FEDERAL COURT OF AUSTRALIA

AGL Energy Limited v Hardy [2017] FCA 420

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| File number: | VID 176 of 2017 |
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| Judge: | **O’CALLAGHAN J** |
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| Date of judgment: | 26 April 2017 |
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| Catchwords: | **CONTEMPT OF COURT** – search order made pursuant to r 7.43 of the *Federal Court Rules 2011* (Cth) – order concerned predominantly with electronic documents – respondent refused to permit search party to enter premises – whether respondent guilty of contempt of court – whether order clear, unambiguous and capable of compliance |
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| Legislation: | *Federal Court of Australia Act* *1976* (Cth), s 31*Federal Court Rules 2011* (Cth), rr 7.42, 7.43, 7.45 42.02(d) |
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| Cases cited: | *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201*Australian Competition and Consumer Commission v ACN 117 372 915 (in liq)* [2015] FCA 1441*Hurd v Zomojo Pty Ltd* [2015] FCAFC 148*ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248*Kirkpatrick v Kotis* (2004) 62 NSWLR 567*Sydney Medical Service Co-operative Ltd v Lakemba Medical Services Pty Ltd (No 2)* [2016] FCA 1188*Universal Music Australia Pty Ltd v Sharman Networks Ltd* (2006) 150 FCR 110Biscoe P, *Freezing and Search Orders: Mareva and Anton Piller Orders* (2nd ed, LexisNexis Butterworths Australia, 2008)*Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 1 WLR 1233  |
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| Date of hearing: | 27 March 2017 |
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| Registry: | Victoria |
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| Division: | Fair Work |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 106 |
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| Counsel for the First Prospective Applicant: | Mr CJ Murdoch QC |
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| Solicitor for the First Prospective Applicant: | Minter Ellison |
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| Counsel for the First Prospective Respondent: | Mr EP White and Ms R Shann |
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| Solicitor for the First Prospective Respondent: | Slater and Gordon Lawyers |

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| **Table of Corrections** |  |
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| 2 May 2017 | In the heading to page 16 of the Annexure, the First Prospective Respondent’s street address has been redacted. |

ORDERS

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|  | VID 176 of 2017 |
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| BETWEEN: | AGL ENERGY LIMITED (and others named in the Schedule)First Prospective Applicant |
| AND: | GREGORY THOMAS HARDY (and another named in the Schedule)First Prospective Respondent |

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| JUDGE: | o’callaghan j |
| DATE OF ORDER: | 26 April 2017 |

THE COURT ORDERS THAT:

1. Gregory Thomas Hardy is guilty of contempt of court, in that on 2 March 2017, after being served with the Search Order made by the Court on 28 February 2017, he failed to comply with paragraph 11 of that order by refusing to permit members of the Search Party to enter the Premises so that they could carry out the search and other activities referred to in the order.
2. The hearing of the interlocutory application dated 9 March 2017 be held over for a penalty hearing on 30 May 2017.
3. On or before 10 May 2017, Mr Hardy file and serve any affidavit or affidavits and any written submission on which he intends to rely in respect of penalty.
4. On or before 24 May 2017, AGL Energy Limited, AGL Loy Yang Pty Ltd and AGL Loy Yang Marketing Pty Ltd file and serve any affidavit or affidavits and any written submission on which they intend to rely in respect of penalty.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

O’CALLAGHAN J:

1. This is an application seeking an order that Mr Gregory Thomas Hardy (**Mr Hardy**) be found in contempt of court, for refusing to comply with a search order made under r 7.42 of the *Federal Court Rules 2011* (Cth) (the **Rules**).

# INTRODUCTION

## The 28 February 2017 search order

1. On 28 February 2017, on the ex parte application of AGL Energy Limited, AGL Loy Yang Pty Ltd and AGL Loy Yang Marketing Pty Ltd (collectively, **AGL**) I made a search order under r 7.42 of the Rules permitting a search of the home of Mr Hardy in Traralgon, Victoria (the **premises**), by an independent lawyer, an independent computer expert and a lawyer at the law firm Minster Ellison, who are AGL’s lawyers (the **order**), according to the terms of the order.
2. AGL Energy Limited (**AGLE**) wholly owns AGL Loy Yang Pty Ltd (**AGL LY**), which operates the Loy Yang Power Station at Traralgon. AGL Loy Yang Marketing Pty Ltd (**AGL LYM**) markets and receives revenue on behalf of AGLE and AGL LY for the power generated by AGL LY at the Loy Yang Power Station.
3. Mr Hardy is a Unit Controller for AGL LY and is the Secretary of the Loy Yang Lodge of the Construction, Forestry, Mining and Energy Union (**CFMEU**).
4. I made the order because I was persuaded: (i) of the existence of a strong prima facie case that between 12 and 18 January 2017, Mr Hardy organised industrial action at the Loy Yang Power Station in breach of the general protections provisions of the *Fair Work Act 2009* (Cth); (ii) that the potential loss or damage to AGL would be serious if the order was not made; and (iii) that there was sufficient evidence in relation to Mr Hardy that he possessed important evidentiary material and that there was a real possibility that he might destroy such material or cause it to be unavailable for use in an anticipated proceeding by AGL in relation to the general protections provisions of the *Fair Work Act 2009* (Cth).

## Alleged non-compliance

1. Mr Hardy does not dispute that he was served with the order by the independent lawyer at approximately 9.00 a.m. on 2 March 2017, and also with the other documents required by the terms of the order to be served, including the material that AGL relied upon at the hearing on 28 February 2017, the transcript of the hearing, the draft originating process against Mr Hardy and the Rules of the CFMEU Mining and Energy Division.
2. Mr Hardy also does not dispute that he refused to allow members of the search party, other than the independent lawyer, to enter the premises.
3. On 9 March 2017, AGL filed an interlocutory application seeking an order, among others, that, pursuant to r 42.02(d) of the Rules and s 31 of the *Federal Court of Australia Act* *1976* (Cth), Mr Hardy be found in contempt of court (the **interlocutory application**).
4. By a statement of charge also filed on 9 March 2017 (the **statement of charge**), AGL alleges against Mr Hardy that:

On 2 March 2017, after being served with the Search Order, you failed to comply with Order 11 of the Search Order by refusing to permit members of the Search Party to enter the Premises so that they could carry out the search and other activities referred to in the Search Order.

1. The statement of charge contains particulars, which detail the circumstances in which the alleged failure to comply occurred.
2. AGL relied upon:
3. the interlocutory application;
4. the statement of charge;
5. an affidavit of the independent lawyer, Mr Daniel Marquet, a partner of the law firm Corrs Chambers Westgarth, sworn 9 March 2017, deposing to the circumstances in which Mr Hardy declined to allow the search party to enter the premises; and
6. paragraphs 1, 2, 3, 4 and 5 of an affidavit of Mr Daniel Williams, sworn 9 March 2017, deposing to the documents referred to in the search order with which the independent computer expert and independent lawyer were provided prior to service of the order on Mr Hardy.
7. Through his counsel at the hearing before me on 28 March 2017 Mr Hardy pleaded not guilty to the charge of contempt. He also reserved his right to make a “no case” submission at the conclusion of the applicants’ case. Ultimately, no such submission was made.

## Terms of the search order

1. The order is substantially based on the “Example Form of Search Order” contained in Annexure A to the Court’s *Search Orders Practice Note* (GPN-SRCH) (the **template order**). The Practice Note supplements Div 7.5 in Pt 7 of the Rules relating to search orders, which was inserted in 2006 in accordance with advice of the Rules Harmonisation Committee appointed by the Council of Chief Justices.
2. Rule 7.42 within Div 7.5 relevantly empowers the Court, upon satisfaction of the matters prescribed by r 7.43, to make a search order in any proceeding or in anticipation of any proceeding in the Court, with or without notice to the respondent, for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence that is, or may be, relevant to an issue in the proceeding or anticipated proceeding. Nothing in Div 7.5 diminishes the inherent, implied or statutory power of the Court to make a search order: r 7.44.
3. Pursuant to r 7.45, the Court has broad powers to tailor the terms of a search order to the circumstances of a particular application. Rule 7.45 relevantly provides:

**7.45 Terms of search order**

(1) A search order may direct each person who is named or described in the order:

(a) to permit, or arrange to permit, other persons named or described in the order:

(i) to enter premises specified in the order; and

(ii) to take any steps that are in accordance with the terms of the order; and

(b) to provide, or arrange to provide, other persons named or described in the order with any information, thing or service described in the order; and

(c) to allow other persons named or described in the order to take and retain in their custody any thing described in the order; and

(d) not to disclose any information about the order, for up to 3 days after the date the order was served, except for the purposes of obtaining legal advice or legal representation; and

(e) to do or refrain from doing any act as the Court considers appropriate.

