

## **SEARCH WARRANT TIPS**

When you encounter a matter in which a search warrant has been issued it is probably a good idea to make some further investigations in order to identify whether there are any issues relating to the issue of the warrant or its execution that could either assist your client's defence and or identify that your client has a potential civil action against Police.

Initially you will have 3 sources of information being from the Client, the Court and the Police.

### **1. CLIENT**

When taking your client's instructions and finding out what happened you may want to keep in mind the following issues

- When was the search conducted?

(Date, Time, Day (6am -9pm s72 LEPR Act) or  
Night (9pm – 6am s72 LEPR Act)

- Did the Police announce themselves prior to entry to the premises?

(s68 LEPR Act)

- Were they given a copy of the Occupier's Notice?

(s67 LEPR) If they were, sight it and copy it.  
Non service of occupiers notice = unlawful search  
(Black v Breen (2000) NSWSC 987 , )  
(Ballis v Randell (2007) NSWSC422)

- Did you notice any mistakes on the Occupier's Notice or Search Warrant ?

(eg: Was it the right house? Code of Practice for CRIME  
Custody, Rights, Investigation, Management and Evidence  
[www.police.nsw.gov.au/ data/assets/pdf file/0007/10880  
8/Code CRIME - January2012.pdf](http://www.police.nsw.gov.au/data/assets/pdf_file/0007/10880/8/Code_CRIME_-_January2012.pdf) )

Did it list an offence?

- Did the Police show you the warrant? Did you ask to see the warrant?

(s69 LEPR Act)

- Did the Police video tape the search?

(NSW Police Force Standing Operating Procedures, Search Warrant 12 June 2009 See Annexure D; PIC Research & Issues Paper Number 07 May 2011 –Corruption Risks Associated with the Execution of Search Warrants: A Review of Compliance with NSW Police Force Policies and Guidelines  
[www.pic.nsw.gov.au/files/reports/ProjectOstara.pdf](http://www.pic.nsw.gov.au/files/reports/ProjectOstara.pdf) )

- Was any part of the search taking place away from the video operator?
- Was the search stopped and recommenced for any reason  
(eg: video battery ran out, Police left and came back)
- Describe what the Police did during the search?  
(Did they open drawers when searching for an elephant?)
- Was there an independent Police officer present  
(NSW Police Force Standing Operating Procedures, Search Warrants 12 June 2009)
- Who else was there? Were the media there? Did they enter the property?  
(TCN Channel 9 Pty Ltd v Anning (2002) NSWSCA 82; NSW Police Media Policy Feb 2013 9.1 Crime Scenes and the Media p 34  
[www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0003/17526/9/Media\\_Policy\\_4\\_February\\_2013\\_FINAL.pdf](http://www.police.nsw.gov.au/_data/assets/pdf_file/0003/17526/9/Media_Policy_4_February_2013_FINAL.pdf) )
- Did the Police search you or any other person at the premises?  
(s50 LEPR Act “reasonably suspects of having a thing mentioned in the warrant”)
- Describe the search, did you or anyone else have to remove any clothing during the search? (LEPR Act, ss31,33,34)
- What had happened in the period prior to the Police searching anyone? What did the Police say? What did you or anyone else say? Was there a police dog? What did it do?
- Did the Police seize anything? If so what? Did they get a receipt for the property seized? Was everything listed on the receipt?

(If so, Sight it, Copy it)(s49 LEPR Act, Reg 8 LEPR Reg 2005)

- Did the Police warn you prior to asking you any questions?  
(s138,s139 Evidence Act 1995)

## 2. COURT

The Occupiers Notice will tell you what Court the Search Warrant was issued from and you should go and inspect the Search Warrant application or get a colleague to do it for you (if it is located far away eg: Parramatta After Hours Registry) you never know what you will find.

Sometimes the Court will provide you with a copy of the documents but more usually they will let you inspect and take notes.

My practice is to print off the blank Search Warrant forms from the Regulations (Schedule 1 LEPR Regs 2005);

Form 1 Application for Part 5 warrant;

Form 1A Application for Covert Search Warrant,

Form 1B Application for Criminal organisation warrant,

Form 2 Application for Search Warrant other than Part 5,

Form 3 Application for Suspected Domestic Violence offence-entry by warrant where entry denied),

Form 4 Application for Crime Scene Warrant

Form 5 Application for warrant to use dog to carry out drug detection warrant,

Form 6 Application for Notice to Produce,

Form 7 Application for warrant for arrest of person unlawfully at large,

Form 8 Application for Detention Warrant, plus relevant Warrant form and Occupier Notice form and Form 20 Report to Eligible Issuing Officer on execution of warrant and then fill in the gaps to create a complete copy of the Search Warrant documents held by the Court.

What should you be looking for when you inspect the documents?

- Is the applicant authorized to apply for a search warrant?

