

# PRACTICE DIRECTION NUMBER 2 OF 2007

## DISTRICT COURT OF QUEENSLAND

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### SEARCH ORDERS (ALSO KNOWN AS 'ANTON PILLER ORDERS')

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Practitioners are reminded that the District Court does not have jurisdiction to make such orders until a proceeding has been commenced for relief within s 68 of the District Court of Queensland Act: see *Startune Pty Ltd v Ultra-Tune Systems (Aust) Pty Ltd* [1991] 1 Qd R 192.

1. This Practice Direction concerns Chapter 8 Part 2 Division 3 of the *Uniform Civil Procedure Rules* ("UCPR") relating to search orders (also known as *Anton Piller* orders, after *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55).
2. A pro-forma search order is set out below as an appendix.
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. The number of persons permitted in the search party should be as small as reasonably practicable.
5. The affidavits in support of an application for a search order should ordinarily 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 as the Court considers appropriate; and

- (f) identification of any person likely to be on the premises at the time of the proposed search who could reasonably be considered to be in a position of vulnerability.
6. If it is envisaged that specialised computer expertise may be required to search the respondent's computers, an independent computer specialist will need to be appointed who should be required to give undertakings to the Court.
7. The responsibilities of the independent solicitor ordinarily will include the following:
- (a) serve the order, the application, the affidavits in support, and the originating process;
  - (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 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 application, and have available to be brought to the Court all things 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.
8. 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.
9. 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. However, there may be circumstances in which such a restriction is not appropriate.

10. A search order must not be executed at the same time as the execution of a search warrant or similar process.
11. The terms of the search order may make provision in respect of any person thought to be in a position of vulnerability.
12. 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.
13. 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 applicant's solicitor's undertaking should include an undertaking not to disclose to the applicant any information the solicitor has acquired during or as a result of 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.
14. The applicant may be required to provide security for the due performance of any undertaking as to damages.
15. A search order is subject to the Court's adjudication of any claim of privilege against self-incrimination.
16. Included in the matters to be considered on the return date of the application are:
  - (a) the disposition of any things removed from the premises and any copies which have been made;
  - (b) maintenance of confidentiality of the respondent; and
  - (c) claims of privilege.

**Chief Judge PM Wolfe  
22 June 2007**

## APPENDIX

### DISTRICT COURT OF QUEENSLAND

#### Pro-forma Search Order

On the undertakings in Schedule B to this order,

#### THE COURT ORDERS AS FOLLOWS:

##### Introduction

1. (a) The application for this order is made returnable immediately.  
(b) The time for service of [*describe documents required to be served*] 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 there will be a further hearing in respect of this order before a judge listed in Applications.
3. The respondent may apply to the Court at any time to vary or discharge this order.
4. This order may be served only between [*insert time*] am/pm and [*insert time*] am/pm [on a business day].<sup>1</sup>
5. In this order:
  - (a) 'applicant' means the person who applied for this order, and if there is more than one applicant, includes all the applicants.
  - (b) 'independent computer expert' means the person (if any) identified as the independent computer expert in the search party referred to in Schedule A to this order.
  - (c) 'independent solicitor' means the person identified as the independent solicitor in the search party referred to in Schedule A to this order.
  - (d) 'listed thing' means any thing referred to in Schedule A to this order.
  - (e) 'premises' means the premises and any of the premises identified in Schedule A to this order, including any vehicles and vessels that are under the respondent's control on or about the premises or that are otherwise identified in Schedule A.
  - (f) 'search party' means the persons identified or described as constituting the search party in Schedule A to this order.
  - (g) 'thing' includes a document.

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<sup>1</sup> Normally the order should be served between 9:00am and 2:00pm on a business day to enable the respondent more readily to obtain legal advice.

- (h) 'respondent' where the context permits includes the respondent's servants or agents.
- 6. This order must be served by, and be executed under the supervision of, the independent solicitor.

