Setting Aside Search Warrants in New South Wales

a paper delivered by Mark Robinson SC to the Getaway CPD Criminal Lawyers Conference 10 June 2018

This seminar covers setting aside search warrants in New South Wales and how best to assist a client (or yourself) in the execution of a warrant.

As you all know, the principal place of reference for search warrants to be issued and executed in NSW are the:

- *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)("**LEPRA**"), and
- *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) ("**the regulations**").

Together, they comprise a statutory code for the subject.

The LEPRA provides for a number of different warrants to be issued, namely:

- Search warrants (ss 47, 48, 49)
- Telephone warrants (s 61)
- Covert search warrants (ss 46C, 47(3), 49A)
- Crime scene warrants (ss 94, 59(1)(c), 94, 94A, 95)
- Detention warrants (ss 118, 119, 120)
- Drug detection warrants (ss 140, 141, 142)
- Notices to produce documents (for banks) (ss 53, 54)

In this paper, I will generally limit my comments to search warrants.

A few things should be noted at the outset.

Section 77 of LEPRA abolishes the old common law search warrants. This means, in effect, that the Act constitutes a complete code for the valid issue and execution of search warrants in NSW. It and the regulations (read together) sets out that which must occur for the lawful issue of such warrants.

Section 76 of the Act provides:

> "**Defects in warrants**
>
> A warrant is not invalidated by any defect, other than a defect that affects the substance of the warrant in a material particular."

Section 232 provides for the protection of police acting in the execution of warrants. If a police officer is sued in criminal or civil proceedings, he or she is not to be convicted or held

liable merely because there was an irregularity or defect in the issuing of the warrant or notice, or the person who issued the warrant or notice lacked the jurisdiction to do so.

If you ascertain that the search warrant may be bad in law, you have to choose whether to take the issue to the trial and make an application pursuant to section 138 of the *Evidence Act 1995*(NSW) (Exclusion of improperly or illegally obtained evidence) or to go to the Supreme Court of NSW and seek a declaration or an order in the nature of certiorari to set aside the search warrant for that defect. A "delivery-up" or destruction order should also be sought in relation to items (wrongly) seized in the execution of the said warrant.

The Supreme Court's jurisdiction to be invoked is the Court's supervisory judicial review jurisdiction to review administrative or executive decisions both generally, and pursuant to sections 69 (proceedings by summons in lieu of the prerogative writs), 65 (order to fulfil a public duty), and, 75 and 63 (declarations) of the *Supreme Court Act 1970* (NSW).

Bear in mind that there is no presumption of regularity in relation to a search warrant: *R v Tillett; Ex parte Newton* (1969) 14 FLR 101 at 106.8 and *Patten v JP Redfern Court* (1986) 22 A Crim R 94 at 98.4.

The first hurdle to overcome generally is the Court's discretion to <u>not</u> deal with the matter by reason of the potential fragmentation of the criminal justice system.

It is long established that the power of the Court to make such orders in its supervisory jurisdiction should be exercised sparingly where the declaration would touch the conduct of existing criminal proceedings (see, for example, the cases cited in *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at [23], footnote 15). The fragmentation of the criminal process is to be actively discouraged. Therefore, good reasons need to be put to the Court so that the matter may progress and be heard.

As to warrants generally, it is long established that search warrants must be construed strictly.

For example, the failure of the police to hand over an valid occupier's notice on entry means that it is entirely appropriate for the Court to issue a declaration that the execution of the subject warrant was contrary to law - *Black v Breen* [2000] NSWSC 987 at [37](Ireland AJ); *Ballis v Randall* (2007) 171 A Crim R 243; [2007] NSWSC 422 (Hall J); and, *Commissioner, Australian Federal Police v Oke* (2007) 159 FCR 441 at [40] (Branson, Lindgren and Besanko JJ).

In *State of New South Wales v Corbett* (2007) 230 CLR 606 Kirby J said (at [16]-[18]):

> "From its earliest days, this Court has insisted on a rule of strictness in expressing the law governing search warrants [*MacDonald v Beare* (1904) 1 CLR 513 at 522 per Griffith CJ]…
>
> [I]ntermediate courts in Australia have normally adhered to the rule of strictness. They have correctly interpreted that to be their duty, conforming to the unanimous reasons of seven Justices of this Court in *George v Rockett* [(1990) 170 CLR 104 at 110-111, 115. See reasons of Callinan and Crennan JJ at [87]] . Those reasons, in turn, constituted a strong reaffirmation of a line of federal cases such as *R v Tillett; Ex parte Newton* [u(1969) 14 FLR 101 at 106 per Fox J] and *Parker v Churchill* [(1985) 9 FCR 316 at 322] , extracted and cited with approval in *Rockett* [1990) 170 CLR 104 at 111-113. See also *Crowley v Murphy* (1981) 52 FLR 123 at 143]."

