



COMMERCE COMMISSION

Commerce Commission Investigation Powers



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Who Are We?

- New Zealand's competition regulatory agency
- Established under section 8 of the Commerce Act 1986.
- An independent enforcement agency with wide investigative powers including:
 - Power to requisition information
 - Power to search and seize information



COMMERCE COMMISSION

What Do We Do?

The Commerce Commission enforces legislation that

- promotes competition in New Zealand markets
- prohibits misleading and deceptive conduct by businesses
- is specific to the telecommunications, dairy and electricity industries.



What Do We Do?

- The Commission investigates, prosecutes and adjudicates
 - clearance of mergers and acquisitions
 - authorisation of anti-competitive practices
 - access to telecommunications networks
 - assesses compliance with performance thresholds by electricity lines businesses
 - makes regulatory decisions under the Dairy Industry Restructuring Act



Enforcement



- The Commission enforces a number of statutes but its enforcement role mainly involves:
 - Part II of the Commerce Act 1986; and,
 - The Fair Trading Act 1986.
- Commission has power to requisition information and to obtain search warrants
- Fair Trading Act – s47G and s 47
- Commerce Act – s98 – note s98(c) and s98A



Getting Information



- Information is extremely important to the Commission in order to detect offending
- Informal and formal methods
- Often information provided informally
- Cooperation and Leniency Policies



COMMERCE COMMISSION

Requisitioning Information

- Threshold for use of notices: is it necessary or desirable
- Commission can seek any relevant information
- Commission decides what is relevant: **Telecom Corporation of NZ Ltd v Commerce Commission** (1991) 3 NZBLC 101,962



Requisitioning Information

- Notices can be served on corporate entity and officers and directors - various methods available
 - Personal
 - By post
 - Substituted service – last known place of business or deemed by Commission to be place of service – see **Koppers Arch v Commission** – unreported decisions of Williams J



Requisitioning Information



- Notices require information to be supplied or documents provided
- Documents widely defined and include computer information
- Commission can not require privileged material
– see **Telecom case** and **The Daniels Corporation V ACCC** (2002) 43 ACSR 189



Requisitioning Information



- Commission can require a significant amount of material subject to a reasonable time allowed
- A failure to provide the information without reasonable excuse is a criminal offence
- Parties must comply within the time specified or seek an extension of time
- Seek extension prior to time expiring otherwise arguable offence committed.



Requisitioning Information



- Commission can and will prosecute for non-compliance
- **Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd and Roy Parish**
District Court Manakau, 3/6/05
 - Company and officer hid documents
 - Very serious behaviour
 - Similar to perverting course of justice
 - Company fined \$25,000 – General Manager \$8,000



Requisitioning Information



- Commission can requisition confidential material
- Notices often used to overcome confidentiality obligations; e.g. banking information
- Commission may need to discuss confidential material with third parties and can make confidentiality orders in respect of the information under s100 Commerce Act



Section 98(c) Hearings

- Commission can require people to attend interviews with the Commission
- Parties must answer questions even incriminating questions
- It is an offence to refuse to answer



Section 98(c) Hearings

- Parties can be legally represented – corporate counsel need to consider who represents directors and officers
- Corporate legal representatives may be excluded or made subject to s100 confidentiality order



Search warrants



“There is no mystery about the word ‘warrant’: it simply means a document issued by a person in authority under power conferred in that behalf authorising the doing of an act which would otherwise be illegal.”

see IRC v Rossminster Ltd [1980] AC 952 at 1000



Search Warrants



Warrant authorises Commission to

- enter and search
- use reasonable force
- search for and remove documents
- copy documents, or extracts
- require reproduction, or assistance with reproduction, in usable form, of information recorded or stored in a document.



Search Warrants



- The Commission can search a place:
- Place includes any:
 - Premises
 - Building
 - Aircraft, ship, carriage, vehicle
 - Box or receptacle and
- Can search for and remove goods or documents including information stored in a computer or any other device, labels, films, tapes.



Search warrants

- Section 21 of the New Zealand Bill of Rights Act 1990:
 - “21. Unreasonable search and seizure – Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise.”
- Parties rely on the BORA to challenge the validity of search warrants and their execution