(2) Without limiting the generality of subparagraph (1) (a) (ii), the steps that may be taken in relation to a thing specified in a search order include:

(a) searching for, inspecting or removing the thing; and

(b) making or obtaining a record of the thing or any information it may contain.

(3) A search order may contain other provisions the Court considers appropriate.

1. At the hearing on 28 February 2017, senior counsel for AGL handed up a draft order that contained certain modifications to the template order, in accordance with the Court’s broad powers under Div 7.5, because the evidence sought to be preserved by the application was predominantly in digital or electronic form. I made the order in the form of the proffered draft.
2. The order permitted a search of Mr Hardy’s home by Mr Sisk, an independent computer expert, and Mr Zielinksi of the law firm Minter Ellison, under the supervision of Mr Marquet.
3. The search permitted by the order was in substance limited to a search for the purposes of preserving evidence on Mr Hardy’s laptop computer and mobile telephone, as well as any other hardware, email accounts or online storage devices. Because it will later become necessary to refer to the terms of the order in some detail, I have annexed to these reasons a copy of it, with certain personal information redacted.
4. Paragraph 11 of the order (or “Order 11” as that part of it is referred to in the statement of charge) provided:

Subject to paragraphs 13 to 23 below, upon service of this order you must 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.

1. Having “permitted members of the Search Party to enter the Premises”, paragraph 12 of the order required Mr Hardy then to do the following things:
2. permit the search party to leave and re-enter on the same and the following day until the search and other activities referred to in the order were complete;
3. permit the search party to search for and inspect the “Listed Things” and to make or obtain a digital image, copy, photograph, film, sample, test or other record of those things;
4. disclose to the search party the whereabouts of all the “Listed Things” in his possession, custody or power, whether at the premises or otherwise;
5. disclose to the search party the whereabouts of all “Storage Devices” or systems at the premises in which any “Electronic Documents” (both as defined in the order) among the “Listed Things” were or may have been stored, located or recorded;
6. do all things necessary to enable the search party to access the “Listed Things”, including opening or providing keys to locks and enabling them to access and operate “Storage Devices” and providing them with all necessary user names, passwords or other credentials;
7. permit the independent lawyer to remove from the premises into the independent lawyer’s custody any things the subject of dispute as to whether they are “Listed Things”;
8. permit the independent computer expert to search any “Storage Device” in which any “Electronic Documents” among the “Listed Things” were or may have been stored, located or recorded and make a copy or digital copy of any such “Storage Device”; and
9. permit the independent computer expert or the independent lawyer to remove any such “Storage Device” from the premises as set out in paragraphs 23 and 24 of the order.
10. Paragraphs 13 to 22 of the order were headed “Restrictions on Entry, Search and Removal”. Those paragraphs contained:
11. preconditions to entry, which, if not satisfied, entitled Mr Hardy to refuse entry: paragraphs 13-15 (by reference to 16 and 17); and
12. restrictions on the search and removal powers of various members of the search party: paragraphs 18, 20 (subject to 21) and 22.
13. Paragraphs 19, 23 and 24 related to functions of the independent computer expert. Like paragraphs 18 and 20-22, those paragraphs did not impose any restriction on the search party’s right to enter the premises under paragraph 11.

### Restrictions on entry: paragraphs 13, 14 and 15 (by reference to 16 and 17)

1. The obligation imposed on Mr Hardy by paragraph 11 of the order, to permit entry to the premises so that the search party could carry out the search and other activities referred to in the order, would not have been engaged in the following circumstances.
2. First, where the order had purportedly been executed at the same time as a search warrant (or similar process): paragraph 13.
3. Secondly, if Mr Hardy had not been served with copies of the order and the affidavit of Mr Williams referred to in the order: paragraph 14(a).
4. Thirdly, if Mr Hardy had not been given an opportunity to read the order and, if the independent lawyer did not, if asked, explain the terms of the order to him: paragraph 14(b).
5. Fourthly, if Mr Hardy had exercised his right to refuse entry to anyone except the independent lawyer – for a period not exceeding two hours, or such longer period as the independent lawyer permitted – in order to seek legal advice, ask the Court to vary or discharge the order and/or gather together certain material subject to legal professional privilege or client legal privilege and hand them to the independent lawyer in a sealed envelope or container: paragraph 15(a), (b) and (c).
6. The circumstances detailed in paragraph 15(a), (b) and (c) of the order supplied a basis for refusing access to the premises, to anyone other than the independent lawyer, during the period referred to in paragraph 15.
7. During that period Mr Hardy remained obliged to:
8. inform and keep the independent lawyer informed of the steps being taken;
9. permit the independent lawyer to enter the premises but not to start the search;
10. not disturb or remove any document or material the subject of the order (defined as “Listed Things” in paragraph 6 of the order); and
11. comply with paragraph 28 of the order (by not destroying, tampering or parting with possession, custody or control of the “Listed Things”): paragraph 17(a), (b), (c) and (d).
12. The order further precluded the independent lawyer from inspecting, or permitting others, including AGL and its lawyers, to inspect, anything handed to the independent lawyer in accordance with paragraph 15(c) (being documents subject to legal professional privilege or client legal privilege): paragraph 16. This prohibition would not have extended to Mr Hardy or his lawyer had he exercised the right conferred by paragraph 25 to inspect anything removed from the premises (including to copy and claim privilege in respect of those things). Anything handed to the independent lawyer in accordance with paragraph 15(c) was required to be delivered to the Court at or prior to the hearing on the Return Date.

### General restrictions on search and removal: paragraphs 18, 20 (subject to 21) and 22

1. Once permitted to enter the premises, the order provided that the search party could then search and remove certain things from the premises, to the extent provided for in the order. To that end, paragraphs 18, 20 (subject to 21) and 22 of the order imposed certain constraints on the search party’s search and removal powers.
2. Paragraph 18 provided that if a dispute arose as to whether a thing was a “Listed Thing”, within the meaning of paragraph 6 of the order, that thing was to be handed to the independent lawyer pending resolution of the dispute or further order of the Court.
3. Paragraph 20 provided that the premises were not to be searched, and things were not to be removed from the premises, except in the presence of Mr Hardy or a person who appeared to the independent lawyer to be Mr Hardy’s partner, employee, agent or other person acting on Mr Hardy’s behalf or instructions. However, the independent lawyer was empowered to permit a search to occur otherwise than in accordance with the requirements of paragraph 20: paragraph 21.
4. Paragraph 22 imposed an obligation on AGL’s lawyers and the independent lawyer to prevent AGL from inspecting or having copies of anything removed from the premises during the search until the Return Date or other time fixed by the Court. Similarly, AGL’s lawyers and the independent lawyer were forbidden from communicating to AGL information about the contents of anything removed from the premises or about anything observed at the premises.

### Search and removal by the independent computer expert: paragraphs 19, 23 and 24

1. Paragraphs 19, 23 and 24 made specific provision for the search and removal powers of the independent computer expert.
2. Paragraph 19 provided that before removing any “Listed Thing” from the premises, other than a thing about which there was a dispute as to whether it was a Listed Thing (for the purposes of paragraph 18), the independent computer expert, through the independent lawyer, would be required to provide Mr Hardy with a list of such things and a reasonable time to check the correctness of the list, before providing both Mr Hardy and AGL’s lawyers with a signed copy of the list.
3. Paragraph 23 provided for the role of the independent computer expert within the search party: paragraph 23(a). The various subparagraphs of paragraph 23 both conferred discretions and imposed obligations on the independent computer expert with respect to search, copying and removal of relevant facilities, accounts and devices.
4. Paragraph 23(b) provided that any search of a “Storage Device” was to be carried out only by the independent computer expert, while subparagraph (e) provided that such search (of the Storage Device or a copy thereof) might occur at and/or away from the premises.
5. Paragraph 23(c) provided that the independent computer expert was required, without inspecting the material contained therein, to make a copy or digital copy of any “Online Storage Facilities, Email Accounts or Storage Devices” (each within the meaning of paragraph 7 of the order) in which “Listed Things” were or may have been stored, located or recorded. Paragraph 23(e) provided that the independent computer expert could copy – electronically, in hard copy or both – any Listed Things found during a search conducted in accordance with than paragraph. Paragraph 23(f) required the independent computer expert to deliver a copy or digital copy of Online Storage Facilities, Email Accounts or Storage Devices to the independent lawyer, together with a report of what the independent computer expert had done, including a list of such electronic or hard copies. The independent lawyer was then required, by paragraph 23(g), to deliver all things received from the independent computer expert to the Court and serve a copy of the independent computer expert’s report on the parties.
6. Paragraph 23(c) further provided that a copy or digital copy taken in accordance with that paragraph was to be removed from the premises. Paragraph 23(d)(i) empowered the independent computer expert to remove any Storage Device referred to in paragraph 23(c) from the premises. If such a Storage Device was removed from the premises pursuant to paragraph 23(d)(i), the independent computer expert was obliged to return the Storage Device as soon as practicable, once satisfied that a complete digital image of the Storage Device had been accurately generated: paragraph 23(d)(ii).
7. Paragraph 24 prescribed a specific objection procedure for claiming the privilege against self-incrimination or civil penalty privilege in response to a purported exercise of the powers and discretions provided for in paragraph 23: paragraph 24(a)(i), (ii). Paragraph 24 is consistent with the procedure prescribed by s 128A of the *Evidence Act 1995* (Cth), which further prescribes the process for determination of a claim made in accordance with that provision. Were such an objection to have been made by Mr Hardy, paragraph 24(b) would have required him to do certain things, namely to:
8. disclose so much of the information required to be disclosed to which no objection was taken; and
9. prepare an affidavit containing so much of the information required to be disclosed to which objection was taken, and deliver it to the Court in a sealed envelope; and
10. file and serve on AGL a separate affidavit setting out the basis for the objection.

