Chapter 5
Investigating Breaches Of the Electricity (Consumer Safety) Act & Regulation - Gas Supply (Gas Appliances) Regulation - any Legislation Administered by the Minister for Fair Trading

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BACKGROUND

The Energy Utilities Unit (EUU) is comprised of 10 staff, including one Principal Investigator Energy Safety 1 Senior Investigator Gas Safety, 6 Senior Investigators and 2 Investigators.

5.1.1 What is the purpose of an EUU investigation?

The major purpose of an investigation is to gather sufficient evidence with which to take compliance action against traders who are found to have breached the *Electrical (Consumer Safety) Act* or Regulation or *Gas Supply (Gas Appliances) Regulation* or other relevant legislation including the *Fair Trading Act* or *Business Names Act*. These compliance measures, which include disciplinary action, prosecution, and the issue of penalty notices, aim to:

- deter traders from further breaches of the Act;
- encourage greater compliance with the Act by individual traders of electrical and natural gas appliances;
- maintain a high standard of competency amongst traders of electrical and natural gas articles/appliances.

5.1.2 What are the possible outcomes of an investigation?

At the conclusion of the investigation process, if there is sufficient evidence to support the allegation that the trader breached the Act the Investigator is responsible for recommending an appropriate compliance response against the trader. Possible responses include:

- Issue of a penalty notice;
- Prosecution;
- Injunction;
- Undertaking under the FTA;
- Written Warning;
- Compliance action under other legislation administered by the Office of Fair Trading (eg. for a breach of the *Business Names Act*).

In some cases, the Home Building Service may decide that the most appropriate response to an alleged breach of the Act is to take no further action. This most commonly occurs with complaints that are handled by RAAU Assessment Officers and are not referred to EUU for investigation.

Generally, if a complaint is referred to EUU and accepted for investigation by the EUU Manager, the expectation is that the matter will be suitable for a more serious compliance response than a warning (or NFA).

The compliance response that is most appropriate will depend on factors such as:

- whether the trader resides in Australia;
- whether there is sufficient evidence available to support the allegation that the trader breached the Act;
- the type of breach (e.g. issue a penalty notice as prescribed in section 5.15);
- the seriousness of the breach;
- the level of detriment suffered by the consumer
- whether or not the trader has breached the Act before;
- whether any action has been taken against the trader before.

See section 5.15 for information on when the OFT can issue a penalty notice against a trader.

See section 5.16 for information on when the OFT can prosecute, or seek an undertaking against, a trader.

5.1.3 What is an offence?

An offence under the Electricity (Consumer Safety) Act or Regulations is when a trader or an entity (e.g. a company) breaches a section of the Acts or Regulations that specifically gives rise to a penalty. For example:

The Electricity (Consumer Safety) Act - Division 6 – “Sale of electrical articles”

s16 Electrical articles must meet certain standards before they can be sold

(1) A person must not sell an electrical article if:
(a) in the case of a declared electrical article—the article is not of:
(i) a model of electrical article that has a model approval, or
(ii) a class, description or model that has been approved or registered by the relevant authority for another State or a Territory, or
(iii) a model of electrical article that has been approved or certified under a recognised external approval scheme (being an approval or certification that is evidenced by marking on the article), or
(b) the article is not marked in accordance with the regulations, or
(c) the article does not comply with any one or more of the following:
(i) the class specifications (if any) for the article,
(ii) the model specifications (if any) for the article,
(iii) any other specifications prescribed by the regulations (if any) for the article,
(iv) any other requirements prescribed by the regulations (if any) for the article.

Maximum penalty:

(a) in the case of a second or subsequent offence by a corporation—7,500 penalty units, or
(b) in the case of a first offence by a corporation—5,000 penalty units, or
(c) in the case of a second or subsequent offence by an individual—750 penalty units or imprisonment for 2 years, or both, or
(d)in the case of a first offence by an individual—500 penalty units.

(2) The Director-General may, by order in writing and subject to such conditions, if any, as are specified in the order, exempt a person or persons of a specified class from the operation of any or all of the provisions of subsection (1).

*¹ One penalty unit=$110, as at 1 July 2004
5.1.4 How does the Home Building Service decide which matters should be referred to EUU for investigation?

Generally all complaints received by the Home Building Service are channelled first through RAAU for assessment.

RAAU Assessment Officers assess complaints to identify any breaches of the Act and recommend an appropriate compliance response. If RAAU believes that the matter may be suitable for investigation by EUU, the file will be referred to the EUU Manager for review.

If the EUU Manager disagrees with the assessment of RAAU and thinks the matter is inappropriate for investigation, s/he will discuss this with the RAAU Manager. If no consensus is reached, the Managers will refer the matter to the Operations Review Committee for a final assessment. These procedures are outlined at section 5.4.2.

Further information about the assessment process and RAAU procedures are contained in Chapter 2 of this Manual.

In some cases, EUU will take compliance action on matters that come directly to EUU attention, without initial assessment by RAAU. For example, shop inspection associated with the EUU annual compliance program.
5.2 REVIEWING MATTERS THAT ARE REFERRED BY RAAU

Once a file is marked for investigation by RAAU and referred to EUU, it is the responsibility of the Manager EUU to:

1. Review the file and the assessment notes made by RAAU within 5 working days;
2. Consider whether to endorse RAAU’s recommendation to investigate the matter;
3. If the Manager agrees that the matter should be investigated he/she will refer the file to the Principal Investigator who will, within 5 working days, allocate the file to an Investigator.

If the Manager of EUU considers that the matter should not be investigated by EUU, it is the responsibility of the Manager to:

1. Discuss the issue with the Manager of RAAU to see if consensus can be reached on the most appropriate course of action for the matter
2. If consensus is reached, follow the course of action agreed on
3. If consensus is not reached, refer the matter to the Operations Review Committee (ORC) for consideration
4. The Director, Mediation Services & Compliance may direct that the matter be referred to the ORC.

An Operations Review Committee Report template is at attachment “A” and is located on the G drive at EUU/Procedures Templates/ORC proforma.
5.3 ALLOCATING A FILE TO AN INVESTIGATOR

Once the EUU Manager has reviewed a file and confirmed that it should be investigated, the Manager should refer the file to a Principal Investigator.

It is then the responsibility of the Principal Investigator to:

1. Review the file within 5 working days from date of receipt;
2. Allocate the file to an investigator;
3. Note on the Minute sheet any necessary directions for the Investigator. For example:
   - Investigate with a view to issuing a penalty notice;
   - Investigate with a view to prosecution;
   - If detailed directions are required these must be recorded on CAS;
4. Note on the Minute sheet the time period (i.e. 10 working days from date file was received by the Investigator) in which the investigation plan is to be submitted;
5. Update CAS with the due date for the investigation plan to be submitted and directions as to whether to treat the matter as a
   - preliminary investigation
   - minor investigation or
   - major investigation

See section 5.4 below for how investigation can be classified.
5.4 CLASSIFYING AN INVESTIGATION AS “MINOR” OR “MAJOR”

It is the responsibility of the Principal Investigator to classify an investigation as “minor” or “major”.