### **Entry, search and removal**

- 7. Subject to paragraphs 9 to 19 below, upon service of this order the respondent must:
  - (a) permit members of the search party to enter the premises so that they can carry out the search and other activities referred to in this order;
  - (b) permit members of the search party 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;
  - (c) permit members of the search party 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;
  - (d) disclose to members of the search party the whereabouts of all the listed things in the respondent's possession, custody or power, whether at the premises or elsewhere;
  - (e) disclose to members of the search party 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;
  - (f) do all things necessary to enable members of the search party 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;
  - (g) permit the independent solicitor to remove from the premises into the independent solicitor's custody:
    - (i) the listed things and any things the subject of dispute as to whether they are listed things; and
    - (ii) the copies, photographs, films, samples, tests, other records and printed out documents referred to above; and
  - (h) permit the independent computer expert to search any computer and make a copy or digital copy of any computer hard drive and permit the independent computer expert or the independent solicitor to remove any computer hard drive and computer from the premises as set out in paragraphs 18 and 19 below.

### **Restrictions on entry, search and removal**

- 8. This order may not be executed at the same time as a search warrant (or similar process) is executed.
- 9. The respondent is not required to permit anyone to enter the premises until:

- (a) the respondent has been served with copies of this order and any affidavits referred to in Schedule C (confidential exhibits, if any, need not be served until further order of the Court); and
  - (b) the respondent has been given an opportunity to read this order and, if the respondent so requests, the independent solicitor has explained the terms of this order.
10. Before permitting entry to the premises by anyone other than the independent solicitor, the respondent, for a time (not exceeding two hours from the time of service or such longer period as the independent solicitor may permit):-
- (a) may seek legal advice;
  - (b) may apply to the Court to vary or discharge this order;
  - (c) the respondent not being a corporation, may gather together any things which the respondent believes may tend to incriminate the respondent or make the respondent liable to a civil penalty and hand them to the independent solicitor in (if the respondent wishes) a sealed envelope or container; and
  - (d) may gather together any documents that passed between the respondent and its lawyers for the purpose of obtaining legal advice or that are otherwise subject to legal professional privilege and hand them to the independent solicitor in (if the respondent wishes) a sealed envelope or container.
11. Subject to paragraph 20 below, the independent solicitor must not inspect or permit to be inspected by anyone, including the applicant and the applicant's solicitors, any thing handed to the independent solicitor in accordance with subparagraphs 10(c) and (d) above and the independent solicitor must deliver it to the Court at or prior to the hearing on the return date.
12. During any period referred to in paragraph 10 above, the respondent must:
- (a) inform and keep the independent solicitor informed of the steps being taken;
  - (b) permit the independent solicitor to enter the premises but not to start the search;
  - (c) not disturb or remove any listed things; and
  - (d) comply with the terms of paragraphs 23 and 24 below.
13. If there is a dispute whether something is a listed thing, that thing must promptly be handed to the independent solicitor for safekeeping pending resolution of the dispute or further order of the Court.
14. Before removing any listed things from the premises the independent solicitor must supply a list of them to the respondent, give the respondent a reasonable time to check the correctness of the list, and give the respondent and the applicant's solicitors a copy of the list signed by the independent solicitor.

15. The premises must not be searched, and things must not be removed from the premises, except in the presence of the respondent or a person who appears to the independent solicitor to be a director, officer, partner, employee, or agent of the respondent.
16. If the independent solicitor is satisfied that full compliance with the immediately preceding paragraph is not reasonably practicable, the independent solicitor may permit the search to proceed and the listed things to be removed without full compliance.
17. The applicant's solicitors and the independent solicitor must not allow the applicant to inspect or take copies of any thing removed from the premises, or give to the applicant information about its contents or about anything observed at the premises, until 4:30pm on the return date or other time fixed by further order of the Court.