## ISSUES AND EVIDENCE

1. It was common ground between the parties that in order to prove a civil contempt constituted by a breach of a court order, the moving party must prove beyond reasonable doubt that:
2. the relevant order was made by the Court;
3. the terms of the order are clear, unambiguous, and capable of compliance;
4. the order was served on the alleged contemnor;
5. the alleged contemnor had knowledge of the terms of the order; and
6. the alleged contemnor breached the terms of the order.

(See *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201; cited with approval by the Full Court in *Hurd v Zomojo Pty Ltd* [2015] FCAFC 148 at [28] per Besanko and Gilmour JJ (Beach J agreeing at [164]), by Flick J in *Sydney Medical Service Co-operative Ltd v Lakemba Medical Services Pty Ltd (No 2)* [2016] FCA 1188 at [13] and by Moshinsky J in *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* [2015] FCA 1441 at [51].)

1. It was also not disputed that a person who refuses to comply with a search order is in contempt of court.
2. Mr Hardy conceded that the search order was made and that it was served on him at about 9.00 a.m. on 2 March 2017. Items (1) and (3) above are therefore not in dispute.
3. Mr Hardy put in issue items (2), (4), and (5). He submitted that:
4. certain terms of the search order were unclear, ambiguous and incapable of compliance;
5. the evidence did “not exclude the reasonable possibility that Mr Hardy did not know the terms of the search order – i.e. that he did not know what was required of him” (Mr Hardy’s written submissions at [52]);
6. he did not breach the search order.
7. Mr Marquet was cross-examined by counsel for Mr Hardy. But counsel did not challenge his evidence about the circumstances in which Mr Hardy declined to allow the search to occur. Mr Marquet deposed to the following facts, set out at [47] to [57] below, each of which I am satisfied beyond reasonable doubt occurred.
8. Shortly after 9:00 a.m. on 2 March 2017, Mr Marquet attended the premises with the other members of the search party. Mr Marquet served the order and the documents required to be served with the order on Mr Hardy. The other documents were the application for the search order filed on 27 February 2017; Mr Williams’ affidavit date 27 February 2017; the applicants’ written submissions in support of the order dated 28 February 2017; a draft originating application; the Rules of the CFMEU Mining and Energy Division; and the transcript of the hearing before me on 28 February 2017: see the affidavit of Mr Williams sworn 9 March 2017. The documents were contained in two lever arch folders. Mr Hardy invited Mr Marquet to enter the premises for the purpose of explaining the terms of the order, which he did. The other members of the search party remained outside.
9. Once inside the premises, Mr Marquet explained the terms of the order to Mr Hardy and told him that he had a two hour window within which to seek legal advice, apply to the Court to vary or discharge the order and to gather together privileged material. Mr Marquet asked Mr Hardy whether he had a lawyer or could contact a lawyer through the CFMEU, to which Mr Hardy responded that he did not. Mr Hardy said words to the effect that he did not want to comply with the order, to which Mr Marquet responded with words to the effect that he had two hours to consider the documents and seek legal advice.
10. Mr Hardy said that he needed to consult with the people he represented and asked Mr Marquet for an electronic copy of the documents with which he had been served. Mr Marquet left the premises briefly to speak with Mr Zielinski to make arrangements for this to occur and then went back into the premises.
11. Mr Marquet sat with Mr Hardy in the front room of the premises, until around 10:50 a.m., while Mr Hardy read the order and reviewed the accompanying documents. From time to time Mr Hardy asked questions about the order, which Mr Marquet answered. Mr Marquet said words to the effect that if Mr Hardy did not comply with the order he could be in contempt of court and suggested that he seek legal advice before taking steps that could constitute a contempt.
12. At around 10:00 a.m., Mr Hardy said that he was concerned that the terms of the order permitted the search party to search areas of the premises such as his wife’s bedroom drawers. Mr Marquet responded that, while that was so, the focus of the search was on electronic documents stored on devices such as Mr Hardy’s computer and mobile phone. Mr Marquet also told him that only electronic documents could be removed from the premises.
13. At around 10:10 a.m., Mr Zielinski informed Mr Marquet by text message that emails had been sent to Mr Hardy attaching the documents with which he had been served. Mr Hardy took no steps in Mr Marquet’s presence to access those documents.
14. Several times during the course of his discussions with Mr Marquet, Mr Hardy queried the independence of Mr Marquet, the law firm of which he is a partner, and the firm by which the independent computer expert is employed. Mr Marquet said that he was an independent lawyer with no interest in the proceeding and that the order had been made to preserve evidence. Mr Marquet informed Mr Hardy of the undertakings he had provided to the Court, namely, that he would hold any material obtained during the search pending further order of the Court and that AGL would not be provided with such material until the Return Date (namely, 10 March 2017), at which Mr Hardy would have an opportunity to be heard. Mr Marquet told Mr Hardy that the independent computer expert was in the same position. In response, Mr Hardy said words to the effect that he did not accept this.
15. Mr Marquet drew Mr Hardy’s attention to paragraph 26 of the order and said that it required him to prepare an affidavit before the Return Date.
16. As the end of the two hour period referred to in paragraph 15 drew near, Mr Marquet sought to clarify Mr Hardy’s response to paragraph 11. Mr Hardy said words to the effect that he “was not prepared to let AGL have [his] stuff” and that there was confidential material on his laptop relating to employees of AGL. Mr Marquet said to Mr Hardy words to the effect that there appeared to be three options available to him: permit the search; not permit the search; or, as a middle ground, permit the search of his computer devices and then discuss the need for further searches. Mr Maquet cautioned Mr Hardy about the consequences of being in contempt and suggested that it may be preferable partially to comply with the order. Mr Hardy said words to the effect that he “did not see any difference between being in contempt by not complying with the [o]rder partially or not complying at all”. Mr Marquet then asked Mr Hardy whether he would permit the search, to which he replied that he would not. Mr Marquet indicated that if that was Mr Hardy’s position, he would leave the premises. He then did so.
17. From around 11:00 a.m. to 11:56 a.m., Mr Marquet waited outside the premises with the search party. Mr Zielinski spoke with his supervising lawyer, Mr Williams, with whom Mr Marquet also spoke.
18. At around 11:56 a.m., Mr Williams called Mr Zielinski to tell him that he wanted Mr Marquet to go back to the premises to ask Mr Hardy to confirm his position in respect of the order. Mr Marquet then returned to the front room of the premises with Mr Hardy, where Mr Marquet said words to the effect that that would be his final opportunity to comply and that, if he did not, it was likely that AGL would take contempt proceedings. Mr Hardy responded by again saying words to the effect that he “was not letting AGL search his stuff” and that he understood the potential for contempt proceedings. Mr Marquet informed Mr Hardy that if he changed his mind he should call Mr Marquet. They exchanged contact details and Mr Marquet left the premises.
19. During cross-examination, Mr Marquet agreed with counsel for Mr Hardy that throughout Mr Marquet’s time with Mr Hardy, Mr Hardy was polite and respectful.
20. I am satisfied on the evidence beyond reasonable doubt, and Mr Hardy did not contest, that he did not permit the search party to enter his home during the period provided for in the order or during the additional period offered by Mr Marquet so that the search party could carry out the search and other activities referred to in the order.
21. At no time since 2 March 2017 has Mr Hardy sought to discharge or vary the order or otherwise sought to assert that the order should not have been made.
22. Mr Hardy’s principal submission in support of the proposition that he did not commit a contempt, by refusing to permit the search party to enter the premises so that they could carry out the search and other activities referred to in the order as required by paragraph 11 of the order, is that certain terms of the order (but not paragraph 11) are unclear, ambiguous and incapable of compliance. His other submissions – that the evidence does not exclude the reasonable possibility that he did not know the terms of the search order, and that he did not breach it – largely stand or fall on that principal submission. So much is clear from both the written and oral submissions made to the Court by counsel on Mr Hardy’s behalf.