The Principal Investigator should take the following factors into consideration when deciding whether to classify the matter as a “minor” or “major” investigation:

**Minor** investigations are reasonably straightforward, where less time is required to complete the investigation (30 days). For example:

- The likely compliance outcome is a penalty notice
- There are no previous breaches recorded against the trader
- There is a low level of consumer detriment

**Major** investigations are more complex, requiring more time to complete the investigation (90 days). Factors for consideration:

- The investigation will involve detailed and complex intelligence searches because the trader cannot be located or cannot be identified;
- The purpose of the investigation is to take disciplinary action against a trader for an offence against the Act;
- Consultation with external experts is required eg. for collation and analysis of forensic information or language interpretation;
- The consumer is of a disadvantaged group eg. of non-English speaking background (NESB), frail aged or has a disability;
- High and/or potentially protracted consumer detriment.
5.5 INVESTIGATING AN ALLEGED BREACH OF THE ACT

Once a file is allocated to an Investigator for investigation, it is the Investigator’s responsibility to:

1. Read through the file to form an understanding of the alleged breach of the Act, the parties involved, and the evidence available

2. Identify which sections of the Act and other relevant legislation the trader is alleged to have breached

3. Confirm the identity of the trader
   - This may require a follow-up search completed by RAAU and should include searches of the Business Names Register, or records held by the RTA, Australia Post, Electoral Commission, and Police Service for example.
   - See section 5.8 for obtaining intelligence information about a trader.
   - Also, consider whether the trader is a company or a partnership, rather than an individual. If the trader is a company you will need to identify who can speak on behalf of the company.

4. Consider the compliance history of the trader
   - The trader Trim File, GLS, and CAS online databases contain details of previous investigations and breaches by the trader and the outcomes.
   - In most cases, this information will be already on file (compiled by RAAU)

5. Clarify the purpose of the investigation with the Principal Investigator if necessary; i.e. is it to take disciplinary action against the trader under the Act, to issue a Penalty Notice to the trader, to prosecute the trader or to seek an undertaking from the trader under the provisions of the FTA.

8. Prepare an investigation plan within 10 days of receiving the file
   - See section 5.6 for information on preparing an investigation plan.

9. Implement the investigation plan
   - Perform each of the tasks outlined in the investigation plan by the due date. For example:
     - conducting intelligence searches to clarify the location or identity of the trader;
     - collecting statements from witnesses;
     - conducting an interview with the trader.
   - See section 5.6 for further information about the investigation plan.

10. Undertake an appropriate compliance response to the breach that you have investigated. For example:
    - Issue a Warning Letter (see section 5.15)
    - Issue a penalty notice (see section 5.16)
    - Prepare a brief to prosecute the trader (see section 5.17)

11. Prepare a report on the results of your investigation:
- Prepare an “Investigation Report” if you are recommending a warning letter, penalty notice or NFA.
  
  An investigation report template is at attachment “B” and is located on the G drive at EUU/Procedures Templates/Investigation Report template

- Prepare an “Investigation Report – Prosecution” if you are recommending an undertaking from, or prosecution of (or an injunction against) the trader;

  An investigation report template is at attachment “C” and is located on the G drive at EUU/Procedures Templates/Investigation Report-Prosecution template

12. When issuing a Penalty Notice:

- Refer to the OFT Issuing of Penalty Notice Guidelines;

- Place a copy of the Notice on the file;

- Send Part A to the Infringement Processing Bureau;

- Update the “Outcomes” field in CAS;

- Prepare filed investigation report to be attached to the TRIM file;

- Prepare an investigation completion summary report from CAS;

- Forward the file to the Legal Services Division for data entry on SCAM.

  The Legal Services Division will liaise with the State Debt Recovery Office to ensure the Penalty Notice is processed.

13. Store exhibits in the evidence storage area

  See section 5.13 for information on storing exhibits
5.6 PREPARING AN INVESTIGATION PLAN

An investigation plan is a tool to assist the investigator to complete a thorough and timely investigation. The investigation plan should set out:

1. What investigative tasks you need to perform to complete the investigation
   Investigative tasks might include:
   - Conducting an intelligence search to establish the identity or location of the trader;
   - See section 5.8 for further information about intelligence searches;
   - Collecting documentary evidence (sales invoices, receipts, newspaper advertisements, bank records etc);
   - See also section 5.11 for information on issuing a notice under s.20 of the FTA
   - Taking a statement from the complainant;
   - See section 5.10 for information about taking statements from witnesses;
   - Interviewing the trader. See section 5.10;
   - Recommending an appropriate compliance response

2. How and from whom you will obtain evidence

3. When you will complete each task

4. When you will meet with the Principal Investigator for regular progress reviews

5. Enter the name of the Investigator and Principal Investigator and progress review dates must be entered in CAS for tracking purposes.

6. Enter a reminder date in CAS for 10 working days before each progress review is due
   NB: If progress review dates change before or after the PI signs the Investigation Plan, remember to change the date in CAS. Similarly, if during the course of the Investigation the review dates are renegotiated, make amendments in CAS.

7. When a reminder from CAS is received the Investigator must enter the date in “tasks” in Groupwise and forward the message to the Principal Investigator with a copy to the Manager EUU.

8. Up-date CAS following completion of a progress review.

An investigation plan template is at attachment “D” and is located on the G drive at EUU/Procedures Templates/Investigation Plan template
5.7 TIME LIMITS FOR INVESTIGATIONS

It is the responsibility of the Investigator to:

1. Complete minor investigations within 30 days
2. Complete major investigations within 90 days
3. Seek approval from the Principal Investigator if you require more time to complete an investigation

**Note:** An investigation plan will not be accepted unless all proposed times and dates by which tasks and progress reviews are to be achieved have been filled in.

See section 5.4 for some of the criteria used to categorise an investigation as “minor” or “major”.

5.8 APPLYING FOR INTELLIGENCE INFORMATION

Intelligence searches are conducted by the Operational Priorities and Intelligence Unit (OP&I) of the Office of Fair Trading.

If an Investigator seeks intelligence information to assist an investigation, it is the responsibility of the Investigator to:

1. Clearly identify what intelligence information is required and why
2. Complete an application form seeking intelligence information from OP&I

   Use the Application for Intelligence Information form for:
   - a company extract
   - a business names extract
   - complaint details from CMS
   - investigation details from SCAM
   - land and property information
   - bankruptcy information
   - electoral roll information
   - trader licence information
   - driver licence information
   - vehicle ownership
   - NSW criminal history

   Use the Application for Telephone/Post Office Information form for:
   - the name and address of a telephone trader when you have the phone number
   - the phone number of a trader when you have the name and address
   - details of the holder of a post box number
   - details of mail redirection notices
   - details of people receiving mail at a particular address
These forms are located at attachment “E” and also on the intranet at FTNet/Forms/Compliance Group

3. Submit the application to Manager EUU for approval
   This only applies to applications for:
   - telephone information
   - postal information
   - driver licence information
   - NSW criminal history search
   - vehicle ownership information

Note: Intelligence applications are subject to random internal audit and must be kept on the relevant TRIM file at all times.
5.9 USING AN OFFICIAL NOTEBOOK

The Investigator should use an official OFT notebook to record conversations and observations. It is the Investigator’s responsibility to:

1. Record a conversation or observation in the notebook as soon as possible after the event
   Conversations should be recorded in the first person (“I said….. He said…..”)