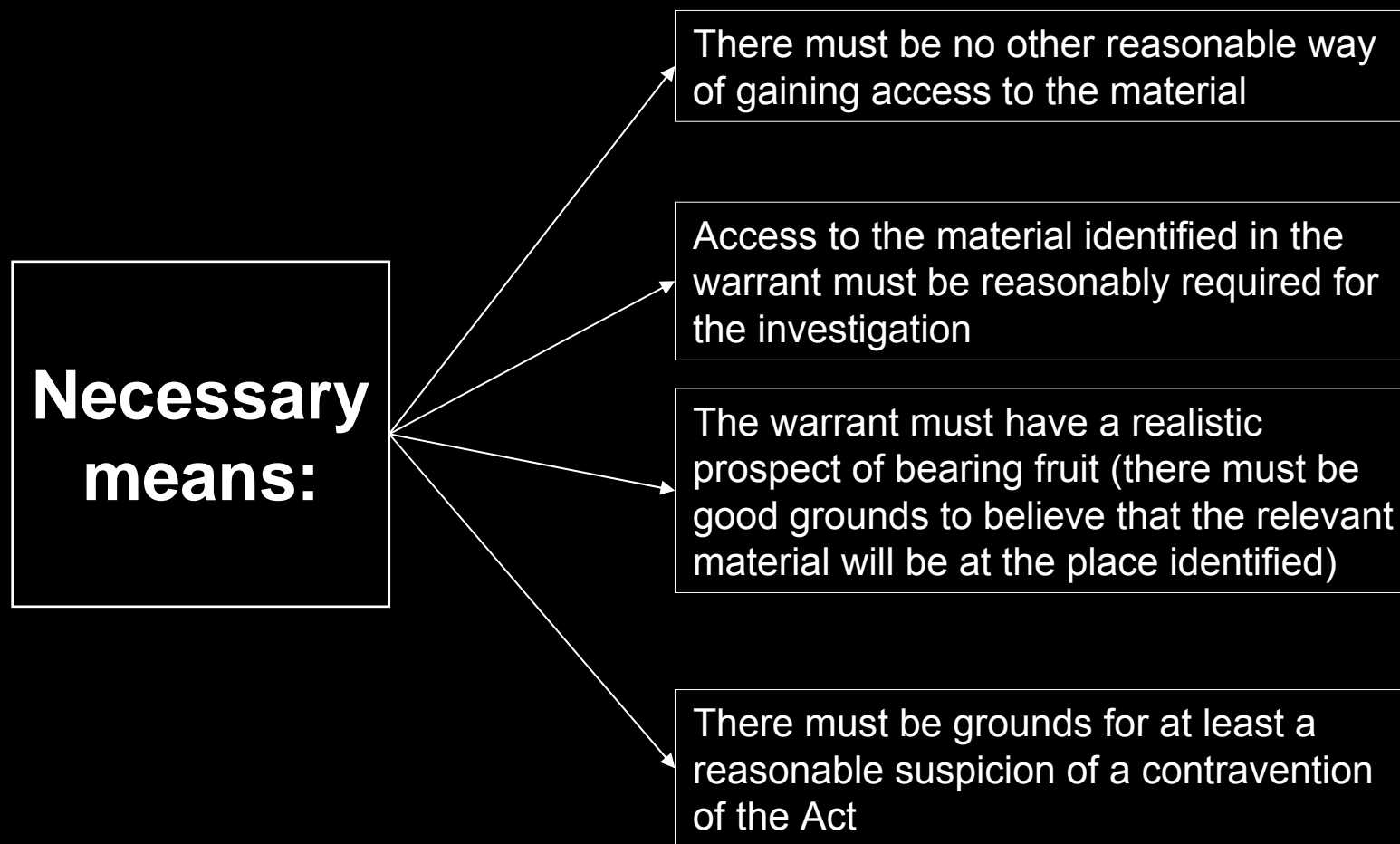
Search Warrants

- The Commission must demonstrate to a judicial officer that the warrant is
 - Necessary
 - Specific
- Commission must make full disclosure of all relevant information

**See *Tranzrail v Commerce Commission* [2002]
10 TCLR 477**



Search Warrants





Search Warrants



- “For centuries the law has set its face against general warrants and held them to be invalid ... A general warrant in this context is one which does not describe the parameters of the warrant, either as to subject matter or location, with enough specificity.”
 - **Tranz Rail** para 38.
- Warrant must be specific about: (1) location (2) contravention (3) material.



Search Warrants



- Warrant must describe contravention
- Mere reference to statutory provisions without a description of actual conduct will be too general
- Must be more than simply conduct that does or may constitute contraventions of sections 27 and/or 36 of the Commerce Act 1986. (Tranz Rail, para 39)



Search Warrants



- Warrant must describe material sought
- Warrant can not authorise search and seizure of privileged material
- Warrant must specify how privileged material will be treated
- Court can impose conditions e.g. a protocol for information taken from a computer system



Search Warrants

- Special conditions for copying and seizing computer hard drives/cloning
- **SFO v A Firm of Solicitors** (CA 108/04, 16/8/05)
- 4 conditions:
 - Data likely to be on hard drive
 - Need forensic investigative techniques
 - On-site extraction impractical
 - No practicable alternative to removal of hard drive



Search Warrants

- Most searches require extraction of computer data
- Options include on-site searching and locking down system so data can not be removed
- Alternative is to clone and search/extract off-site
- Conditions needed to deal with irrelevant and/or privileged material
- Issue is seizure of material not the search
- Conditions need to allow search off-site and prohibit use of irrelevant/privileged material



Search Warrants

- Duty to assist – party searched must provide all reasonable facilities and assistance
- It is a criminal offence to obstruct the carrying out of the warrant
- Note s98G – Commission can use its powers even when there are court proceedings



Search Warrants



- Person executing the warrant must
 - Be authorised
 - Produce the warrant
 - Prove identity
- A schedule must be left or served in 7 days stating
 - What was taken
 - Where from
 - Where held



Conclusion



- Commission and similar agencies have wide powers to requisition information or to obtain search warrants
- The agencies powers must be exercised within the statutory framework
- Commission respects the position it has and that every person's home is their castle and it will not seek to invade parties' privacy unnecessarily.



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