# CONSIDERATION

## Whether the terms of the order are clear, unambiguous, and capable of compliance

1. There is no dispute between the parties about the applicable legal principles. Search orders, like any other injunction, “should be granted in clear and unambiguous terms which leave no room for the person to whom they are directed to wonder whether or not their future conduct falls within the scope of the injunction”: *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259 per Lockhart J. Further, “the Court approaches the question of whether the order is ambiguous on the basis that the recipient is expected to try to understand it and obey it”: *Kirkpatrick v Kotis* (2004) 62 NSWLR 567 at 578, [55] per Campbell J.
2. But an order will not be incapable of founding a charge of contempt “merely because it leaves a respondent with room to wonder whether future conduct falls within it. At least where the true construction of the order is one which ought fairly to have been in the contemplation of the person to whom the order was directed … the Court which entertains the charge of contempt will be required to determine that construction”: *Universal Music Australia Pty Ltd v Sharman Networks Ltd* (2006) 150 FCR 110 (***Universal Music***) at [38] per Branson J.
3. Counsel for Mr Hardy submitted, by way of summary, that the order was unclear, ambiguous and incapable of compliance because it:
4. contained internally contradictory paragraphs; and
5. provided Mr Hardy with “important safeguards which the order state[d] he [could] assert to prevent or limit the search but provide[d] impossible means to activate them in circumstances of a search entirely focussed on electronic documents”.
6. A number of the submissions made on Mr Hardy’s behalf in support of these propositions laboured under the misapprehension that many of the matters contemplated by the order to be done after the search party was permitted to enter the premises (something that did not occur in this case) were required to occur within the two to three hour “windows” provided for in paragraphs 3 and 15 of the order. Counsel submitted, for example, that the removal and search orders contained in paragraph 23 of the order, and the provision entitling Mr Hardy to prepare an affidavit containing information required to be disclosed to which he took objection under paragraph 24, required Mr Hardy’s compliance within “the two or three hours on the morning of [2 March 2017]”. Mr Hardy’s counsel submitted that “the practicality of compliance during the time the Court is here concerned with, is virtually nil”.
7. But that is simply not so. Other critical parts of the order made it abundantly clear that, had Mr Hardy chosen to permit the search party entry to the premises to conduct the search, he would have had ample time to invoke whatever rights given to him under the order that he chose to invoke. The order did not contemplate that the invoking of claims to privilege were to be done within two or three hours of the order being served. Paragraph 12(a) allowed 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 [the] order [were] complete”. Those “other activities” obviously included the matters the subject of paragraphs 23 and 24. Further, paragraph 15 permitted the independent lawyer to extend the two hour time limit provided for in paragraph 15 within which Mr Hardy was entitled to seek legal advice and ask the Court to vary or discharge the order. And, in any event, paragraph 3 of the order provided that Mr Hardy could have applied to the Court to vary (or discharge) the order, by calling my chambers on the telephone number given in that paragraph.
8. Mr Hardy’s counsel also submitted that because paragraph 24 of the order “is not time limited”, there cannot be a breach of the obligation to permit entry provided for in paragraph 11 of the order. Counsel submitted in oral argument that “if the period [within which Mr Hardy was to permit the search to occur] is limited, as… is clear… then if there is capacity to claim privilege at a later time, then how can there be a breach [of paragraph 11] where that claim is either – has been made or might be made? It might be made as I stand here today”.
9. That contention is, with respect, also misconceived, because, like many of the other submissions made on Mr Hardy’s behalf (which are dealt with below), it ignores the obvious fact that “the capacity to claim privilege” referred to in paragraph 24 could only arise if and when Mr Hardy permitted the search party to enter the premises to carry out the search. That is something that he did not permit, so the question of whether Mr Hardy ever had “the capacity to claim privilege” under paragraph 24 during the period of any search permitted by the order never arose.
10. Mr Hardy further submitted that paragraph 24 of the order was unclear and/or incapable of compliance. He submitted that the steps required to be taken by paragraph 24(b) were incapable of being completed at the time at which the independent computer expert would be purporting to exercise his powers under paragraph 23, because:
11. Mr Hardy lived in Traralgon and was required by the order to be at his home while the search was conducted and “at the same time” prepare an affidavit and deliver it to the Court and “do all other matters he was ordered to do”;
12. the Listed Things were contained on a Storage Device; he could not, so it was submitted, disclose “some” of the information in accordance with paragraph 24(b)(i), assuming privilege was not claimed over all of it;
13. Mr Hardy would risk altering the documents’ properties, and thus breaching paragraph 17, were he to segregate and/or review certain documents for the purposes of preparing an affidavit under paragraph 24(a)(ii).
14. Mr Hardy further submitted that paragraph 15(c) was “incapable of compliance”, because it required Mr Hardy to put documents subject to legal professional privilege in an envelope or container, which is impossible when all of the relevant Electronic Documents were contained in a Storage Device. Rhetorically, his Counsel asked, “is [he] to put his computer in an envelope? Is he to review the contents of his electronic documents and print those over which he wishes to make a claim?”
15. Mr Hardy next submitted that paragraph 18 was incapable of compliance, because all of the Listed Things were electronic and:
16. Paragraph 23(b) provided that only the independent computer expert was permitted to search the relevant Storage Devices on which the Listed Things were contained, yet paragraph 23(c) prohibited the independent computer expert from inspecting such Storage Devices before removing them from the premises.
17. It would have constituted a breach of paragraph 17(c) for Mr Hardy to review each Electronic Document to determine whether it was a Listed Thing.
18. Mr Hardy also submitted that paragraph 12(b) and paragraph 19, respectively, contradicted paragraph 23. In the first instance, it was submitted, this is because paragraph 12(b) empowered all members of the search party to search for and inspect the Listed Things, while paragraph 23(b) empowered only the independent computer expert to search a Storage Device (and all of the Listed Things are contained on a Storage Device). Mr Hardy would, it was submitted, thus have been unable to identify who should be permitted to search his Electronic Documents. In the second instance, the contradiction was said to arise from paragraph 19 providing a process for removal of Listed Things from the premises (namely, by the independent computer expert providing Mr Hardy with a list of those things for his verification) while paragraph 23 provided for the removal of Storage Devices and copies thereof: paragraph 23(c), (d). A “tension”, Mr Hardy submitted, arose from the individual treatment of Listed Things in paragraph 19 with the bulk treatment of such things (as contained on Storage Devices) in paragraph 23.
19. Mr Hardy also submitted that paragraph 3 contradicted paragraph 15(b), because those paragraphs provided two different mechanisms for seeking variation or discharge of the order. The former entitled Mr Hardy to seek variation or discharge on the giving of three hours’ written notice to AGL. The latter entitled him to seek variation or discharge, before permitting entry to the premises, during the period prescribed by that paragraph. It was submitted that paragraph 8 of the “Important Notice to the First Prospective Respondent/Occupier of the premises at [street address], Traralgon, Victoria” on page 18 of the order compounded this contradiction. Relevantly, that paragraph notified Mr Hardy of his right to seek variation or discharge “provided that you do so at once, and provided that meanwhile you permit the independent lawyer (who is a lawyer acting independently of the Prospective Applicant) and one of the Prospective Applicants’ representatives to enter, but not start to search, the premises”.
20. Finally, Mr Hardy submitted that paragraph 23 was “internally contradictory, inconsistent with other [o]rders and is unworkable” because:
21. Paragraph 23(c) required the independent computer expert, inter alia, to make a copy of Storage Devices and remove any copy from the premises, without making inspection of the material contained therein. Paragraph 23(e), however, conferred a discretion on the independent computer expert to search a Storage Device at the premises.
22. Paragraph 23(c) was inconsistent with paragraph 19, because, presumably, it would not be possible for the independent computer expert to create a list of all Listed Things without inspecting the material contained on a Storage Device.
23. Only the independent computer expert was empowered to search a Storage Device, but “the subject and nature of the definition of Listed Things require[d] someone with knowledge of the workplace and dispute to consider scope (particularly in identifying documents falling within Order 6(c))”.
24. I will deal with the submissions set out at [69] to [74] above in turn.