2. Record the date, time and place of the conversation, or of the observation

3. Record any people who were present during the conversation or at the time of the observation

4. Number each page in the notebook consecutively

5. Rule a margin on each page to provide room for comments

6. Return the notebook to the Principal Investigator when it is complete

7. Request a new notebook from the Branch Administrator when you are nearing the end of a current one.

For detailed instructions about the use of official notebooks, see the Office of Fair Trading’s Guidelines on the use of official notebooks by OFT Investigators (Nov 2003) at attachment “F”.

An electronic copy of the Guidelines is also available on the OFT intranet at Policies/Compliance Group.

It is the responsibility of the Principal Investigator to:

1. Ensure each notebook is properly identified before it is allocated to an Investigator

2. Record to which Investigator you allocate each notebook

3. Record the return of completed notebooks

4. Arrange for safe storage of unused and completed notebooks

5. Conduct quarterly audit of notebooks to ensure correct use

See the OFT Guidelines referred to above for more detailed information.
5.10 OBTAINING EVIDENCE FROM A WITNESS OR A TRADER

5.10.1 In what format should an Investigator take evidence from a witness and/or from a trader who is alleged to have breached the Act?

The table below sets out the format in which evidence should be included in a Investigation Report recommending prosecution or disciplinary action.

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<td><strong>Penalty Notice</strong></td>
<td><strong>Undertaking</strong></td>
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<td>A witness (including the complainant)</td>
<td>Evidence available from Investigator OR Typed and signed statement</td>
<td>Evidence available from Investigator OR Conversation recorded in official notebook and signed by complainant OR Typed or signed statement</td>
<td>Trader history</td>
</tr>
<tr>
<td><strong>The trader who is alleged to have breached the Act</strong></td>
<td>Electronic record of interview OR Typed and signed Record of interview OR Conversation recorded in official notebook and signed by complainant</td>
<td>Contact trader and put allegation to him/her. Ask if they want to be interviewed. If Yes take a Statement. If No and there is sufficient evidence issue the penalty notice</td>
<td>OFT Files</td>
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5.10.2 How should an Investigator prepare a typed statement from a witness?

Often a statement from a complainant will provide some leads as to where the necessary evidence to prove an offence may be obtained. Sometimes, the statement may indicate to the Investigator that there is insufficient evidence to prove an offence. It is important that a statement from the complainant, the principal witness, be obtained as quickly as possible. The recollection of a witness becomes less reliable as a result of delays in obtaining a statement from that witness. This may make the proving of an allegation more difficult.

The evidence of other witnesses such as manufacturer’s, technical expert, is often intended to corroborate the evidence of the principal witness.

All effort should be made to obtain the statements in person.

1. **Preparation for taking a statement from a witness**

   When taking a statement from a witness, it is the Investigator’s responsibility to:
a. Research the file to determine what information or evidence the witness can provide to support the elements of the alleged offence.

b. Contact the witness advising them of the investigation and the information we are seeking from them to assist the investigation.

c. Inform them that the investigation is of a serious nature and that the information they give will form a statement. Inform them also that they may be asked to give the statement as evidence in court.

d. If the witness states that they would not be willing to give the statement as evidence in court ascertain the reason, record in CAS and seek the advice of your supervisor before proceeding further.

e. If the witness agrees to give the statement in court, arrange a meeting to take the statement.

f. Assess what evidence the witness has to support the allegation e.g. personal recollection, documents, invoices, receipts and bank statements etc.

g. If you intend taking the witness’s statement off-site remember to take a lap-top and portable printer.

h. If the witness is of non-English speaking background (NESB) offer them assistance by way of the Department’s CLAS services and language aides as necessary for giving a Statement. See section 5.10.5 (k) for more information.

2. Taking the Statement

a. Open the Statement Form template on your laptop.

A Witness Statement template can be located on the G drive at EUU/Procedures Templates/Witness Statement template.

b. Read the following jurat to the witness. The jurat is sanctioned by s 78 and 79 of the Criminal Procedures Act and is an essential element of a valid statement:

“This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.”

c) Ask the witness to state their age.

d) If the witness is a professional person ask them to state and give evidence of their credentials e.g.

“I am a legally qualified Electrical Engineer and I hold the qualification of Bachelor of Electrical Engineering, Sydney University, 1985. I am currently working for Hellec Engineering Limited and have been in their employ as Compliance Engineer since 2001.”

f) Ask questions and collect exhibits relating to the witnesses identification or association with the matter e.g.

i. If the witness is the consumer – eg. ebay advertisement which prompted he/she to purchase the item off the trader

ii. If the witness is a technical expert - copy of business card and proof of expertise in this area. eg. Design Engineer Hacket & Leave It.

g) Ask the witness (consumer) to arrange in chronological order the events in relation to the complaint and to present any written documents consistent with the order of events. e.g:
On 14th March, 2003 I sent a cheque to Doggy Appliances for $800 as payment for a dishwasher.

On 26th March, 2003 Dishwasher arrived and was installed.

On 27th March 2003 Used dishwasher for the first time and I received an electric shock. Shock reported to Energy Australia who investigated the report.

**Exhibit:** I produce a copy of a cheque dated 14th March 2008 for the dishwasher. Cheque made out to Doggy Appliances for $800.

**Exhibit:** I produce a copy of consumers bank statement containing record of $800 been drawn on by Doggy Appliances.

**Exhibit:** I produce a copy of the shock report from Energy Australia.

**h)** When the witness is recalling a conversation record the information in the first person e.g.

I said: “Hello I’m James Pepper. I saw your ad for a disco brand dishwasher for $800.”

He said: “Gidday I’m Trevor Terrifik. I own the shop, I’ve got plenty of disco brand dishwasher for $800. How many do you want?”

I said: “Mate just one but are they safe? Are they Australian approved?”

He said: “Yes, there all approved!”

I said: “I can you include delivery in the price?”

He said: “Yes”

About 3.00 pm that afternoon Mr Terrifik came to my home in a truck and unloaded a dishwasher... I then gave him a cheque for $800.

He said: “Have you got the $800 in cash?”

I said: “No mate, only a cheque.”

**i)** Ensure conversation remains relevant and that the interviewee doesn’t digress from the facts of the Act.

**j)** Try not to include hearsay.

A person can only give evidence of what they perceive with their five senses. That is they can give evidence about what they have seen, tasted touched, smelt or heard. If a person attempted to give evidence about a matter which was not form one or all of their five senses then it would be considered to be hearsay.

In addition to this a person can only give in evidence conversation that was said in the presence and hearing of the defendant.

**k)** The actions and events set out in the statement should be arranged in chronological order and illustrate what, when, where, why and how the event took place.

**l)** Where a witness uses a word or phrase in contradiction to its common meaning ask and record the answer to a clarifying question to prevent the witness’s statement being misunderstood. Eg:

Q: For the purposes of taking this statement when you said

“I spoke to the salesman and I thought I was getting a ‘Mickey Mouse’ product” what did you mean?