(s46 LEPR Act "Police Officer" Required to be authorized re Covert Search Warrants and Criminal organisation warrant-s46D Superintendent or above)

- Were the correct forms used as per the Regulations?

(s66LEPR Act, Ballis v Randell (2007) NSWSC 422 @ 85)

- Were the forms filled out correctly by the applicant Officer?

(This isn't that significant but becomes very significant if the Justice doesn't correct them)

- Were the premises sufficiently described?
- Was the application sworn or affirmed?

(Section 60(2) LEPR Act)

- Was the offence specified in the warrant?

(Douglas v Blackler (2001) NSWSC 901 Taylor AJ – The warrant failed to specify an offence in relation to which the search was to be limited. the failure in the warrant to specify the offence is a fatal flaw in the document rendering it invalid and creating an entitlement in the plaintiff to have it quashed)

(Carroll & Ors v Mijovich (1991) 25 NSWLR441;

Dover v Ridge (1998) NSWSC Dunford J unreported 3 July 1998

Carver v Clerk of Blacktown Local Court (1998) NSWSC BC 9805275)

- Was the offence sufficiently described?

(NSW v Corbett (2007) HCA 32 NSWCA decision overturned – Warrant still valid despite wrong year of Firearms Act used)

- What were the things to be searched for?
- Were the things sufficiently described?

(George v Rockett (1990) HCA 26)

- Examine the grounds supplied by the applicant officer?

(s62(1) LEPR Act – Application must include

(a) name of applicant and details of authority to make application

(b) particulars of grounds on which application is based including nature of searchable offence or other offence involved

(c) the address or other description of the premises

(d) if searching for a particular thing a full description of that thing and if know its location

(e) if searching for a particular kind of thing a full description of the kind of thing

(f) if a previous application for the same warrant was refused details of the refusal and any additional information required by s64

(g) any other information required by the regulations

- Are the grounds in the application correct?

*(s63 LEPR Act false or misleading information in s/w application – summary offence 6 month limitation period)*  
*(Dishonesty and impropriety required – Majzoub v Kepreotis (2009) NSWSC 1498 Hall J)*  
*Genuine mistake, other material still sufficient to provide reasonable grounds for issue – Vincent v Randall (1999) NSWSC 833*  
*Carelessly arrived at but no willful or intentional misleading of Justice – Gibbon v Evans (2008) NSWSC 495 Adams J)*

- Is the Authorised Justice authorised to issue the Search Warrant?

(s46 LEPR Act eligible issuing officer, s3 LEPR Act authorized officer Magistrate, Registrar, certain employees of NSW Attorney General's Department)

- When was the Search Warrant application received?

(Date and time?) See start of Part 2 of Application-Eligible Issuing officer's record of application

- When was the Search Warrant issued?

(Date and Time?) See Paragraph 6 of Application

- How long did it take? Could the Justice have properly exercised their discretion in this time?

(Patten v Justice of the Peace, Redfern Court (1986) NSWSC Foster J unreported BC 8600784)

- Was there sufficient connection between the offence and the items to be searched for?

*(s46(3) LEPR Act a thing is connected with a particular offence if it is*  
*(a) a thing with respect to which the offence has been committed, or*  
*(b) a thing that will provide evidence of the commission of the offence, or*  
*(c) a thing that was used, or is intended to be used, in or in connection with the commission of the offence).*

- What type of warrant was it? (note different forms and criteria for each)

Search Warrant

(s47A LEPR Act power to enter and search for things connected with a particular searchable offence)

Covert Search Warrant,  
(Division 2 Part 5 LEPR Act, s62(2) LEPR Act)

Criminal Organisation Warrant,  
(Division 2 Part 5 s62(2)(a) LEPR Act)

Suspected Domestic Violence offence where entry denied warrant  
(s83 LEPR Act)

Use of drug detention dog warrant  
(Division 2, Part 11 LEPR Act)

Crime Scene Warrant  
(s94 LEPR Act – reasonable grounds to preserve, search for,  
and gather evidence of the commission of a serious  
indictable offence)  
(Note issue whether warrant is to extend Crime Scene  
declared by Police after lawful entry or whether warrant  
authorizes entry)  
(Note requires “serious indictable offence” or traffic  
accident with death or serious injury and need to preserve,  
search for or gather evidence of the commission of the  
offence)

Telephone Search Warrant

(s61LEPR Act – Justice must be satisfied required urgently  
and not practicable for application to be made in person –  
Atkinson v Coady (1989) NSWSC Campbell J unreported BC  
8901561 , Commissioner of Police v Atkinson  
(1991)23NSWLR 495 – See Par 1 of Part 2 of application)

- Did the Eligible issuing Officer record seeking any further information from the applicant officer?