### Paragraph 24

1. Counsel for Mr Hardy submitted that the order was unclear, ambiguous or incapable of compliance. Counsel contended that because paragraph 11 was “*Subject to*” paragraph 24 (it being “picked up” by paragraph 23), paragraph 24 qualified what otherwise would have been an unqualified obligation to comply with the order to permit the search contained in paragraph 11.
2. In other words, Mr Hardy contended that the process for objection prescribed by paragraph 24 provided a basis for refusing entry to the premises.
3. I reject that submission. The words of paragraph 11 admit of no doubt. That paragraph states: “Subject to paragraphs 13 to 23 below, upon service of this order you must 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.” The words “Subject to” mean that Mr Hardy was required to permit entry into the premises, unless one of the circumstances in paragraphs 13 to 23 (and 24) was engaged, such that he was entitled to refuse to permit entry. It is readily apparent that not all of those paragraphs are capable of giving rise to a right to refuse entry to the search party. Paragraph 24 is one such paragraph. Paragraphs 18 to 23 also have nothing at all to do with the obligation to permit entry. All of those paragraphs involved considerations or matters that could only have arisen if and when entry to the premises was permitted.
4. The obligation to permit the independent computer expert to make the searches provided for in paragraph 23 obviously becomes inoperative to the extent of any objection made under paragraph 24. But an objection pursuant to paragraph 24, if made, would not have alleviated Mr Hardy of the obligation to permit entry under paragraph 11. It is clear from the terms of paragraph 24 that it applied to the functions and powers of the independent computer expert under paragraph 23. Relevantly, Mr Hardy was to permit (unless he had made an objection under paragraph 24) the independent computer expert’s search of a relevant Storage Device (paragraph 23(b), (e)), copying of any relevant “Online Facilities, Email Accounts or Storage Device” (paragraph 23(c), (d)(ii), (f)) and, if the independent computer expert had so decided, removal, of any relevant Storage Device from the premises. Paragraph 24 was, therefore, a basis for objecting to the disclosure that would have been effected by permitting the independent computer expert to exercise the powers or discretions conferred on him by paragraph 23 – something that could only be done once entry to the premises had been permitted.
5. Paragraphs 11 and 12 drew a distinction between obligations imposed on Mr Hardy to: permit entry to the premises (paragraphs 11, 12(a)); permit the search to occur (paragraph 12(b)-(e), (g)); and permit certain things to be removed from the premises (paragraph 12(f), (g)). The opening words of the chapeau to paragraph 12 (“Having permitted entry…”) make these distinctions abundantly clear.
6. The submission (see [69(1)] above) that Mr Hardy could not have prepared an affidavit pursuant to paragraph 24(b)(ii) of the order, and thus could “not comply” with the order, because he lived in Traralgon and could not be present for the search and do “other things” he was ordered to do all at the same time, is misconceived. As I have explained, had he chosen to permit entry into the premises to permit the search to occur, Mr Hardy would have had ample time under the clear and express terms of the order to invoke whatever rights, including making claims to privilege, that he chose to invoke.
7. The submission (see [69(2)] above) that, because the Listed Things were contained on a Storage Device, Mr Hardy could not disclose “some” information if privilege was not to be claimed over all of it, was not developed during oral argument and it is difficult to understand. I can see no reason, and none was given to explain, why documents contained on a Storage Device (that is, on a computer, a digital device, a removable storage device, a hard drive and the like) could not be separated from each other. I accordingly reject the submission.
8. The submission (see [69(3)] above) that Mr Hardy would risk altering the documents’ properties, and thus breaching paragraph 17 of the order, were he to segregate and/or review certain documents for the purposes of preparing an affidavit under paragraph 24(a)(ii) is a regrettable submission. It is inconsistent with Mr Hardy’s counsel’s own assertion at the directions hearing before me on 10 March 2017 that whatever changes or alterations are made to the electronic properties of a document when it is on a computer could not constitute “destroying” of “tampering” with the document because such changes as may be effected by the computer by such reviewing would not be intentional acts of the recipient of the order. It was on that basis that counsel said that he had “no difficulty” with the Court making an order that:
9. Until 4.30pm on 27 March 2017 (or such further time as the court may allow) the First Prospective Respondent must not (whether by himself, his directors, officers, employees or agents, or otherwise howsoever) destroy, tamper with, cancel or part with possession, power, custody or control of the 'Listed Things' referred to in the order dated 28 February 2017 in this proceeding otherwise than in accordance with the terms of the order made on 28 February 2017 or further order of the Court.
10. I accordingly reject that submission.

### Paragraph 15(b) and/or 3

1. Mr Hardy submitted that the interaction between paragraphs 3, 15(b) and/or the notice in paragraph 8 on page 18 of the order created ambiguity as to Mr Hardy’s entitlement to seek variation or discharge of the order. This ambiguity was said to arise from the different time periods specified in each section.
2. In my view, no relevant ambiguity arises.
3. Paragraph 3 imposed an obligation on Mr Hardy to provide three hours’ written notice of any intention to seek variation or discharge of the order. Paragraph 15(b) entitled Mr Hardy to refuse entry to the premises for the purpose of seeking variation or discharge of the order, but only if he did so within the period specified in that paragraph. Plainly, in order to allow Mr Hardy to comply with his notice obligation under paragraph 3, the independent lawyer would have needed to extend the initial two-hour window in accordance with his power to do so under paragraph 15. Such an extension could readily have been given, had Mr Hardy communicated to the independent lawyer an intention to seek variation or discharge of the order (which he did not).
4. Although paragraph 8 of the notice on page 18 of the order is not an operative section of the order, like paragraphs 3 and 15(b), it too can be read consistently with the scheme prescribed by those paragraphs. The notice informed Mr Hardy that, unless he had an entitlement under the order to refuse entry (for example, if it was during the period provided for in paragraph 15(b) or one of the requirements of paragraph 14 had not met), he was required to permit the independent lawyer and a representative of AGL to enter, but not search, the premises while he sought variation or discharge of the order.

### Paragraph 15(c)

1. I do not accept Mr Hardy’s submission with respect to paragraph 15(c). It is, with respect, frivolous. While paragraph 15(c) does refer to Mr Hardy placing certain electronic documents in an envelope, it also entitled him to place them in a “container”. If relevant documents had been contained on a storage device that would fit in an envelope (like a USB drive), then he could have put the device in an envelope. But, plainly, larger storage devices would have had to have been put in a container, as the order expressly provided.

### Paragraph 18

1. Paragraph 18 was a restriction on search, which did not in terms vest in Mr Hardy an entitlement to refuse entry to the premises. A dispute as to whether a thing was a Listed Thing could only have occurred once the search was permitted and under way. The question of the construction of paragraph 18, therefore, has no bearing on whether Mr Hardy was entitled to refuse entry to the premises; is irrelevant to the question of whether order 11 is clear, unambiguous and capable compliance; and cannot meaningfully be considered in an evidentiary void. In any event, there is no substance in the submission that paragraph 18 of the order was unclear, ambiguous or incapable of compliance and I reject it.

### Paragraph 23

1. Similarly, the independent computer expert’s powers of search, copy and removal, as set out at [35]-[41] and [79] above, would have been enlivened or engaged only once the independent computer expert had been permitted entry to the premises. Mr Hardy’s contentions with respect to paragraph 23 generally (see [74] above) and its interaction with paragraphs 12(b) and 19, respectively (see [72] above), thus do not advance his broader submission that paragraph 11 is unclear, ambiguous and/or incapable compliance.

## Whether Mr Hardy had knowledge of the terms of the order

1. Mr Hardy acknowledged that the evidence disclosed that he knew that not complying with the order could be a contempt of court with serious consequences: Mr Hardy’s submissions at [54]. He submitted, however, that that does not mean that he had the requisite knowledge of the terms of the order and that “the evidence does not exclude the reasonable possibility” that he did not: Mr Hardy’s written submissions at [52]-[58]. It does not assist AGL, Mr Hardy submitted, that he declined, despite the advice of the independent lawyer, to seek urgent legal advice or avoid taking steps that would place him in contempt. Ultimately, Mr Hardy’s counsel submitted in oral argument as follows:

…by the end of [his time with the independent lawyer] he clearly expressed he did not understand who would be privy to his documents. He further exhibited no understanding of how he could resist the [order] despite stating from the outset he did not wish to comply…and that he was concerned about his computer having confidential material on it relating to employees…