A: “When I use the words ‘Mickey Mouse’ I mean ‘quality product’.”
m) Do not correct poor grammar. Remember it is the witness’s statement not yours. Help them arrange information in a logical order but ensure the words recorded are theirs even if slang or swear words are used.

n) Print the first draft of the statement and ask the witness to read it. Alternatively, if the statement was taken over the phone fax it to the witness, and ask if there is anything they wish to add, delete or qualify any information given.

o) Make changes as per their verbal reply or their amendments sent by return fax.

p) Print out the statement.

q) Ask the witness to then sign each page of the statement in the bottom left hand corner next to the word “Signed” ……………………………

r) Sign your name in the bottom right hand corner next to the word “Witness” ………………. as you are required to witness the signature of the person making the statement. If the Statement is being signed off-site ask the Witness to have their signature witnessed by an adult.

s) Give a copy of the signed Statement to the witness and place the original in a plastic sleeve on the file.

An example of a completed Statement from a witness can be found at Attachment “G”

5.10.3 What is an electronic record of interview?

A Record of Interview is an interview between an Officer from the Office of Fair Trading and an alleged offender. The purpose of the interview is to allow an alleged offender to respond to the allegations relating to possible breaches of legislation. In order to preserve the integrity of such a recording as evidence, it is best to use a triple deck tape recorder.

5.10.4 When should an investigator conduct an electronic record of interview?

An electronically recorded interview should always be conducted where there is appropriate resources available i.e. ERISP machine and suitable accommodation. OFT ERISP machines have portable capabilities to conduct interview of up to 2 hours on battery power.

When it is apparent that the matter is going to be prosecuted through the Local or District Court, injunction proceedings are to be commenced in the Supreme Court or other disciplinary action is to be taken, an electronic record of interview should be offered to the alleged offender. The offender is not obliged to participate in the interview. Other interviews may be recorded as records of conversation in an investigator’s official notebook with the interviewee being invited to sign the note book adjacent to the relevant entry. A handheld digital recorder provides an alternate method for recording a record of conversation.

Interviews with witnesses, consumers, manufacturers or any other person not connected with the trader should be conducted with the objective of obtaining a signed typed statement.
5.10.5 How should an investigator conduct an electronic record of interview?

When an Investigator conducts an electronic record of interview, it is the Investigator’s responsibility to:

1. **Prepare for the Interview:**
   - **(a)** Become familiar with the file of the alleged offender, the alleged offence, the proofs and the chronology of events.
   - **(b)** Meet with the Investigator who is going to assist you in the interview and discuss how the interview will be conducted.
   - **(c)** Meet with the Principal Investigator who will review your notes on the preparation of the interview.
   - **(d)** Ensure that the interviewee is the actual person involved in the commission of the offence, check his relationship with the company if he is not a sole trader and his authority to answer questions on behalf of the business entity concerned.
   - **(e)** Before calling the interviewee take the time to write down the main points of any prior conversations you or an Inspector may have had with them. (So that you can include and adopt that conversation in your record of interview).
   - **(f)** When calling to ask them to attend an interview give them the following information:
     - An explanation of what the interview will entail including the subject of the interview, use of tape recorder, the viewing of exhibits and the signing of the master tape.
     - Advice that their agreement to participate in the interview is voluntary.
     - Advice that they are entitled to have language aides (including an interpreter) if required.
   - **(g)** Gather and label documents and/or other exhibits for presentation at the interview.
   - **(h)** Decide who the Lead Investigator will be as this person will ask the primary questions on each offence. When they have finished, the Support Officer will be given the opportunity to ask clarification on any points.
   - **(i)** Prepare questions as dot points on each of the proofs. In the interview, ask, “What can you tell me about that” in relation to each proof or allegation. Try to obtain answers to what, where, when, why and how in relation to each alleged breach. Keep in mind the different tracks that the interviewee may take.
     - ie. If the interviewee is a trader, consider whether he/she is going to admit to the offence, completely deny the offence, or put forward an alibi defence.
   - **(j)** Your plan should include the following aspects:-
     - Proofs of the offence/s
     - Alibi’s & Defences;
     - Facts established e.g. Unmarked declared electrical article
     - Facts not established (That you want to establish). Eg Is the article approved?.
   - **(k)** Determine whether the interviewee is of non-English speaking background (NESB) or hearing impaired. If so, refer to the Language Services Guidelines which contain a list of CLAS officers and outlines the use of different language services like telephone or on-site interpreters to come to the office.
Copy of the Guidelines can be found on the Commerce intranet at Employee Resources/Diversity & Equity/Client Access Equity.

A copy of the list of language aides such as Telephone Interpreting Services TIS or Auslan (sign language) can be found on the Commerce intranet at Employee Resources/Diversity & Equity/Ethnic Groups/Language Services.

For a list of Dept of Commerce CLAS officers refer to Groupwise

Click on “Address Book”. Click on “Find Items” (or “Tools” then “Find”). Enter language in “Language”. A list of language aides, telephone numbers & locations will be displayed.

1) The Lead and Support Investigator to meet and discuss interview plan prior to the interview.

2. Conducting the Interview:

The table below contains the main steps to follow during the course of an electronic record of interview.

<table>
<thead>
<tr>
<th>Step 1</th>
<th>Pre-interview questions. (Show any documentation during this time).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 2</td>
<td>Set up interview equipment and unwrap tapes in the presence of the accused and place into the interview machine. (Ensure “A” side of tapes is facing upwards).</td>
</tr>
<tr>
<td>Step 3</td>
<td>Opening/Introduction questions. i.e.</td>
</tr>
<tr>
<td></td>
<td>▪ This is an interview between Mr X and Mr Y Investigator Energy Utilities Unit</td>
</tr>
<tr>
<td></td>
<td>▪ State time the interview commences</td>
</tr>
<tr>
<td></td>
<td>▪ Voice Identification – including introduction of Lead Investigator and Support Investigator</td>
</tr>
<tr>
<td></td>
<td>▪ Preliminary Adoption Questions</td>
</tr>
<tr>
<td>Step 4</td>
<td>Personal details of accused i.e. establish:</td>
</tr>
<tr>
<td></td>
<td>▪ Whether the interviewee is employed</td>
</tr>
<tr>
<td></td>
<td>▪ Interviewee’s authority to speak on behalf of the business entity concerned</td>
</tr>
<tr>
<td>Step 5</td>
<td>Allegation regarding the offence/breach 1 including questions about relevant documents.</td>
</tr>
<tr>
<td></td>
<td>“Do you agree that prior to the commencement of this interview I showed you a number of documents/records, numbered 1 to 100?”</td>
</tr>
<tr>
<td></td>
<td>“Do you agree that you have examined all of these documents/records?”</td>
</tr>
<tr>
<td></td>
<td>“Do you also agree that after examining these documents/records that you placed your initials on each page?”</td>
</tr>
<tr>
<td>Step 6</td>
<td>Caution.</td>
</tr>
<tr>
<td></td>
<td>I want you to understand that you are not obliged to say or do anything unless you wish, but whatever you say or do will be electronically recorded and may later be used in evidence. Do you understand that?”</td>
</tr>
</tbody>
</table>
5.10.6 How should an Investigator prepare a typed statement from a trader who is alleged to have breached the Act?

