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January 16, 1995

Attention: Mr Laurie Rolls
Catholic Church Insurances Limited
GPO Box 180B
MELBOURNE 3001

Dear Sir

Re: **Police Powers of Search and Seizure
Execution of Search Warrants**

Further to our discussions in relation to the above matter we now provide you with our advice as follows:-

A. The powers of search and seizure are granted to the police pursuant to the terms of either the Magistrates' Court Act 1989 or the Crimes Act 1958.

(i) Magistrates' Court Act 1989

The Act empowers a Magistrate to issue a search warrant authorising a police officer or other person to -

- break enter and search any place named or described in the warrant for any article, thing or material of any kind named or described in the warrant;
- to bring the article, thing or material before the Court so that the matter may be dealt with according to law;
- to arrest any person apparently having possession, custody or control of the article, thing or material.

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A Magistrate may only issue a warrant when the application for the warrant is supported by evidence on oath, be it by affidavit or viva voce.

(ii) Crimes Act 1958

In addition to the provisions of the Magistrates' Court Act s.465 of the Crimes Act provides the power to any Magistrate to issue a warrant providing he is satisfied that there is reasonable ground for believing that there is in any building, receptacle or place -

- anything upon or in respect of which any indictable offence has been or is suspected to have been committed;
- anything which there is reasonable ground to believe will afford evidence as to the Commission of any such offence;
- anything which there is reasonable ground to believe is intended to be used for the purpose of committing any indictable offence against the person for which the offender may be arrested without warrant.

A Magistrate may issue a warrant to search such building, receptacle or place for any such thing and to seize or carry it before the Magistrates' Court to be dealt with according to law.

B. Breadth of Terms of Search Warrant

- There is within the Magistrates' Court Act and Crimes Act no restriction on the terms of a search warrant and how broad it may be. This is only able to be determined by reference to decided cases and looking at the terms of the warrant that issues in each particular case. However, there are a number of guidelines which are of assistance in this regard.

(a) Police Operating Procedures

Rule 11.8.2 of the Police Operating Procedures provides that when officers are planning a search of premises they must consider that the object of the search, including the nature of evidence sought, must be clearly defined and understood by all members participating.

(b) Common Law Rules

- A search warrant must contain a statement of the offence in respect of which the search is made.

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- A search warrant must contain a statement concerning the items sought.

In this regard it is a fundamental principle with respect to search warrants that the person executing the warrant must strictly observe the warrant's terms. The person executing the warrant may only seize those items which the warrant authorises him to seize but includes items with respect to which the searcher forms a belief upon reasonable grounds is an item to which the search warrant applies.

A search warrant cannot authorise a general search of premises. It is not necessary that the warrant itemise each document, thing or subject of the search but it must bear a sufficient description of the item sought such that all concerned (i.e. the searcher and the occupier of the premises) understand what items are covered by the warrant. In that regard vagueness and ambiguity are the key.

The Supreme Court of Victoria has held that a description may be extremely wide without being vague whereby the warrant will not be invalid on the basis of insufficiency of description. It has, in considering the same case, determined that descriptions which are vague and imprecise such as "purporting to be" are too vague and will render a warrant void for uncertainty.

A warrant specifying numerous classes of documents and also purporting to authorise the seizure of items "as to which there are reasonable grounds for believing that same will afford evidence as to the commission of" stipulated offences will be void for uncertainty. Such a warrant is excessively wide and uncertain and akin to a general warrant: see *Arno v. Forsyth* (1986).

A warrant is less likely to be held void for uncertainty if it specifies time limits or precise periods for which records relate, particular businesses to which the records relate, particular parties to which the records relate and particular circumstances with respect to which the documents relate: see *Lemesk Pty Ltd v. Easterby* (1993).

Having inspected a document once a searcher knows that the document is not one covered by the warrant any further detention or physical contact with it is a trespass. A searcher is only empowered to look at documents for the sole purpose of determining whether those documents fall within the class of documents as specified in the search warrant.

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Protection of Documents - Privileged

There is no protection for you as an insurer in respect of documents that come into your hands from the insured on the basis of that insurer client relationship.

There are only two ways, to our knowledge, of protecting your documentation from the operation of a search warrant. The first is to not have the documentation on your premises. Secondly to have the documentation covered by legal professional privilege.

In the event that documents are on your insurance files which are covered by legal professional privilege then, in the course of a search, the officer conducting the search should be advised that particular documents are covered by a claim of legal professional privilege and that it is intended to make that claim before a Magistrate once the documents are delivered to him. It would be prudent in those circumstances to accompany the executing officer to the Magistrate before whom the property is brought so that a proper claim for privilege may be made. The executing officer is obliged by the terms of the Crimes Act and the Magistrates' Court Act to, once he has seized items relative to the warrant, take the materials and present them to a Bail Justice or Magistrate to be dealt with according to law.

It is unlikely that a Magistrate once he has had materials presented to him pursuant to a search warrant will deal with the claim of legal professional privilege on the spot. It will be enough for your officer to advise the Magistrate that a claim will be made, to ask the Magistrate to stand the matter down and to retain custody of the documents until such time as proper legal representation can be obtained and an appointment for the hearing of argument is arranged.

The terms and validity of a search warrant can be challenged, however, invariably, as notice of the search warrant does not come to light until its execution, the challenge is subsequent to the search having been made.

We will not, in this advice, detail the circumstances of challenging the validity of a search warrant.

Conclusion

We conclude by providing to you a general check list with respect to the execution and post execution stages of search warrants which should be noted by you and your officers and acted upon in the event that the police attend a search of the premises.

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1. Telephone your solicitor.
2. Read the warrant.
3. Ensure that the person proposing to execute the warrant has the appropriate seniority and is authorised by the terms of the warrant.
4. Ensure that the terms of the warrant are not too broad or vague so that it is unclear to the occupier as to what items are being searched for. (Any objection at this point on the ground that the warrant is too broad and uncertain is unlikely to be acted upon by the executing officer, however, it is a good idea to put the executing officer on notice of that objection being made. An application would need to be made to the Supreme Court for an injunction restraining execution and it is unlikely that the executing officer will agree to postpone the search until such time as that application is made.)
5. Accompany the executing officer/officers during their search.
6. Ensure that the executing officer is not acting outside the terms of the warrant, i.e. examining documents other than for the purpose of identifying them.
7. If possible separate any privileged document or documents which you intend to dispute as being covered by the warrant into a sealed box and inform the officer that a claim for privilege will be made or any other objection will be made at the appropriate time.
8. If any objections are made with respect to the document seized it is advisable to phone the Court and let the Court officials know of an intention to claim privilege or raise other objections with respect to the documents seized pursuant to the warrant which should be identified by its number.
9. If possible accompany or at least attend before the Magistrate/Justice for the Directions Hearing to be heard in respect of any directions that you may have.
10. Do not obstruct the members of the Police Force in conducting the search as to do so would be to commit a separate offence.

Should you have any further queries concerning the above please do not hesitate to telephone our Mr Paul Gamble who will be happy to assist you with same.

Yours faithfully
DUNHILL MADDEN BUTLER