1. Mr Hardy’s counsel also submitted that in determining whether the search order was of uncertain application in the circumstances giving rise to the alleged disobedience, the Court should take into account that the order was “not directed to a person with legal training, or a [person] who has some particular knowledge of the law, but … [was] addressed to a worker from the [Latrobe] Valley – an employee of AGL”. It was also put that “the legality, the formality and the formal legal language…hasn’t really been addressed such that the order was expressed in simple language of everyday people” and that the search order “has to be clear [and] unambiguous…to the person [against whom it is directed]”.
2. Mr Hardy’s counsel did not cite any authority for those propositions. Search orders (also referred to as Anton Piller orders) “inevitably, are complicated”: see, e.g., *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 1 WLR 1233. The same may be said of the template order, of which Counsel for Mr Hardy made no criticism and on which the order was largely based. Search orders must necessarily anticipate a wide variety of possible circumstances or contingencies, which partly explains their “inevitable complexity”. However, there is no authority for the proposition that orders of this type should be tailored differently when they are addressed to people who are unlikely to have legal knowledge or who are “workers”. Such an approach to the drafting of orders would, it seems to me, be entirely unworkable. It is precisely because complexities are inevitably involved with such orders that, by their terms, they provide time and opportunity to the recipient to have the order explained to them by the independent lawyer, to seek legal advice and to ask the Court to vary or discharge the order, before having an obligation to permit entry into the premises. As to safeguards for recipients of search orders introduced in Australia in harmonised rules of court generally, see: Biscoe P, *Freezing and Search Orders: Mareva and Anton Piller Orders* (2nd ed., LexisNexis Butterworths Australia, 2008) at 7.53-7.56.
3. I do not accept Mr Hardy’s submission that the evidence “does not exclude the reasonable possibility” that he did not know the terms of the order or that he had “no understanding of how he could resist the order”. It is clear from Mr Marquet’s unchallenged evidence set out at [46] to [58] above, and I am satisfied beyond reasonable doubt, that Mr Marquet provided to Mr Hardy a sufficient explanation of the terms of the order; that he gave him ample opportunity throughout the morning of 2 March 2017 to seek legal advice; that he told Mr Hardy that he could ask the Court to vary or discharge the order; and that in such circumstances he would not be at risk of being in contempt of the order (in this context, the order that he permit members of the search party to enter the premises so that they could carry out the search and other activities referred to in the order). I do not accept that “the evidence does not exclude the reasonable possibility” that Mr Hardy did not have knowledge of the terms of the order. On the contrary, the evidence establishes beyond reasonable doubt that he did.
4. It was also contended on Mr Hardy’s behalf that the evidence does not exclude the reasonable possibility that he did not know the terms of certain parts of the order, including paragraphs 15(c), because they were ambiguous or unclear. For the reasons given above, I do not accept that there was any ambiguity or relevant lack of clarity in that or any other relevant part of the order.
5. I should also address one final point made by Mr Hardy’s counsel during oral argument. The order contained an error. At page 2 of the order, Mr Hardy was told that the Court had made the order, among other things, after having “read the affidavit in Schedule B to this order”. There is no Schedule B, only a Schedule C, at page 15, which reads:

**SCHEDULE C**

**AFFIDAVITS RELIED ON**

|  | **Name of deponent** | **Date affidavit made** |
| --- | --- | --- |
|  | 1. Daniel Charles Williams
 | 27 February 2017 |

1. That is the affidavit in fact served upon Mr Hardy together with the order and the materials. Mr Hardy’s counsel submitted that it was not “mere typographical error”; that the error was substantive; and was “important”.
2. I disagree. The error was manifestly typographical and could not possibly have been the source of any relevant or sufficient ambiguity or lack of clarity. Any reasonable person would have read “C” to mean “B” at page 15, because there was no other possibility. In any event, the matter has nothing to do with Mr Hardy’s obligation to permit entry under paragraph 11.

## Whether Mr Hardy breached the terms of the order

1. Mr Hardy submitted that he cannot be taken to have breached paragraph 11 on 2 March 2017, because paragraph 24 did not prescribe a time within which the steps required by paragraph 24(b) were to be taken. This is the same point that is dealt with at [67]-[68] above.
2. Mr Hardy’s counsel’s written submission on the issue of whether Mr Hardy breached the order further asserted that “[i]t is common ground between the parties that reliance on [paragraph] 24 would affect any requirement to permit the search pursuant to [paragraph] 11”. First, that proposition was most certainly not common ground. Secondly, the submission again conflates the obligation imposed by paragraph 11, to permit entry, with the obligations imposed by paragraph 12, to do various things directed to facilitating the search. For the reasons given at [76]-[79] above, an objection taken pursuant to paragraph 24 would not have alleviated Mr Hardy of the obligation to permit entry that was imposed by paragraph 11 and could only have occurred if and when he permitted the search party to enter the premises – something he did not do.
3. Mr Hardy further submitted that he did not breach paragraph 11 of the order because paragraph 14(b) entitled him to refuse entry until he was provided with an opportunity to read the order and, in circumstances where he had been served with two lever arch folders of documents (the documents that were served are the documents listed at [47] above), two hours was an insufficient period of time within which to read and understand that material. I do not accept that submission.
4. Contrary to Mr Hardy’s submission, paragraph 14(b) of the order did not entitle Mr Hardy to refuse access until he had read and understood all of those documents. That subparagraph is directed squarely to Mr Hardy understanding, with the assistance of the independent lawyer, if necessary, the terms of the order, not the other documents. During the time provided for in paragraph 15, Mr Hardy was entitled to refuse entry to anyone other than the independent lawyer, for the purposes of seeking legal advice, seeking discharge or variation of the order or dealing with documents subject to legal professional privilege. Had two hours been an insufficient time for Mr Hardy to consider his position as to whether to seek discharge or variation of the order, plainly the independent lawyer was empowered by paragraph 15 to extend that time. Had the independent lawyer refused that request for some reason, Mr Hardy would well have understood that he could approach the Court to request a variation to the terms of the order accordingly, by telephoning my chambers. But an understanding of each of the documents served with the order was not a precondition to the obligation under paragraph 11 to permit entry to the search party.

# cONCLUSION

1. In accordance with the terms of the order, Mr Hardy was required by paragraph 11 to allow the search party entry to the premises to carry out the search and other activities referred to in the order unless a circumstance provided for in the order entitled him to refuse. For the reasons given above, only paragraphs 13, 14 and 15 supplied bases for refusing entry to the premises. None of those paragraphs is relevant here, for reasons I have explained. Had Mr Hardy permitted entry, paragraphs 18, 19, 20 (subject to 21), 22 and/or 23 (by reference to paragraph 24) may have supplied bases for constraining search and removal. However, because he refused entry, such questions did not then arise, and they are not relevant now to the single charge of contempt in respect of Mr Hardy’s refusal to comply with paragraph 11. In any event, for the reasons I have given above, the paragraphs of the order about which Mr Hardy complains are not, in my view, unclear, ambiguous or incapable of compliance.
2. The evidence establishes beyond reasonable doubt that Mr Hardy refused the search party entry to the premises when he had no entitlement under the order to do so. It follows that Mr Hardy breached paragraph 11 of the order.
3. I find Mr Hardy guilty of contempt of court, in that on 2 March 2017, after being served with the search order made on 28 February 2017, he failed to comply with paragraph 11 of that order by refusing to permit members of the search party to enter the premises so that they could carry out the search and other activities referred to in the order. The proceeding will be re-listed for a penalty hearing.

|  |
| --- |
| I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan. |

Associate:

Dated: 26 April 2017

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Prospective applicants |  |
| Second Prospective Applicant  | AGL LOY YANG PTY LTD |
| Third Prospective Applicant | AGL LOY YANG MARKETING PTY LTD |
| Prospective respondent |  |
| Second Prospective Respondent | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION |

ANNEXURE

Federal Court of Australia

District Registry: Victoria

|  |  |
| --- | --- |
| Division: Fair Work  | No: VID176/2017 |

**AGL ENERGY LIMITED** and another/others named in the schedule

Prospective Applicant

**ORDER**

|  |  |
| --- | --- |
| **JUDGE:** | JUSTICE O'CALLAGHAN |
| **DATE OF ORDER:** | 28 February 2017 |
| **WHERE MADE:** | Melbourne |

**THE COURT ORDERS THAT:**

**PENAL NOTICE**

**TO: Gregory Thomas Hardy**

**IF YOU (BEING THE PERSON BOUND BY THIS ORDER):**

**(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THE ORDER FOR THE DOING OF THE ACT; OR**

**(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,**

**YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.TO: Gregory Thomas Hardy**

This is a '*search order*' made against you on 28 February 2017 by Justice O'Callaghan at a hearing without notice to you after the Court was given the undertakings set out in Schedule A to this order and after the Court read the affidavit listed in Schedule B to this order.

**THE COURT ORDERS:**

**INTRODUCTION**

1. (a) The application for this order is made returnable immediately.

(b) The time for service of the application, supporting affidavit and draft originating process is abridged and service is to be effected by 5:00pm on 3 March 2017.

1. Subject to the next paragraph, this order has effect up to and including 10 March 2017 ('the **Return Date**'). On the Return Date at 11.00 am there will be a further hearing in respect of this order before Justice O'Callaghan.
2. On the giving of 3 hours’ notice in writing to the Prospective Applicants, you may apply to the Court at any time to vary or discharge this order, including, if necessary, by telephone to the judge referred to in the immediately preceding paragraph (phone no. (03) 8600 4118).
3. This order may be served only between 9:00am and 2:00pm on a business day.