It is preferable to conduct either an electronic or typed ROI with an alleged offender. In some cases ROI’s can be recorded in an officer’s Official Notebook. However, there may be occasions where the trader may wish to make a statement.

When an Investigator takes a typed statement from a trader who is alleged to have breached the Act, it is the responsibility of the Investigator to:

1. Preparation for taking a Statement from a Trader
   - a) Conduct a preliminary interview with the trader and confirm the proofs of the alleged offence e.g. Trader sold unapproved article from his/her shop.

2. Taking the Statement
   a) Caution the Trader as follows:
      “I want you to understand that you do not have to make a statement unless you wish to do so, but any statement you do make may later be used in evidence. Do you understand that?”
   b) If they answer ‘Yes’ then carry out procedures 2-12 in section 5.10.5 above
   c) Type and ask the following adoption questions at the end of the statement i.e.
      i. Have you made this statement of your own free will?
      ii. Is this a true and correct statement?
      iii. Has any threat, inducement or promise been held out to you to make this statement?
iv. Were you cautioned prior to making this statement that you were not obliged to make the statement unless you wished as any statement you did make may later be used as evidence?

d) Type the trader’s answer underneath each question a) to d)

e) Print out the statement and ask the trader to write their initials next to questions a) to d)

f) Ask the trader to then sign each page of the statement in the bottom left hand corner next to the word “Signed” ……………………

g) Sign your name in the bottom right hand corner next to the word “Witness” ……………… as you are required to witness the signature of the person making the statement.

h) Ask a Senior Officer, not associated with the case to adopt or witness the statement.

i) The interviewer must then leave the room.

k) The independent Senior Officer must then ask questions a) to d) again and asks the witness whether s/he has any complaints about the process. Finally he asks, pointing to the signature whether the signature is that of the witness and co-signs the statement.

The Interviewer is then asked back into the room, gives a copy of the signed Statement to the trader and places the original in a plastic sleeve on the file.

5.10.7 Obtaining affidavits from witnesses and traders

An affidavit is a written statement which is sworn or affirmed. It contains all the evidence that the deponent can give about a matter. It must be comprehensive and complete. In Supreme Court matters the deponent will not be called to give evidence in chief. Therefore, if anything that is relevant and admissible is left out of the affidavit it will not make it into evidence. However be careful not to record assumed knowledge on the part of the deponent.

Assumed knowledge:

This is where a witness observes actions and makes assumptions as to their meaning, e.g. where Person A observes Person B taking money out of a drawer and states in his affidavit that Person B stole money out of the drawer.

Courts and Tribunals may have differing formats and it is appropriate to check with a Legal Officer as to the precise format requirements for each jurisdiction. As a general rule the format used in the Supreme Court will be acceptable for other jurisdictions.

Use the pro forma at attachment “I”, and on the G drive at EUU/Procedures Templates/Affidavit template

A. Formal Parts

1. The Supreme Court format requires a 5 cm gap at the top of the first page of any document to be filed.

2. The affidavit should identify the deponent and the date upon which the affidavit is made with an introductory paragraph such as:-

“On the second day of March 1998, I John Smith, Public Servant, of 1 Fitzwilliam Street, Parramatta say on oath:-”
3. The affidavit should be structured into consecutively numbered paragraphs, each paragraph being confined to a distinct and separate portion of the subject or action taken by the deponent.

4. Each page of the affidavit, including annexures, should be consecutively numbered and the complete document should not exceed 50 pages.

5. The actions and events set out in the affidavit should be arranged in chronological order.

6. Once an Investigator takes a draft affidavit he/she must confer with the Principal Investigator before submitting the draft to the Legal Services Division who will “settle” it. This is a process whereby the affidavit is checked for admissibility in court.

7. Make any changes recommended by the Legal Services Division e.g changing 2008 to 2009, and forward it to the deponent who is required to sign (by way of full signature) each page of the affidavit and have it witnessed (by way of full signature) on each page by the Solicitor/Justice of the Peace before the affidavit is sworn.

8. The affidavit must contain a clause which documents that the document is either sworn or affirmed.

   a) **If an affidavit is to be sworn** the following clause is appropriate to be used on the last page:

   "Sworn at Parramatta )
   Before me: )

   ……………………
   Justice of the Peace/Solicitor"

   - At the time of swearing the deponent should hold a Bible whilst the Solicitor/Justice of the Peace says:-

   “Do you swear that the contents of this affidavit are true to the best of your knowledge and belief”?

   To which the deponent should reply:-

   “So help me, God”.

   - The deponent should then sign the affidavit in the presence of the Solicitor/Justice of Peace. The solicitor/Justice of the Peace will then also sign the affidavit.

   If the body of an affidavit exceeds one page, every page should be signed at the bottom by the deponent and the Solicitor/Justice of the Peace.

   b) **If the deponent does not wish to take an oath**, he may affirm the contents of the affidavit.

   - The appropriate clause to be used at the end of an affidavit is:

   "Affirmed at Parramatta )
   Before me: )

   ________________________________"

   Solicitor/Justice of the Peace
- At the time of affirming the Solicitor/Justice of the Peace will say:-

  “Do you solemnly, sincerely and truly declare and affirm that the contents of this affidavit are true to the best of your knowledge and belief”?

To which the deponent should reply:-

  “I do”.

- The deponent and the Solicitor/Justice of the Peace should then sign the affidavit in each others presence.

If the body of the affidavit exceeds one page, every page should be signed at the bottom by the deponent and the Solicitor/Justice of the Peace.

9. If a deponent to an affidavit is blind or illiterate a special clause is to be used in swearing the affidavit. In such cases you should first consult with a Legal Officer.

10. No alteration can be made to an affidavit once it is sworn. If any amendments are identified as being necessary an amending affidavit may be required.

B. **Annexures**

1. Where practical, any document referred to in the affidavit should be annexed.

2. The Affidavit should contain a phrase which identifies the annexure with a letter. For example:

   “Annexed hereto and marked with the letter “A” is a copy of the (describe document e.g. letter, contract, advertisement)”.

3. Each annexure should have a clause written on the front page of the annexure which links it back to the affidavit. The letter used in the affidavit to identify the annexure should be placed at the top of the first page of the annexure. For example:- Page 1 would be marked with an “A” and the statement below would follow.

   “This and the following nine pages is the annexure marked with the letter “A” referred to in the affidavit of John Smith sworn on 2 March 1998 before me:

   ________________________________
   Justice of the Peace/Solicitor”. 
C. **Exhibits**

Generally, bulky documents should be dealt with as an exhibit to an affidavit, rather than an annexure.

In the Supreme Court an affidavit including annexures must not exceed 50 pages. If the affidavit exceeds 50 pages the long annexures should be made exhibits.