(See Paragraph 2 of Part 2 of Form 1 –To be completed if the EIO required the applicant to provide further information concerning the grounds on which the warrant was sought.

Further information provided by the applicant, as required by me, is attached.

Particulars of further information orally provided by the applicant, as required by me, are as follows)

- Did the Eligible Issuing Officer fill out the form correctly?

(See Paragraph 3 of Part 2 of application "I found/did not find")

(s65 LEPR Act

Carroll v Mijovich (1991) 25NSWLR441

Kirby – Rule of Strictness)

“The position of the issuing Justice is more problematical. Her stance can be derived only from reading together the whole of Exhibit P1 including her own additional notations, and the whole of Exhibit P2, the statutory record made by the Justice.

Exhibit P2 is, to speak with respectful frankness, more than a little slap-dash.

Paragraph 1 of the document calls for the maker of the document to indicate whether the application was made in person or whether it was made otherwise and conformably with certain statutory provisions respecting very urgent applications. No choice has been made.

Paragraph 2 is printed. It calls upon the maker of the document to affirm either that it was, or that it was not, found that there were reasonable grounds for issuing the warrant. In this case, at least, a choice has been made.

Paragraph 3 calls upon the maker of the document to set out “(t)he relevant particulars of the grounds on which I relied to justify the issue of the warrant”. A foot-note advises:

“Either identify in the application the relevant particulars of the grounds or specify them. If space insufficient continue overleaf or attach separate sheet.”

This would indicate plainly enough, it might be thought, that a careful and precise particularisation is required. I have quoted earlier herein at [7] what was actually inserted. (IE: *Technology of fast track to locate the bobcat & ensure it is still on premises. Quick track have attended premises. Police have subsequently attended premises to obtain street details & description. Card & Phone details provided were incorrect.*)

I have read the Justice’s manuscript additions to the application, Exhibit P1; together with her manuscript insertions into paragraph 3 of Exhibit P2. I can see at once a justification for the issue, in the proper exercise of the relevant discretion, of a Warrant authorising an urgent search of the “outdoor shed” nominated in the Warrant itself. I can see no evidence whatsoever that could justify the extension of the Warrant to cover “other sheds within the curtilage”. I can see, indeed, no evidence that there were in fact in existence such “other sheds”.

68 Most significantly of all, however, I can see no basis whatsoever for its having been thought reasonable to issue a Warrant for the dwelling house. The Justice had been told that the identity/identities of the occupant(s) of the dwelling house was/were unknown to police. She had been told that there was no evidence to link the occupants, whoever they might be, with the original hirer. I take that to mean that there was no evidence to link any such occupant with any false credit card or other personal details given out by the original hirer.

69 Those facts and circumstances seem to me to warrant fairly a conclusion that the second defendant did not bring her mind to bear, in the way explained in **Patten** as being essential, upon the reasonableness of her issuing a Warrant in the sweeping terms that she in fact authorised.

70 Insofar as Grounds III, IV, V and VI are to be understood as attacking the section 5 belief of the applicant, I am of the opinion that they have not been made good.

Insofar as the grounds, or any of them, are to be understood as attacking the exercise by the Justice of her statutory powers, duties and discretion, then I am of the opinion that they have been established.”

- Did the Authorised Justice authorise execution by day or night?  
(s72(1) LEPR Act by day unless night authorised)
- Examine the reasons recorded by the Eligible Issuing Officer and the information they recorded as being the reasonable grounds to issue the warrant.

(See Part 4 of Part 2 of application)  
(62(3) LEPR Act – grounds including but not limited to  
(a) reliability of the information on which the application is based, including the nature of the source of the information  
(b) whether there is sufficient connection between the thing sought and the offence

- Is there a copy of the Occupiers Notice? Are the details on the application re premises, offence and items to be searched for the same as on the Search Warrant and Occupier’s Notice?
- Did the Authorised Justice delete the provision re Child prostitution offence on the application, warrant and or Occupier’s Notice?
- Is there a copy of the search warrant? Are the details on the Search Warrant re premises, offence and items to be searched for the same as on the Application and Occupier’s Notice?

(See s76 LEPR re defects other than a defect that affects the substance of the warrant in a material particular)  
(See Carroll & Ors v Mijovich (1991) 25NSWLR441

- When was the warrant executed?

(Check that it was prior to expiry – s73 LEPR Act – usually 72 hours, 24 hours telephone/facsimile warrants, 7 days criminal organisation warrant, 10 days covert search warrant)



- Was anything seized?  
(Did the police provide a receipt listing the items seized?)
- Were the things seized the things identified in the warrant?  
  
(s49(1)(b) LEPR Act may in addition seize and detain any other thing that the person finds in the course of executing the warrant and that the person has reasonable grounds to believe is connected with any offence.)
- Has the Report on the execution of the warrant been returned to the Court?  
  
