply with the warrant.

Do monitor the ACCC’s search. As long as they do not impede the search, staff and/or the company’s lawyers should:

■ Accompany each ACCC officer at all times while they are on the company’s premises and take notes. Carefully observe their activities and what they are saying to company personnel and each other. Note the locations searched and the time spent in each location, details of what was searched in each location, search criteria used for electronic searches, any material of particular interest to officers and the questions asked of staff and answers given. These observations may be very helpful later in attempting to determine the scope of the ACCC’s investigation.

■ Prepare a list of all documents viewed, copied or seized by each ACCC officer.

■ Receipts and copies of all hardcopy and electronic documents seized by the ACCC.

■ Try to ensure that only material covered by the warrant is taken in the search.

Do assist the ACCC. During the dawn raid staff should:

■ Provide the ACCC officers with all reasonable facilities and assistance. This might include unlocking cupboards, providing photocopying and printing facilities, making meeting rooms available to ACCC officers and providing IT support (including providing administrator access rights, providing passwords and/or temporarily blocking individual email accounts).

■ Answer questions asked by the officers, but keep answers short, factual and accurate. Staff should only answer the question if it relates to the search warrant and should not volunteer extra information that has not been requested. Make a note of any questions asked by the ACCC officers and the answers given.

■ Upon request, produce evidential material to which the warrant relates. However, do not volunteer documents and do not provide any material that is outside the scope of the warrant. Further, do not consent to the search of an area or documents that are not identified in the search warrant.

■ If offices, workstations, desks or filing cabinets are sealed by inspectors overnight, all personnel (including security and cleaning staff) must be instructed not to breach the seal.

Do not destroy or hide documents or files. Issue an internal communication advising all personnel involved in the investigation that no documents relating to the investigation should be destroyed. Also consider whether it is necessary to place holds on routine destruction of documents or files and/or have IT put an immediate block on the deletion of electronic records, including emails.
**Do not** give ACCC officers documents subject to legal professional privilege. The company is not required to produce documents that are subject to legal professional privilege (being documents which contain communications between your company and its lawyers for the purpose of receiving legal advice). Documents staff know are subject to legal professional privilege should be put in a secure container and given to the company’s lawyer. If staff are unable to verify whether documents are subject to legal professional privilege but consider that they may be, staff should expressly reserve the company’s right to continue to claim privilege. Staff should take a copy or make a note of such documents and request that the documents be stored separately from and not reviewed by the ACCC until the issue of privilege is resolved.

**Do** consider the implications for the company’s other offices within and outside of the jurisdiction. The ACCC’s investigation may involve co-ordinated dawn raids on multiple sites across Australia. If the ACCC conducts a search of one of the company’s premises, the company should also consider checking on or sending staff to other locations which the ACCC is likely to simultaneously search, for example, the CEO’s home, a factory or warehouse or retail stores. Also consider the likelihood of raids by competition regulators in other jurisdictions in which the company has offices or operations.

**Do** conduct a review meeting immediately after the dawn raid. Consider the nature of the investigation, the materials the ACCC has copied or seized, methods for dealing with confidential or privileged materials and the company’s next steps in relation to the ACCC’s investigation. These next steps may include conducting an immediate internal investigation, so that the company is best placed to decide how to approach the remainder of the ACCC’s investigation.

**CONCLUSION**

Time is of the essence in relation to dawn raids, particularly if it is part of a cartel investigation. Get the company’s internal or external lawyers involved as soon as possible. If we can assist your company in responding to a dawn raid, please contact us.

For further information, please refer to DLA Piper’s Rapid Response [website](http://www.dlapiper.com) and [app](http://www.dlapiper.com).

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