If an affidavit is to refer to an exhibit the affidavit should contain a phrase which identifies the exhibit. For example:

“Exhibited before me at the time of swearing this affidavit is a bundle of documents marked ‘J.S.1” which constitute the documents received from the defendant on 1st February 1998”

In the example the exhibit itself should bear the marking “J.S.1” and bear a clause to link it back to the affidavit, such as:

“This is the exhibit marked ‘J.S.1” referred to in the affidavit of John Smith sworn on 8th February 1998 before me:

________________________________________
Justice of the Peace/Solicitor”.

D. **Content of Affidavits**

1. All material in an affidavit must be relevant. Consideration should be given as to what is the purpose of the affidavit and what is sought to be proven in the ACT for which the affidavit is used. If information contained in an affidavit is not directly relevant it may be successfully objected to.

2. All actions by a deponent should be expressed in the first person and should use direct speech. eg.
   - I did (describe action).
   - I observed (describe what was seen).
   - I said “(use actual words used)”.
   - He said “(use actual words heard, not a summary of their effect)”.

3. Where the actual words used in a conversation cannot be recalled with absolute precision, the deponent should still record the conversation in direct speech to the best of their recollection. For instance a clause should read:

   “On 5th March 1998 I had a conversation with Bob Jones, where words were said to the following effect:
   I said: ‘set out words used to your best recollection’
   He said: ‘set out words used to your best recollection’.”

If there were numerous or lengthy conversations which cannot be recalled precisely the following clause may be inserted at the end of the affidavit to deal with any imprecision in the recounting of a conversation.

“Where in this affidavit I have referred to direct speech conversations I have attempted, as best as I can recall, to set out the substance of the conversations although I now no longer recollect the precise words used”.

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4. In all Cases hearsay evidence can be objected to. Hearsay is second hand information obtained from someone else that has observed or heard something presented by the deponent of the affidavit as to the truth of the statement. To avoid objections to hearsay, an affidavit ought to be obtained from that other person who observed the event or heard the conversation first hand.

5. Where an affidavit is not to be relied upon in the actual trial of an action (eg in application for an interim injunction), the Court has a discretion to permit hearsay evidence to be used. The deponent may use the expression in an affidavit - “I am informed and verily believe …” provided the deponent sets out the source and grounds for the information and belief.

However, this type of evidence is not admissible at the actual trial. Any affidavits containing hearsay evidence should be re-drafted without the hearsay evidence before the hearing and additional affidavits should be obtained from the person who provided the information initially.

Wherever possible hearsay evidence should be avoided. If the matter is urgent and it is not practical to obtain direct evidence from another witness, you should consult with a Legal Officer about the use of such statements.

6. The deponent in most Cases should avoid expressing opinions or drawing conclusions. An exception to this is opinions of experts, where these opinions are relevant. If opinion evidence is intended to be included in an affidavit you should first discuss the matter with a Legal Officer. It will be necessary for the expert to set out in the affidavit the basis of his expertise in terms of qualifications and/or experience.

Example of an affidavit from expert witnesses e.g. an Investigator and a Consultant are at attachments “J” and “K” respectively
5.11 ISSUING A NOTICE UNDER SECTION 20 TO OBTAIN INFORMATION UNDER FTA

In some cases an Investigator may, for the purpose of investigation, need access to information which a person or organisation refuses to release unless required to do so by law.

Section 20 of the FTA provides the Commissioner for Fair Trading with the power to require a person or organisation to produce information in certain circumstances. If a s.20 notice is served on the recipient, s/he must provide the information referred to in the notice. The Commissioner’s power to issue a notice under section 20 has been delegated to the Director of the Mediation Services and Compliance Division.

An s.20 notice should only be used as a last resort if a person or organisation is otherwise unwilling to provide the information that the Investigator seeks.

Note: Information obtained as a result of s.20 Notice cannot be used as evidence against the individual or entity concerned, however evidence obtained by a s.20 Notice from a third party can be used as evidence against the individual or entity concerned.

5.11.1 Recommending the issue of a s.20 notice to obtain information

Before an Investigator recommends issuing a section 20 notice on a person or organisation, it is the responsibility of the Investigator to:

1. Identify exactly what information is required to assist in the investigation
2. Identify which person or organisation holds the information
3. Contact the person or organisation to:
   - confirm that they hold the information
   - request access to the information

If the person or organisation is unwilling to provide the information to the Investigator, it is the Investigator’s responsibility to:

1. Complete a pro forma brief to the Director, Mediation Services and Compliance, recommending the issue of a section 20 notice to a person or organisation.

The pro forma brief is located at attachment “L” and on the G drive at EUU/Procedures Templates/s20 Notice Brief template

The brief should include the following information:

- What is the name of the person, partnership or corporation being investigated?
- What are the possible contraventions of the Acts or Regs being investigated?
- What information or documents are required to assist in the investigation?
- Which person or organisation is believed to be able to produce the required information or documents?
- Why is the information, or the documents, relevant to the investigation?

2. Complete a pro forma cover letter addressed to the person or organisation that holds the information.

---

1In this chapter, “information” also refers to documents
Use the pro forma letter at attachment “M”, also located on the G drive at EUU\Procedures Templates\s20 Covering Letter template

3. Ensure that a copy of section 20 of the FTA is attached to the cover letter

4. Complete the notice to give information.
   The notice informs the person or organisation whether they must produce documents, give information or appear before an authorised person. It also provides the date by which the information/documents must be delivered to the EUU.
   When you complete the notice, make sure to delete any inappropriate phrases. E.g. if you are issuing a notice to produce documents, you should delete any references to “give information” or “appear before an authorised person”.

5. Complete the Schedule to the notice.
   The Schedule outlines exactly what information the recipient of the notice must provide

6. Refer the file, including the brief and completed pro forma, to the Principal Investigator for review

5.11.2 Reviewing a recommendation to issue a s.20 notice

It is the responsibility of the Principal Investigator, the Manager of EUU, and the Director of Mediation Services and Compliance, respectively, to:

1. Review the Investigator’s brief recommending the issue of a s.20 notice
2. Decide whether to support the Investigator’s recommendation to issue a section 20 notice
3. In the FTA the Director, Mediation Services and Compliance, decide whether to approve the recommendation and sign the notice and accompanying documents.

5.11.3 Serving a section 20 notice

If the recommendation to issue a section 20 is approved, it is the responsibility of the Investigator to serve the notice on the recipient, either in person, or by registered mail.
5.12. OBTAINING SEARCH WARRANTS

In order to obtain sufficient evidence to undertake a prosecution for a criminal offence and other methods of obtaining that evidence have been exhausted, approval should be sought for obtaining a search warrant to seize that evidentiary material.

Under s.19a of the Fair Trading Act an Investigator may apply to an authorised justice for the issue of a search warrant if the investigator has reasonable grounds for believing:

a) that a provision of this Act or the regulations, or
b) that a provision of, or of a statutory instrument made under, any other Act,

Under s.4 of the Search Warrants Act, 1985 a “thing” is connected with a particular offence if it is:

a) a thing with respect to which the offence has been committed;
b) a thing that will afford evidence of the commission of the offence; or
c) a thing that was used, or is intended to be used, for the purpose of committing the Offence.

Where an Investigator fears evidence may be destroyed or lost e.g. documents may be shredded or a batch of faulty equipment may be removed from a trader’s premises, then a search warrant should be obtained with a degree of urgency.