Kirby J'also said in *Corbett* (at [40]) that:

> "[T]his is not a case in which there is any departure from (or qualification of) the rule of strictness which this Court has long adopted in expressing the law governing the requirements of precision and accuracy in applications for, and the issue and execution of, search warrants."

See also the remarks of Callinan and Crennan JJ in *Corbett* at [87] as to strict compliance.

In *Corbett v State of New South Wales* [2006] NSWCA 138 especially at [88]-[111] the NSW Court of Appeal was considering legislation that was different in terms from the current LEPRA and the Regulations. The new legislative provisions (LEPRA) require particularity and a more detailed statement of "offences" than the mere provision of a section of an Act.

As to the issue and execution of a search warrant, by reason of the combination of sections 48 and 47 of LEPRA, an "*authorised officer*" (defined in section 3(1) of LEPRA) is empowered to issue a search warrant authorising a police officer to enter specified premises and to search for things connected with a (in this case) "*particular narcotics offence*" (as defined in section 47(4) of LEPRA).

In addition, section 66 of LEPRA (Form of warrant) provides that "*A warrant is to be in the form prescribed by the regulations*."

Further, section 67 of LEPRA provides that an occupier's notice must be served that sets out a summary of the nature of the warrant and the prescribed information in the regulations.

Regulation 6(1)(a) provides that for the purposes of section 66 of LEPRA, Form 9 "*is the form for a Part 5 search warrant*".

Form 9 of the Regulations provides plainly for a search warrant to specify (relevantly):

> "2* To search those premises for any of the following things: [*List and describe the things to be searched for with particularity. If space is insufficient, continue overleaf or attach a separate sheet.*]
> The police officer has reasonable grounds for believing that those things:
> (a)* are connected with the offence(s) of: [*Specify relevant offences*.]
> (b)* are stolen or unlawfully obtained.
> … [* *Delete if inapplicable*.]"

As a matter of manifest statutory intent, the LEPRA and Regulation provisions mandate that "*particular*" and "*relevant*" offences must be "*specified*" on the face of the warrant in order for the warrant to be lawful or valid.

In the case of *Majzoub v Kepreokis* (2009) 195 A Crim R 63, the Court dealt with a warrant that had listed the specified offence as being only:

> "The police officer has reasonable grounds for believing that those things:
> (a) are connected with the offence(s) of:
> Supply Prohibited Drug Section 25 Drug Misuse and Trafficking Act 1985
> Possess Prohibited Drug Section 10 Drug Misuse and Trafficking Act 1985"

The Supreme Court held that this was a sufficient description of the offence. It was held (at [59] that:

> "… In the present case, it was possible to know with a high degree of accuracy that the offence referred to in the warrant concerned or involved the 'supply of prohibited drug', even though the offence may have been aggravated by the presence of more specified features.
>
> As noted above, the issue of specifying the offence with sufficient particularity must be considered by looking at the warrant as a whole: *Ryder v Morley* (1986) 12 FCR 438). This includes the specified items to be searched for. The warrant in this case identified the things to be searched for with a high degree of particularity, including the type of drug ('(ice) Crystal Methamphetamine' and '(speed) Amphetamine'), money associated with the sale of prohibited drugs, drug ledgers and things connected with the sale of prohibited drugs."

The purpose of stating the offence is to set some boundaries for police officers and others in the search itself – see, *Wright v Queensland Police Service* [2002] 2 Qd R 667 at [31]-[32] and *Williams v Keelty* (2001) 184 ALR 411, 438 per Hely J.

In *Wright v Queensland Police Service* [2002] 2 Qd R 667, the validity of the warrant was challenged upon the basis that it failed to provide brief particulars of the offence. It merely said: '*section 123 Criminal Code – Perjury*'[6]. This was non-compliant with the legislative requirements to provide "brief particulars of the offence" and the warrant was held to be invalid [39]-[40].

The Court observed in *Wright* that it was held in *Bradrose Pty Ltd v Commissioner of Police, ex parte Bradrose Pty Ltd* [1989] 2 Qd R 304 that the description of the offence should be such as to enable the person affected to know the exact object of the search.