### **Computers**

18. (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 solicitors ('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 solicitor, together with a report of what the independent computer expert has done including a list of such electronic and hard copies.  
(f) The independent solicitor 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.  
(g) If no independent computer expert has been appointed, but 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, the independent solicitor may remove the computer from the premises for that purpose.
19. (a) The respondent, not being a corporation, is entitled to object to the conduct described in paragraphs 18(b) to (f) on the ground

that it might tend to incriminate the respondent or make the respondent liable to a civil penalty.

- (b) The respondent is also entitled to object to the conduct described in paragraphs 18(b) to (f) on the ground that the computer contains material that is otherwise privileged.
- (c) Upon the making of any objection under paragraph (a) or (b), paragraphs 18(b) to (f) become inoperative to the extent of the objection. In that event, if the applicant's solicitor communicates to the independent solicitor that the applicant proposes to contest the objection:
  - (i) the independent computer expert shall remove the computer hard drive (or, if that is not practicable, the computer) from the premises and deliver it into the custody of the independent solicitor who shall deliver it to the Court at or prior to the return date.
  - (ii) on the return date or on another date, the applicant may apply to the Court for orders to similar effect as paragraphs 18(b) to (f) and if the respondent objects, the Court may adjudicate upon the objection.

### **Inspection**

20. Prior to the return date, the respondent or its representative shall be entitled, in the presence of the independent solicitor, to inspect any thing removed from the premises and to:
- (a) make copies of the same; and
  - (b) provide the independent solicitor with a signed list of things which are claimed to be privileged or confidential and which the respondent claims ought not to be inspected by the applicant.

### **Provision of information**

21. Subject to paragraph 22 below, the respondent must at or before the further hearing on the return date (or within such further time as the Court may allow) serve on the applicant an affidavit setting out the following:
- (a) the location of the listed things;
  - (b) the name and address of everyone who has supplied the respondent, or offered to supply the respondent, with any listed thing;
  - (c) the name and address of every person to whom the respondent has supplied, or offered to supply, any listed thing; and
  - (d) details of the dates and quantities of every such supply and offer.
22. (a) This paragraph applies if,
- (i) the respondent not being a corporation wishes to object that compliance with paragraph 21 may tend to incriminate the respondent or make the respondent liable to a civil penalty; or
  - (ii) if the respondent is a corporation and all of the persons who are able to comply with paragraph 21, on its behalf

and with whom it has been able to communicate, wish to object that compliance may tend to incriminate them or make them liable to a civil penalty.

- (b) The respondent must, at or before the further hearing on the return date (or within such further time as the Court may allow), notify the applicant in writing that the respondent or all such other persons wish to take such objection and identify the extent of the objection.
- (c) If the respondent gives such notice, the respondent must comply with paragraph 21 only to the extent, if any, that it is possible to do so without disclosure of the material in respect of which the objection is taken.
- (d) If such notice is given, the Court may give directions as to the filing and service of affidavits setting out such matters as the respondent or such other persons wish to place before the Court in support of the objection.

### **Prohibited acts**

- 23. Except for the sole purpose of obtaining legal advice, the respondent must not, until 4:30pm on the return date, directly or indirectly inform any person of this proceeding or of the contents of this order, or tell any person that a proceeding has been or may be brought against the respondent by the applicant.
- 24. Until 4:30pm on the return date the respondent must not destroy, tamper with, cancel or part with possession, power, custody or control of the listed things otherwise than in accordance with the terms of this order or further order of the Court.

### **Costs**

- 25. The costs of this application are reserved.

**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 solicitor: [*insert name and address*]
2. The applicant's solicitor or solicitors:
  - (a) [*insert name and address*] [or description e.g. a partner or employed solicitor of A, B and Co].
  - (b) [*insert name and address*] [or description e.g. a partner or employed solicitor of A, B and Co].
  - (c) [*insert name and address*] [or description e.g. a partner or employed solicitor 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****Undertakings given to the Court by the applicant:-**

- (1) The applicant undertakes to submit to such order (if any) as the Court may consider 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.
- (4) If the applicant has not already done so, the applicant will as soon as practicable file a copy of this order and [*describe documents required to be filed*].
- [(5) The applicant will insure the things removed from the premises against loss or damage in an amount reasonably considered to represent their value.]<sup>2</sup>
- [(6) The applicant will:
  - (a) on or before [*insert date*] cause a written irrevocable undertaking to pay in the sum of \$[*insert amount*] to be issued from a bank with a place of business within Australia, in respect of any order the Court may make referred to in the undertaking as to damages contained in paragraph (1) above; and
  - (b) immediately upon issue of the irrevocable undertaking to pay, cause a copy of it to be served on the respondent.]