**KEY TERMS**

1. In this order, 'Electronic Document' means any record of information stored on any Storage Device, in any Online Storage Facilities and/or in any Email Accounts, and includes:
	1. anything on which there is writing; or
	2. anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
	3. anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
	4. a map, plan, drawing or photograph.
2. In this order, 'Listed Thing' means:

(a) Any Electronic Document containing or consisting of:

* + 1. correspondence, communications or other evidence of exchanges between Mr Hardy and employees of the Second Prospective Applicant during the period from 12 to 18 January 2017 inclusive relating to:

(A) the performance of work by any employee of the Second Prospective Applicant in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(B) a ban, limitation or restriction on the performance of work by any employee of the Second Prospective Applicant or on the acceptance of or offering for work by any employee of the Second Prospective Applicant;

(C) a failure or refusal by employees of the Second Prospective Applicant to attend for work or a failure or refusal to perform any work at all by employees of the Second Prospective Applicant who attend for work;

* + 1. correspondence, communications or other evidence of exchanges between Mr Hardy and officers, employees or members of the Second Prospective Respondent during the period from 12 to 18 January 2017 inclusive relating to:

(A) the performance of work by any employee of the Second Prospective Applicant in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee of the Second Prospective Applicant, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(B) a ban, limitation or restriction on the performance of work by any employee of the Second Prospective Applicant or on the acceptance of or offering for work by any employee of the Second Prospective Applicant;

(C) a failure or refusal by employees of the Second Prospective Applicant to attend for work or a failure or refusal to perform any work at all by employees of the Second Prospective Applicant who attend for work;

* + 1. (D) records relating to the personal/carer's leave of employees of the Second Prospective Applicant during the period from 12 to 18 January 2017 inclusive;
		2. records relating to the hours or work and availability of employees of the Second Prospective Applicant during the period from 12 to 18 January 2017; and/or
		3. digital records, data or other electronic traces that demonstrate that the things listed in paragraphs 6(a)(iv)-(iv) were once contained on any Storage Device, in any Online Storage Facilities and/or in any Email Accounts;
		4. emails passing between the following:

(A) any electronic mail account relating to XXXXX XXXXXXX; and

(B) any Email Account;

(b) Any Electronic Document recording telephone calls or sms communications made, sent or received by Mr Hardy during the period from 12 to 18 January 2017 inclusive.

(c) Any other Electronic Documents not listed in paragraphs 6(a) or (b) relating to, or containing information regarding, the following aspects of the Second Prospective Applicant's business:

(i) information relating to the availability of members of the Second Prospective Respondent to work overtime for the Second Prospective Applicant; and/or

(ii) information relating to the personal leave patterns of members of the Second Prospective Respondent who work for Second Prospective Applicant.

(d) Any Electronic Document demonstrating the use of software or other means to delete, in bulk, any Electronic Documents referred to in paragraphs (6)(a) to (c).

1. In this order:

(a) 'Email Accounts' means any Email Accounts owned, used or operated by Mr Hardy, including, but not limited to:

(i) XXXXXXXXXXXXXXXXXXXXXXX; and

(ii) XXXXXXXXXXXXXXXXXXXXXX;

(b) 'Independent Computer Expert' means Martin Sisk of PWC;

(c) 'Independent Lawyer' means Daniel Marquet of Corrs Chambers Westgarth;

(d) Online Storage Facility' means any online storage facilities or file sharing platforms used or operated by Mr Hardy, including, but not limited to:

(i) cloud based resources (for example Dropbox or Gmail); and

(ii) cloud based servers (for example virtual servers running software in Amazon Cloud); and

(e) 'Premises' means the premises located at X XXXXXXX XXXXXX, Traralgon, Victoria, being the residential premises of Mr Hardy, including any vehicle or vehicles under Mr Hardy's control on or about those premises;

(f) 'Prospective Applicants' means the persons who applied for this order;

(g) 'Mr Hardy' means the First Prospective Respondent;

(h) 'Search Party' means the Independent Lawyer, Independent Computer Expert (assisted by Chris Tolentino of PwC) and Pawel Zielinski of Minter Ellison;

(i) 'Storage Device' means any electronic storage device possessed by Mr Hardy, including, but not limited to:

(i) any computers with accessible hard drives (including Mr Hardy's personal or laptop computer);

(ii) mobile or smart phones and digital devices without accessible hard drives (for example tablet devices such as iPads);

(iii) removable data storage devices including CDs/DVDs, USB flash drives,

(iv) USB hard drives and SD Media cards;

(v) server computers.

1. This order must be complied with by:

(a) yourself;

(b) any partner, employee or agent of yourself; or

(c) any other person having responsible control of the premises.

1. Any requirement that something be done in your presence means in the presence of you or of one of the persons described in paragraph 8 above.
2. This order must be served by, and be executed under the supervision of, the Independent Lawyer.

**ENTRY, SEARCH AND REMOVAL**

1. Subject to paragraphs 13 to 23 below, upon service of this order you must 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.
2. Having permitted members of the Search Party to enter the Premises, you must:

(a) permit them 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;

(b) permit them to search for and inspect the Listed Things and to make or obtain a digital image, copy, photograph, film, sample, test or other record of the Listed Things;

(c) disclose to them the whereabouts of all the Listed Things in your possession, custody or power, whether at the Premises or otherwise;

(d) disclose to them the whereabouts of all Storage Devices or systems at the Premises in which any Electronic Documents among the Listed Things are or may be stored, located or recorded;

(e) do all things necessary to enable them to access the Listed Things, including opening or providing keys to locks and enabling them to access and operate Storage Devices and providing them with all necessary user names, passwords or other credentials;

(f) permit the Independent Lawyer to remove from the Premises into the Independent Lawyer's custody any things the subject of dispute as to whether they are Listed Things;

(g) permit the Independent Computer Expert to search any Storage Device in which any Electronic Documents among the Listed Things are or may be stored, located or recorded and make a copy or digital copy of any such Storage Device (eg, a complete digital image) and permit the Independent Computer Expert or the Independent Lawyer to remove any such Storage Device from the Premises as set out in paragraphs 23 and 24 below.

**RESTRICTIONS ON ENTRY, SEARCH AND REMOVAL**

1. This order may not be executed at the same time as a search warrant (or similar process) is executed by the police or by a regulatory authority.
2. You are not required to permit anyone to enter the Premises until:

(a) the Independent Lawyer serves you with copies of this order and the affidavit referred to in Schedule B (confidential exhibits, if any, need not be served until further order of the Court); and

(b) you are given an opportunity to read this order and, if you so request, the Independent Lawyer explains the terms of this order to you.

1. Before permitting entry to the Premises by anyone other than the Independent Lawyer, you, for a time (not exceeding two hours from the time of service or such longer period as the Independent Lawyer may permit):

(a) may seek legal advice;

(b) may ask the Court to vary or discharge this order;

(c) may gather together any Electronic Documents that passed between you and your lawyers for the purpose of obtaining legal advice or that are otherwise subject to legal professional privilege or client legal privilege, and hand them to the Independent Lawyer in (if you wish) a sealed envelope or container.

1. Subject to paragraph 25 below, the Independent Lawyer must not inspect or permit to be inspected by anyone, including the Prospective Applicants and the Prospective Applicants' lawyers, any thing handed to the Independent Lawyer in accordance with subparagraph and (c) above and the Independent Lawyer must deliver it to the Court at or prior to the hearing on the Return Date.
2. During any period referred to in paragraph 15 above, you must:

(a) inform and keep the Independent Lawyer informed of the steps being taken;

(b) permit the Independent Lawyer 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 paragraph 28 below.

1. Any thing the subject of a dispute as to whether it is a Listed Thing must promptly be handed by you to the Independent Lawyer for safekeeping pending resolution of the dispute or further order of the Court.
2. Before removing any Listed Things from the Premises (other than things referred to in the immediately preceding paragraph), the Independent Computer Expert, through the Independent Lawyer must supply a list of them to you, give you a reasonable time to check the correctness of the list, and give you and the Prospective Applicants' lawyers a copy of the list signed by the Independent Computer Expert.
3. The Premises must not be searched, and things must not be removed from the Premises, except in the presence of you or of a person who appears to the Independent Lawyer to be your partner, employee, agent or other person acting on your behalf or on your instructions.
4. If the Independent Lawyer is satisfied that full compliance with the immediately preceding paragraph is not reasonably practicable, the Independent Lawyer may permit the search to proceed and the Listed Things to be removed without full compliance.
5. The Prospective Applicants' lawyers and the Independent Lawyer must not allow the Prospective Applicants to inspect or have copies of anything removed from the Premises nor communicate to the Prospective Applicants 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**

1. (a) The Search Party is to include a computer expert who is independent of the Prospective Applicants and of the Prospective Applicants' lawyers.

(b) Any search of a Storage Device must be carried out only by the Independent Computer Expert.