In *Lawrie v Carey DCM* [2016] NTSC 23 at [12], the offence was described as '*making a false statement in statements required to be under oath or solemn declaration, Section 118 of the Criminal Code Act (Northern Territory*). This description was found to be insufficiently described and the warrant was found to be invalid [23]-[37].

Other cases which address the question of the sufficiency of the description of the alleged offence on the face of the warrant itself both under statute and under the common law– see: *McQueen v Hawi* [2008] NSWSC 136 at [1](Adams J); *Douglas v Blackler* [2001] NSWSC 901 at [9], [14] on the common law requirement for specificity (Taylor AJ); *Carver v Clerk of the Court, Local Court at* Blacktown, Supreme Court of New South Wales (unreported, Supreme Court, NSW, Black AJ, No. 30114/1995, 13 March 1998) (and the cases cited therein); *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151 (Lockhart J); *Pressler v Holzberger* (1989) 44 A Crim R 261 (Spender J) and *Beneficial Finance Corp Ltd v Australian Federal Police Commissioner* (1991) 31 FCR 523 (Sheppard, Pincus and Burchett JJ); see also the cases referred to in *Corbett v State of New South Wales* [2006] NSWCA 138 at [88]-[111].

The case of *Majzoub* was considered and distinguished in *Lee v New South Wales Commissioner of Police* [2017] NSWSC 1594 (Garling J) and *Lee v Commissioner of Police (NSW) (No 2)* [2017] NSWSC 1789 (Garling J).

In *Lee*, a specialist doctor was the subject of a search warrant executed at her home. She sought a declaration that the warrant was invalid, and an order that the items seized pursuant to the warrant be returned to her.

The main complaint of the doctor was that the issuing officer stated reasonable grounds for believing that (at [30]):

> (1) there were, or within 72 hours would be, in or on the premises, the following things: "communication devices including mobile phone, laptop computer, desk top computer, computer tablets, external hard drives, USB drives, discs and any other relevant devices"; and
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> (2) the things were connected with the following searchable offence within the meaning of s 46A(1)(a) of the LEPRA: "Section 13 – *Crimes Domestic Violence and Personal Violence Act 2007*".

In this instance, the Court held that the searchable offence of section 13 above was not lawful and that the execution of the warrant was also unlawful.

The Court held (at [106)] that "the mere description of the offence of stalking or intimidating by simply referring to the section and the legislation, does not tell the occupier, by itself and without more, what the offence is."

In more general remarks, the Court said in *Lee* (at [89] to [97]):

> "It is convenient to start with an outline of the general principles relating to the contents of a search warrant. These principles are not in doubt.
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> First, a fundamental concept underlying the LEPRA is the balance between public and private interests. The public interest is in the detection, prosecution and prevention of crime. The private interest is the protection of an individual's home from unlawful interference: *Crowley v Murphy* [1981] FCA 31; (1981) 52 FLR 123.
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> Secondly, in light of the concern of the legislature to protect the individual's interest, strict compliance with statutory conditions and obligations governing the issue of search warrants is necessary: *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104.
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> Thirdly, there is a requirement arising from the common law and from the LEPRA to identify the relevant offence in the search warrant: *Douglas v Blackler* [2001] NSWSC 901 at [12]. That is because the person whose home is being searched is entitled to know the object of the search: *R v Tillett; Ex Parte Newton* at 113, and because the identification of the object of the search is necessary so as to limit the scope of the warrant: *George v Rockett* at 118.
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> Fourthly, the question of whether a warrant meets the statutory requirements is viewed objectively: *Wright v Queensland Police Service* [2002] QSC 46; (2002) 2 Qd R 667 at 676.
>
> Fifthly, the nature of the offence must be sufficiently stated: *NSW v Corbett* [2007] HCA 32; (2007) 230 CLR 606 at [106]. It need not be stated with the precision of an

indictment: *Beneficial Finance Corporation v Commissioner for Australian Federal Police* [1991] FCA 475; (1991) 31 FCR 523 at 533.

Sixthly, the question of whether the offence is specified with sufficient particularity is a question to be resolved by looking at the warrant in its entirety: *Ryder v Morley* [1986] FCA 437; (1986) 12 FCR 438 at 444. The items identified as being searched for may assist with this examination.

Seventhly, it is not essential to specify, on the warrant, the section or the legislation against which an offence has been committed, providing that the warrant specifies the substance of the offence in question: *Williams v Keelty* [2001] FCA 1301; (2001) 184 ALR 411 at [143]. Conversely, merely to name the section without a description of the offence may be inadequate, particularly having regard to the structure and terms of the offence creating legislation: *Cloran* at 153-154.