**Undertakings given to the Court by the applicant's solicitor**

- (1) The applicant's solicitor will provide to the independent solicitor for service on the respondent copies of this order and the documents which are listed in Schedule C.
- (2) The applicant's solicitor will answer to the best of his or her ability any question as to whether a particular thing is a listed thing.
- (3) The applicant's solicitor will use his or her best endeavours to act in conformity with the order and to ensure that the order is executed in a

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<sup>2</sup> Depending on the nature of the things likely to be removed and their likely value, and the likely particular risks of their being lost or damaged, this undertaking or a more elaborate one may be required.

courteous and orderly manner so as to minimise disruption to the respondent.

- (4) The applicant's solicitor 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, within or outside Australia, other than this proceeding.
- (5) The applicant's solicitor 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.
- (6) The applicant's solicitor will not without the leave of the Court disclose to the applicant any information that the solicitor acquires during or as a result of execution of the search order.
- (7) The applicant's solicitor will use best endeavours to follow all directions of the independent solicitor.

#### **Undertakings given to the Court by the independent solicitor**

- (1) The independent solicitor will use his or her best endeavours to serve the respondent with this order and the other documents referred to in undertaking (1) of the above undertakings by the applicant's solicitor or solicitors.
- (2) Before entering the premises, the independent solicitor will:-
  - (a) offer to explain the terms and effect of the search order to the person served with the order and, if the offer is accepted, do so; and
  - (b) inform the respondent of his or her right to take legal advice.
- (3) Subject to undertaking (4) below, the independent solicitor will retain custody of all things removed from the premises by the independent solicitor pursuant to this order until delivery to the Court or further order of the Court.
- (4) At or before the hearing on the return date, the independent solicitor will provide a written report on the carrying out of the order to the Court and provide a copy to the applicant's solicitors and to the respondent or the respondent's solicitors. The report will attach a copy of any list made pursuant to the order and a copy of any report received from an independent computer expert.
- (5) The independent solicitor will use best endeavours to ensure that members of the search party act in conformity with the order and that the order is executed in a courteous and orderly manner so as to minimise disruption to the respondent, and will give such reasonable directions to other members of the search party as are necessary or convenient for the execution of the order.

- (6) The independent solicitor 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, within or outside Australia, other than this proceeding.
- (7) The independent solicitor 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.

**Undertakings given to the Court by the independent computer expert**

- (1) The independent computer expert will use his or her best endeavours to act in conformity with the order and to ensure that the order, so far as it concerns the independent computer expert, is executed in a courteous and orderly manner so as to minimise disruption to the respondent.
- (2) The independent computer expert 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, within or outside Australia, other than this proceeding.
- (3) The independent computer expert 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.
- (4) The independent computer expert will use best endeavours to follow all directions of the independent solicitor.

**SCHEDULE C****DOCUMENTS THAT MUST BE SERVED WITH THIS ORDER**

The application filed in the court.

The originating process (draft originating process) filed in the Court.

The following affidavits (including exhibits to them):

Name of Deponent	Date Sworn/Affirmed	Date Filed
(1)		
(2)		
(3)		

The following written submissions put to the Court –

Other documents provided to the Court –

A transcript of proceedings, or if none is available, a note of any oral allegation of fact, and of any oral submission, that was put to the Court.

**Name and address of applicant's solicitors**

The Applicant's solicitors are: [Insert name, address, reference, fax and telephone numbers both in and out of office hours].