5.12.1 Recommending a Search Warrant be obtained.

Before an Investigator recommends obtaining a search warrant, it is the responsibility of the Investigator to:

1. Consult with the Principal Investigator and the Manager EUU (and in appropriate circumstances, the Director MS&C) on:
   
a) the grounds for recommending the search. Reference should made to specific breaches of the E(CS)A and GS(A)R, evidence gathered in procedures 5.9, 5.10 and 5.11 above and the need for prompt action to ensure primary evidence is not lost or destroyed.
   
b) the premises where the evidence will be found e.g trader’s place of business or home – (If these are not the same a separate warrant is required to search each premises).
   
c) appropriate officers and any necessary experts to conduct the search.

2. On the Manager’s approval draft the following documents:
   
a) Application for a Search Warrant complete with
      
i. Schedule “A” reasonable grounds for applying for the search warrant
      
ii. Schedule “B” items to be searched for

Use pro-forma Application for a Search Warrant located at attachment “N” and on the G drive at EUU/Procedures Templates/Application for a Search Warrant template
1. On the Search Warrant pro-forma it is unnecessary to fill in the date or name. Similarly the date in the signature block for the JP is to be left blank.

2. A search warrant may be authorised for execution **by day** i.e. during the period between 6am and 9pm on any day or **by night** i.e. during the period between 9pm and 6am on the following day. It is HBS policy that search warrants will only be executed during daylight hours.

b) Search Warrant for Magistrate's signature.

Use pro-forma Search Warrant at attachment “O” and on the G drive at EUU\Procedures Templates\Search Warrant template.

**Note:** The time and date of expiry of the search warrant is to be left blank as is the date and name within the JP's signature block as these will be confirmed once an appointment is made with the Court.

c) Occupiers Notice.

Use pro-forma Occupiers Notice at attachment “P” and on the G drive at EUU\Procedures Templates\Occupier’s Notice template.

**Note:** The time and date of expiry of the search warrant is to be left blank as should the details of the JP who issues the search warrant. Under the Inspection paragraph leave blank the name of the issuing JP.

d) Briefing for Commissioner with documents (a) to (c) attached.

Use standard MLB Briefing to the Commissioner at Start\My Programs\Templates\OFT Ministerial\Executive Documents template and follow prompts

3. Make an appointment at the Local Court to apply for a Search Warrant. When confirmed, attend your appointment with the Authorised Justice and lodge the application documents.

**Note:** An investigator can provide orally, under oath or affirmation, additional grounds for a search warrant to be issued.

4. Following the issue of a signed Search Warrant by the Authorised Justice execute the search warrant as soon as practically possible being mindful that the warrant expires within 72 hours of issue. (If the application is denied you may be given the opportunity of establishing further grounds or obtaining further evidence to support another application).

5. On return to the office place the signed Search Warrant and Occupiers Notice on the file and record details in file notes and CAS

6. The original documents should be maintained with a high degree of security and confidentiality.

**Execution Of The Search Warrant**

7. With the assistance of RAAU and a Police Officer if necessary, carry out a Risk threat analysis including a crime check.

8. Comprehensive Operational Orders for the execution of the Search Warrant must be compiled and approved by the Manager EUU and the Director Mediation Services
and Compliance. Operational Orders are to address the following matters (S.M.E.A.C.):

**Situation**

This covers a summary of the history facts and relevant sections of the Acts or Regulations which the offender is alleged to have breached. This section also details the location, site, address, description and layout of the premises, the likely and possible occupants and any potential access and egress limitations. Attach the Scene Plan showing the location and layout of the premises and a photograph of the site if possible.

**Mission**

This is an explanation what is being searched for. Reference is made to Schedule B of the Search Warrant which lists the “things” suspected of being on the premises. It should briefly cover the likely occupants of the premises, their criminal history if any, known medical condition and potential threats to the searchers involved.

**Execution**

This section covers how the search will be conducted and who by. It should outline the roles and responsibilities of each of the searchers and independent observer before during and after the search warrant has been executed. Details to cover are as follows:

- Assembly point
- Allocation of duties
- Procedures for entering the premises, conducting the search and seizing property.
- Contingency plans

Although authorised to do so under the Search Warrants Act 1985 HBS policy dictates that no Officer will use force to break and enter a premises for the purposes of conducting a search.

**Note:** One of the most important processes in the execution of a warrant is to introduce and advise the occupant of the role of the Independent Observer.

**Administration**

Covers what documents need to be prepared when and who is responsible for preparing and lodging them with the Court. It also covers Briefs to Management, contact arrangements with the HBS and equipment to be used during the search. Other matters to detail include:

- Clothing required including sunscreen hats, protective clothing, first aid kit
- Meals, water
- Transport – vehicle allocation

**Command and Communication**

This is a list of roles and names of personnel to carry out the responsibilities associated with them

Use pro-forma Operational Orders at attachment “Q” and on the G drive at EUU\Procedures Templates\Operational Orders – Search Warrant.
9. Contact the local NSW Police station requesting the attendance of a Police Officer to assist in the search as an independent observer and to prevent a breach of the peace. If the threat/risk analysis determines a med to high risk involved in searching the premises discuss the matter with the O.C. so that security arrangements can be made with the Police if necessary.

10. Obtain the names and contact phone numbers of the assigned Police Officer and include these details in the Operational Orders. The contact details of any technical experts eg Accountants, Architects or Engineers should also be included in the Orders.

11. Conduct a Briefing with all staff, Police Officers and technical experts involved. The purpose of the Brief is to ensure that everyone understands their role and responsibility in conducting the search. Refer to the Scene Plan prepared by the Exhibit Officer and ensure that everybody understands it. The Briefing gives staff a final opportunity to seek clarification on any matters in the Operational Orders which may have been unclear. Give the Police Officer a copy of the search warrant and accompanying documents.

12. Execute the search warrant as described in the Operational Orders.

13. Upon entering the premises an officer must present the occupant with his/her identification and the Occupiers Notice. Other Officer’s in attendance must all present identification and experts must be introduced. The independent Observer must explain his/her role to the occupier.

14. Video the conduct of the search.

**Follow up and Debrief**

1. Upon returning to the office all exhibits including video tapes and those exhibits not recorded on site must be entered in the exhibit book and securely stored. See section 5.4.13 for procedures.

2. Conduct Debrief

3. Complete the Report to Authorised Justice on the execution of a Search Warrant and forward the Report and attachments to the Local Court named in the Occupiers Notice. Place a copy of the report on the file and update ACT.

 tentang This report must be made within 10 days after the execution of the warrant or the expiry of the warrant, whichever first occurs.

Use the pro-forma Report to Authorised Justice at attachment “R” also located on the G drive at EUU/Procedures Templates\Report to Authorised Justice.

4. Debrief the Commissioner

See example at attachment “S” and use the standard MLB Briefing to the Commissioner at Start\My Programs\Templates\OFT Ministerial\Executive Documents template and follow prompts

5. Compile and complete the Brief of Evidence including the Independent Observer’s Field Form.
5.12.2 Search Team Roles and Responsibilities

Careful consideration should be given to who should be assigned to the search team. The following roles need to be undertaken:

**Operational Commander:**

The Manager EUU has overall responsibility for the management and conduct of the operation. This responsibility can be delegated to the Principal Investigator and or a Senior Investigator in their capacity as Case Officer.