See generally the discussion of these principles in *Majzoub* at [52]."

Lawyers and Search Warrant Protocols

When the police seek to execute a search warrant on the premises of a solicitor or barrister then the various agreements listed below should be noted. These agreements largely seek to protect and preserve client legal privilege. See:

- Guidelines as to the execution of search warrants (3 May 1995) an agreement between Council of the Law Society of New South and the Commissioner of Police for New South Wales;
- General Guidelines between the Australian Federal Police and the Law Council Of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made (3 March 1997)
- Guidelines as to the execution of search warrants on barristers chambers (21 January 2013) – a Protocol between the Bar Association of New South Wales and the Commissioner of the New South Wales Police Force.

Other such agreement and policies regarding search warrants are in place, see for example:

- The NSW Parliament's Privileges Committee report on Protocol for execution of search warrants on members' offices dated 28 February 2006.
- Customs Act Warrants (May 2011) Commonwealth Department of Customs and Border Protection Service.
- AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved (undated)

Good Practice on the Execution of a Search Warrant

When a police officer arrives at your client's premises with a search warrant or a notice for the compulsory production of documents, some good and practical advice to a client would be as follows:

When the officers first arrive:

- Be co-operative and respectful and patient at all times.
- Call your solicitors as soon as possible, inform them what is presently occurring and ask them to give you urgent advice on the validity of the warrant and to attend your premises as soon as possible (if not immediately).
- Before the police enter the subject premises they must announce that a police officer is authorised by the warrant to enter the premises, and give any person then in or on the premises an opportunity to allow entry into or onto the premises (section 68 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)("**LEPRA**").
- You should (at the very least) receive the occupiers notice upon entry by the police (section 67(4)(a) LEPRA). If not, then ask for one. You should also ask for a copy of the search warrant (you might not get this document – but they must show it to you, or "produce the warrant for inspection" (section 69 LEPRA).
- You should photocopy the warrant and the occupiers notice and send them to your solicitors as soon as possible. If there is no copy facility, photograph each page with a smart phone and sent that to your solicitors.
- When the officers first arrive, ask them to permit you to inspect each of their written authorities to require the production of documents. Examine each authority carefully. Read it and ensure that each officer is properly authorised by the issuing officer or agency to require the production of documents for inspection of for a police search to be undertaken. Take down (record) all relevant details for example, the full name of each officer. The authority or search warrant must be signed by an issuing officer. Do not simply rely on the presentation of a business card by the officers.
- If it is an order for production, direct the officers to a quiet area of the office and ask them which documents they would like to have produced to them.
- If it is a search warrant, ask the police officer to kindly wait a short while and explain that your solicitor is on his or her way to the subject premises to give the client legal advice as to the validity and scope of the warrant and to oversee the execution of the warrant (if it goes ahead). Give them a specific time as to when your solicitor will expect to arrive.
- Telephone head office to advise what is going on.

- If the police will not wait, you should explain to them that the search warrant might be invalid and if it is, and execution of the warrant commences, you will hold the Police Service to account in the Supreme Court and each individual participating officer will be sought to be held personally liable for both civil and criminal trespass (as well as conversion and detinue).
- Upon arrival of the client's solicitor, the client should receive an opinion as to the validity of the warrant and the prospects of success in having it set aside by the Supreme Court.
- If the search warrant is bad (in law) any execution of the warrant is also bad (in law).
- Ascertain if there are any documents on the premises that are the subject of client legal privilege (documents concerning litigation of the obtaining and receipt of any legal advice are usually covered by this privilege). These would not include any transactional documents, such as sale of land and contracts.
- Tell your solicitor about them.
- Tell the police officer about them and state that you (or the client) makes a claim for client legal privilege over these documents and the police are not permitted to inspect them (these documents should be sealed in a large envelope or bag with the words "Subject to a claim for client legal privilege – Not to be inspected except by order of the Supreme Court of NSW").
- If the solicitor's advice is that the search warrant is bad (in law), you might have to seek to undertake urgent *ex parte* proceedings in the Supreme Court seeking an immediate injunction, orders as to validity of the warrant and placement of the seized documents subject to the claim of client legal privilege with the Court's Registrar pending determination of the claim by the Court.