(c) The Independent Computer Expert is to, without making inspection of the material therein contained, make a copy or digital copy of any Online Storage Facilities, Email Accounts or Storage Device (eg, a complete digital image) in which Listed Things are or may be stored, located or recorded and remove that copy or digital copy from the Premises.

(d) The Independent Computer Expert:

(i) may remove from the Premises any Storage Device referred to in clause 23(c); and

(ii) must, as soon as practicable after he is satisfied that a complete digital image of any such Storage Device has been accurately generated, return the Storage Device to you.

(e) The Independent Computer Expert may search Storage Device or the copy of the Storage Device at the Premises and/or away from the Premises for Listed Things and may copy the Listed Things electronically or in hard copy of both.

(f) 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 any Online Storage Facilities, Email Accounts or Storage Device in which Listed Things are or may be stored, located or recorded to the Independent Lawyer, together with a report of what the Independent Computer Expert has done including a list of such electronic and hard copies.

(g) The Independent Lawyer 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.

1. (a) This paragraph 24 applies if you are not a body corporate and you wish to object to complying with paragraphs 23 on the grounds that some or all of the information required to be disclosed may tend to prove that you:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(b) You must:

(i) disclose so much of the information required to be disclosed to which no objection is taken; and

(ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on the Prospective Applicants a separate affidavit setting out the basis of the objection.

**INSPECTION**

1. Prior to the Return Date, you or your lawyer or representative shall be entitled, in the presence of the Independent Lawyer, to inspect anything removed from the Premises and to:

(a) make copies of the same; and

(b) provide the Independent Lawyer with a signed list of Things which are claimed to be privileged or confidential and which you claim ought not to be inspected by the Prospective Applicants.

**PROVISION OF INFORMATION**

1. Subject to paragraph 27, on being served with this order, the First Prospective Respondent must within 96 hours (4 days):

(a) disclose in writing to the Independent Lawyer the whereabouts of all the Listed Things in the First Prospective Respondent’s possession, custody, power or control, including all Listed Things held on Storage Devices, in Online Storage Facilities, Email Accounts or systems in which any Listed Things are or may be stored, located or recorded;

(b) deliver up (or cause to be delivered-up) to the Independent Lawyer any Storage Devices on which any Listed Things are or may be stored, located or recorded;

(c) do all things necessary to enable the Independent Computer Expert access to the Listed Things delivered up, including enabling access and providing all necessary user names, passwords or other credentials; and

(d) within five (5) working days after being served with this order, make and serve on the Prospective Applicants an affidavit setting out the information referred to above in paragraph (a).

1. (a) This paragraph 27 applies if you are not a body corporate and wish to object to your complying with paragraph 26 on the grounds that some or all of the information required to be disclosed may tend to prove that you:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(b) You must:

(i) disclose so much of the information required to be disclosed to which no objection is taken; and

(ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on the Prospective Applicants a separate affidavit setting out the basis of the objection.

**PROHIBITED ACTS**

1. Until 4.30pm on the Return Date (or such further time as the Court may allow), you must not (whether by yourself, your directors, officers, partners, employees or agents, or otherwise howsoever) 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**

1. The costs of this application are reserved to the Court hearing the application on the Return Date.

**SCHEDULE A**

**UNDERTAKINGS GIVEN TO THE COURT**

**Undertakings given to the Court by the Prospective Applicants**

(1) The Prospective Applicants undertake to submit to such order (if any) as the Court may consider to be 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 Prospective Applicants will not, without leave of the Court, use any information, Electronic 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 Prospective Applicants will insure the things removed from the Premises against loss or damage for an amount that reasonably appears to the Prospective Applicants to be their full value.

**Undertakings given to the Court by the Prospective Applicants' lawyer**

(1) The Prospective Applicants' lawyer will pay the reasonable costs and disbursements of the Independent Lawyer and of any Independent Computer Expert.

(2) The Prospective Applicants' lawyer will provide to the Independent Lawyer for service on the First Prospective Respondent copies of the following documents:

(a) this order;

(b) the application for this order for hearing on the Return Date;

(c) the following material in so far as it was relied on by the Prospective Applicant at the hearing when the order was made:

(i) affidavits (or draft affidavits);

(ii) exhibits capable of being copied (other than confidential exhibits);

(iii) any written submission; and

(iv) any other document that was provided to the Court.

(d) a transcript of the hearing before Justice O'Callaghan on 28 February 2017; and

(e) the draft originating process produced to the Court.

(3) The Prospective Applicants' lawyer will answer to the best of the lawyer's ability any question as to whether a particular thing is a Listed Thing.

(4) The Prospective Applicants' lawyer will use the lawyer's best endeavours to act in conformity with the order and to ensure that the order is executed in a courteous and orderly manner and in a manner that minimises disruption to the First Prospective Respondent.

(5) The Prospective Applicants' lawyer will not, without leave of the Court, use any information, Electronic 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.

(6) The Prospective Applicants' lawyer will not disclose to the Prospective Applicants any information contained in a Listed Thing that the lawyer acquires during or as a result of execution of the search order, without the leave of the Court.

(7) The Prospective Applicants' lawyer will use best endeavours to follow all directions of the Independent Lawyer.

**Undertakings given to the Court by the Independent Lawyer**

(1) The Independent Lawyer will use his or her best endeavours to serve the First Prospective Respondent with this order and the other documents referred to in undertaking (2) of the above undertakings by the Prospective Applicants' lawyer or lawyers.

(2) Before entering the Premises, the Independent Lawyer 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 First Prospective Respondent of his right to take legal advice.

(3) Subject to undertaking (4) below, the Independent Lawyer will retain custody of all things removed from the Premises by the Independent Lawyer 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 Lawyer will provide a written report on the carrying out of the order to the Court and provide a copy to the Prospective Applicants' lawyers and to the First Prospective Respondent's lawyers. 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 Lawyer 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 and in a manner that minimises disruption to the First Prospective 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 Lawyer will not, without leave of the Court, use any information, Electronic 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.

(7) The Independent Lawyer 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 and in a manner that minimises disruption to the First Prospective Respondent.

(2) The Independent Computer Expert will not, without leave of the Court, use any information, Electronic 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 Independent Computer Expert will use his or her best endeavours to follow all directions of the Independent Lawyer.

(4) The Independent Computer Expert will use his or her best endeavours to follow all directions of the Independent Lawyer.

**SCHEDULE C**

**AFFIDAVITS RELIED ON**

|  | **Name of deponent** | **Date affidavit made** |
| --- | --- | --- |
|  | Daniel Charles Williams | 27 February 2017 |

**NAME AND ADDRESS OF PROSPECTIVE APPLICANT'S LAWYERS**

The Prospective Applicants' lawyers are:

Minter EllisonAttention: Daniel Williams

Level 22, 1 Eagle Street

Brisbane QLD 4000

Reference: DCW 1156280

Fax Number: (07) 3119 1340

Phone number (office hours): (07) 3119 6340

Phone number (out of office hours): 0414 241 264

Email: dan.williams@minterellison.com

**IMPORTANT NOTICE TO THE First PROSPECTIVE RESPONDENT/OCCUPIER OF THE PREMISES AT X XXXXXXX XXXXXX, Traralgon, Victoria:**

1. This Court order orders you to allow the persons mentioned in the order to enter the premises described in the order and to search for, examine and remove or copy the items specified in the order. The persons mentioned will have no right to enter the premises, or to remain on the premises, unless you give your consent to their doing so. If, however, you do not give your consent you will be in breach of the order and may be held to be in contempt of court. This order also requires you to hand over certain items which are under your control and to provide information to the Prospective Applicant's lawyers, and it prohibits you from doing certain acts.

2. You should read the terms of the order very carefully. You should consult a lawyer as soon as possible.

3. Before you allow anybody onto the premises to carry out this order you are entitled to have the lawyer who serves you with the order, or the independent lawyer appointed in accordance with the order, explain to you what it means in everyday language.

4. You are entitled to insist that there is nobody present who could gain commercially from anything they might read or see on your premises.

5. You are entitled to refuse entry before 9.00am or after 2.00pm or at all on Saturday and Sunday.

6. You may be entitled to refuse disclosure of any documents which may incriminate you or to answer any questions if to do so may incriminate you. It may be prudent to take advice, because if you so refuse, your refusal may be taken into account by the Court at a later stage.

7. You are entitled to refuse disclosure of documents passing between you and your lawyers for the purpose of obtaining advice.

8. You are entitled to seek legal advice, and to ask the Court to vary or discharge this order, provided that you do so at once, and provided that meanwhile you permit the independent lawyer (who is a lawyer acting independently of the Prospective Applicant) and one of the Prospective Applicants' representatives to enter, but not start to search, the premises.

9. If you disobey this order you may be found guilty of contempt of court.

10. If any person with knowledge of this order procures, encourages or assists in its breach, that person may also be guilty of contempt of court.