(s 74(2) LEPR Act must be furnished within 10 days after execution or expiry)
- Has the Report been completed correctly?  
  
(Reg 9 LEPR Reg 2005 must use Form 20)
- Does the information in the Report match your client's instructions?
- Does it state that the occupier's notice was served or not served?  
  
(s67(4) LEPR Act to be served at entry or if no one home within 48 hours)  
(s67(5) LEPR Act Where unable to be served Justice may order steps to bring notice to attention of occupier instead of service)

### **3. REGULATION 11 CERTIFICATES**

Sometimes the Authorised Justice has issued a Regulation 11 Certificate which prevents you inspecting the search warrant documents.

Steps you can take if a Regulation 11 Certificate has been issued

- Check when the Certificate was issued (if the Certificate was only issued after you asked to inspect it is that proper?)
- Check reason for Certificate (protection of identity of person or jeopardising of any investigation)
- Check what documents the certificate applies to (There should be no objection to inspecting the search warrant, occupier's notice and report to authorized justice)
- Seek review of the authorized Justice decision

- Seek to inspect an edited or redacted set of documents
- Seek review by another more senior authorized justice which can be a Magistrate

*(Warner v Elder & Ors; Ventura v Elder and Anor; O'Connor v Elder and Ors (1997) NSWSC BC9703044 Temby AJ*

*"I should make clear that jurisdiction is conferred upon any authorized Justice by cl10(4) to revoke a confidentiality certificate, and no consent of this Court is needed to obtain a listing in a Local Court for that purpose")*

*(Application could be made by letter or by filing an application in the Local Court using Application Notice-General located on Lawlink)*

- Issue a subpoena in the Local Court proceedings (public interest immunity issues may arise)
- If you have grounds for challenging the warrant in the Supreme Court incorporate an order for access (Crown Sol will often release more details although Public interest immunity issues will most likely arise)

#### **4. POLICE**

If the Police serve a brief they will often provide

- Statements by Officers relating to the search
- Photographs of items seized
- DVD of the Search or a Transcript of the Search DVD

You may also want to GIPA or subpoena

- Documents relating to the Search Warrant
- Standard Operating Procedures

(NSW Standard Operating Procedures, Search Warrants 12 June 2009; there may also be specific to that warrant eg: Lachlan Command Standard Operating Procedures)

- DVD of search (copy or permission to view at a Police station)
- Material referred to in the Search Warrant application (COPS entries, Intelligence reports, Crimestoppers calls)

## 5. WHAT TO DO IF YOU FIND SOMETHING

- Discuss it with your Senior Solicitors, Counsel or Legal Aid Civil lawyers
- Challenging the items seized or admissions made during the search in the Local Court proceedings re the offence (Voir Dire)

"The learned Magistrate did have power to determine the validity of the warrant" *Majzoub v Kepreotis* (2009) NSWSC Hall J BC 200903138 @ 33.

*Rohozynsky v Holder & Ors* (2005) NSWSC 868 Sully J  
sought a declaration

"that the third defendant (Stills LCM) in proceedings against the plaintiff in the Local Court at Penrith erred in law in holding he had no jurisdiction to rule upon the validity of the issuing of the warrant". And an order that "the Third defendant hear and determine the Local Court proceedings according to law".

Decision – Declaration warrant invalid. Order Warrant quashed. Declined to declare that execution of warrant was unlawful.

"The Warrant itself having been declared invalid and quashed, it must follow that anything seized under the authority of that Warrant was, at least prima facie, seized unlawfully. Section 138 of the [Evidence Act 1995](#) (NSW) is ample to do, in such a case, what I apprehend might be the actual purpose of the claim made by paragraph 3 of the amended summons".

- Challenging the Search Warrant in the Supreme Court

(Declarations re validity of issue or lawfulness of execution of warrant- Orders for Certiorari- Decision on exclusion of evidence or return of property seized still up to Local Court-Discretion to grant relief where it could delay criminal proceedings)

- Referral to Legal Aid Civil lawyers

## **6. OTHER SUBSEQUENT ACTION**

- Trespass to property
- Trespass to person
- Assault
- Battery
- Unlawful arrest
- False imprisonment
- Detinue/conversion
- Application for return of property in Police custody in Local Court (s219 LEPR Act) if retention as evidence not required and person is lawfully entitled to possession of property (Send letter s 218 first, Use Application Notice-General form located on Lawlink – Local Court forms - Special Jurisdiction Local Court Act – Remember to seek Costs which usually follow the event) Cases – McQueen v Hawi & Anor (2008) NSWSC 136, Fantakis v Commissioner of Police (2013) NSWSC685, Carolan v State of NSW & anor (2013) NSWSC 1593
- Ex gratia payments
- Malicious prosecution

Patrick Latham  
NSW Legal Aid  
Dubbo Office  
2013