Production of documents:

- The officers will ask to see certain documents or files (if it is a warrant for production). Or they will seek to commence searching for documents (if it is a search warrant). Unless you can come to some arrangement or agreement with the officers about when you can do so you must produce the documents or files as soon as possible or permit the officers to search your premises. If the officer you are speaking to does not agree to a delay, you may be guilty of delaying or obstructing the execution of the authority or warrant, or, refusing or failing to produce the documents, or hindering the execution of a search warrant - offences under the relevant legislation

Copies of documents:

- The officers are usually authorised to make notes or copies of any document that is required to be produced to them or taken under the applicable legislation. They are not authorised to use the client's photocopying equipment. However, the client can come to an agreement with the officers and can make available to the officers the use of one of its photocopiers for a charge of, say, 50 cents per page. Monitor the number of copies taken so that the police officers can be properly billed and obtain a "receipt" acknowledging the amount of photocopying that has been carried out.

Interviews/speaking with the Police Officers:

- The client is not required to or obliged to speak to the officers.
- If they do speak with the officers, anything said can be written down or recorded by the officers (either then or later) and that information can be used in evidence against the client or the company in proceedings under the legislation, or any other proceedings at a later stage.
- Unconsidered remarks which are either inaccurate or which misrepresent a situation are extremely damaging to the credibility of the client and likely to lead to an inappropriate reaction.
- If necessary, make an agreement with the officers that no records of interview will be sought to be taken of the client's employees, shareholders or agents without the following procedure being complied with:
    - any requests for interviews should be made in writing addressed to the client's solicitors, identifying the person required by the officers to be interviewed and the purpose of the interview; and
    - any questions that are proposed by the officers to be put to the interviewee are to be provided in writing in advance of the proposed interview. Seek the officer's agreement to allow one of the client's solicitors to be present at the interview.

What documents or files must be produced?

- If it is an order for production, the officers will ask the client to produce certain documents. When they do so, the client should ascertain precisely what they have asked for. Preferably, write down their request while you are with them and repeat it to them. This will assist to ensure that you are not producing less than you are required to produce.

What Should a Solicitor or Barrister Do On the Execution of a Warrant?

You need to immediately read the search warrant and/or occupiers notice to ascertain whether they are valid.

If there is an error, ascertain immediately whether the error is a vitiating error (resulting in invalidity) or only a minor error (not resulting in invalidity).

If there is a significant error, consider whether the error is severable from the rest of the warrant - *Perron Investments Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1989) 25 FCR 187 at 191.6 and, at 195.5 (per Lockhart J) and 204.2 (per Burchett J).

Consider your options for immediate advice to the client. If the warrant is invalid, advice commencing Supreme Court judicial review proceedings pursuant to section 69 of the *Supreme Court Act 1979* (NSW) might be in order. Make them *ex parte* if the executing police officers will not stop executing the warrant.

Consider whether the warrant covers documents containing client legal privilege. If it does, ensure the subject documents are <u>not</u> inspected by the officers and that they placed in specially marked envelopes.

Ensure that the executing officers are identified and that they do not merely seize documents without inspecting them first and that they do not take hard drives or laptops without inspecting them first.

Ensure that you or the client obtains a receipt for anything seized during the execution of the warrant – clause 9 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW).

NSW Crown solicitors have published (on the internet) a list of things to consider here. They include:

1. Have all the conditions attaching to the exercise of the power been strictly observed?
2. Has an inspector/investigator been appropriately appointed?
3. Have all powers been appropriately delegated?
4. Are the documents to be requested, searched for, or inspected properly related to the purpose for the grant of the power?
5. Are the documents described in the warrant/notice to produce sufficiently described so as to enable the recipient to ascertain the scope of the authorised search?
6. In relation to electronic devices, is what is sought to be inspected/seized the electronic data on the device or the device itself?

7. Where required, does the relevant officer believe, rather than suspect, the items will be at the premises or are connected with an offence? On what bases?
8. Where applicable, are the items to be inspected or seized sufficiently "connected with" or will they "afford evidence" of an offence?
9. Have all notice requirements been complied with?
10. Are all forms properly completed? Where a prescribed form is required, has it been correctly used?
11. Has any application been supported by evidence on oath or affirmation (as required)?
12. Are the persons assisting in the search properly described as "assistants" or are they delegates or agents of the person to whom the power to search or inspect is vested?
13. Are other powers being exercised that are beyond the scope of the grant of power?
14. Is the conduct of the search/inspection that which is authorised by the statute and/or the warrant? Is the search "reasonable"? Note: a "negative search" will rarely be lawful: *Crowley v Murphy* (1981) 52 FLR 123.

Thank you