**Duties:**

Delegation of Authority: If absent at any time during the operation. Delegate the role of Commander to a Case Officer.

Personal Accountability: Assume personal accountability for actions, inaction and behaviour of subordinates during all phases in the execution of the search warrant and report any improprieties detected to the Operational Commander.

Independent Observer: Ensure that an independent Observer is appointed to oversight the execution of the search warrant and that such person is properly briefed on all relevant aspects of the search and responsibilities of his/her role. Introduce him/her to the occupier of the premises prior to entering and explain his/her role to the occupier. This role could be undertaken by a Police Officer.

Risk threat assessment: In conjunction with Local Police and assistance from RAAU the Case Officer must carry out a crime check as part of a risk/threat analysis of the premises and of occupants. If in the risk/threat analysis the Case Officer concludes that there may be a risk of harm to searchers seek further assistance from the Police to secure the premises.

Operational Orders: Ensure all procedures are set out clearly in Operations Orders and readily available for the information of all personnel involved. Any such orders are to be written where possible but may be oral in exigent circumstances.

Debriefings: arrange debriefings as soon as possible after the execution of the search warrant and evaluate processes undertaken, seek feedback and take remedial action where necessary.

**Case Officer**

The Case Officer has carriage and responsibility for the investigation leading to and during the execution of the search warrant. Ensure that all personnel involved are fully aware of their duties and responsibilities. If absent from the search scene, whether temporarily or otherwise, delegate authority to “Searching Officer” to fulfil the “Case Officer” duties.

Risk threat assessment: In consultation with RAAU and a Police Officer if necessary carry out a risk/threat analysis of the premises and occupants giving consideration to:

a) Seriousness of the offence committed by the suspect/offender
b) Expressed intention by suspect/s to use lethal force
c) Reasonable grounds to believe that the suspect:
- May use force/lethal force
- Has or may cause injury/death
- Has issued threats to injure or kill any persons

d) The suspect has:
- A prior history of violence
- No recent history of violence but known in the past
- Is exhibiting violence now

e) Involvement of innocent participants e.g. bystanders

**Briefing:** Conduct a Briefing of all searchers before the search. Refer to the site plan prepared by the exhibit officer and explain any necessary findings from the risk threat analysis. Assign roles and explain duties and procedures in relation to the Operational Orders.

**Execute the Search Warrant:** Carry out all duties as delegated by the Operational Commander. (See O.C.’s duties above)

**Searching Officers:**

**Duties:**
Delegated Searching Officers must at all times comply with the directions of the Case Officer and Exhibit Officer and be diligent in adhering to searching procedures. Where any ‘thing’ is located, immediately bring same to the attention of:
- The Case officer
- The independent observer
- The exhibit officer
- The occupier/suspect if present
- The video operator.

Undertake the role of the ACT Officer as required.

**Exhibit officer/s**
The Exhibit Officer has the responsibility for ensuring the integrity of ‘things’ located and/or seized, photographing them in situ: properly recording the finder, location, description and exhibits handling continuity until the recording and securing of those items in the exhibits locker (see section 5.13).

**Duties:**
Scene Plan: Prepare scene plan showing the location of the premises for presentation at Briefing.

Use the Search Warrant Procedures Scene Plan pro-forma at attachment “U” also located on the G drive at EUU\Procedures Templates\Search Warrant Procedures-Scene Plan template

Integrity and Security: Maintain the integrity and security of all “things” located by the recording, labelling, packaging and retaining them under personal control – record all movements to maintain a tangible audit trail.
Photographs/Videos: Ensure that all exhibits are photographed and wherever possible, recorded by video and/or photograph, in situ. Use of a digital camera is recommended.

Receipting of seized items by Occupier: Afford the occupier the opportunity of viewing and acknowledging the accuracy of the record of the seized property in the exhibit receipt. Have the occupier sign the exhibit receipt book entry. The exhibit book entries are then to be endorsed as correct by the Independent Observer. The blue copy of the receipt is given to the occupier.

Security of exhibit: Convey the exhibits to the exhibit locker and manage as per procedures in section 5.13.

**Independent observer**

This role may be carried out by a Police Officer

The Independent Observer (I.O.) has the responsibility of ensuring impartiality and scrutiny of the execution of search warrants. The independent observer should not take part in the investigation or searching of the premises other than to ensure the propriety and legality of the search. If a complaint is made at the time of the search these must be referred to the independent observer to safe guard against incorrect procedure in the execution of the search warrant. The I.O. must endorse exhibit book entries once details of items have been entered and the exhibit officer and occupier have signed the exhibit book pages concerned.

A Senior Officer with experience in investigative procedures from another branch of the Office of Fair Trading would be a suitable person to carry out this role. Under no circumstances is a search warrant to be executed without an independent observer.

**Duties:**

Sight the Search Warrant: Read the search warrant.

Be Alert: Remain alert and closely monitor the search procedures.

Fully Briefed on responsibilities: Be properly briefed by the Case officer on all relevant aspects of the search and the responsibilities of the role.

Independent Records: Complete the independent observers form. Make contemporaneous notes of other matters considered appropriate and report any complaints or indiscretions to the Case officer, Principal Investigator and Manager EUU.

Execution: Be present at the time of the execution of the search warrant.

Presence in premises: Enter the premises with the Case Officer and Principal Investigator. Explain the role of the Independent Observer and remain on the premises for the duration of the search.

Occupiers Notice: Confirm that the occupant is served with the Occupiers Notice and the provisions of the notice are adequately explained to the occupier.

Continual monitoring: Remain, at all times, with the search team and exhibit officer as each individual room of the premises is searched and record the entry of individuals coming and going from the premises.

Location of exhibits: Be aware of and view “things” (exhibits) located in the search in situ prior to removal.
Certification of each seizure: Certify the description of the “things” entered in the Exhibit Book by signing below the details of the last item entered on the exhibit book page.

Discussion with Occupier: Before leaving the premises ask the occupier if he/she has any complaints regarding the procedure used in conducting the search.

Complete and sign the Independent Observer’s Field Form and submit to the Case Officer for attachment to the De-brief to the Commissioner.

Use the pro-forma Independent Observers Field form at attachment “T” also located on the G drive at EUU/Procedures Templates/Independent Observers Field form template

**Video Operator**

The role of the Video Operator is essential in recording the location, securing and movement of property, drugs or money during the execution of a search warrant. The video operator is to take no part in the actual search of the premises and is to act in response to directions from the EUU Manager/Case Officer, including when to commence the video recording.

**Duties**

**Competence:** Be competent in the use of the video and its accessories.

**Follow Instructions:** Remain clear of the Operational Area until the operation Commander/ACT Officer isolates and contains the premises (i.e. declares the site or premises secure)

**Recording Exhibits:** As items of evidence are located, film the item/s in situ.

**Photographs:** The video recording will not replace photographs, photographs should still be taken.

**Evidence:** The video recording will not be used as the only form of evidence of conversations with suspected persons.

**Video Tape:** At the completion of the operation, the video tapes must be labelled recorded in the exhibit book and stored in the evidence locker.

**Police Officer/s**

*This person may be given the dual role of Independent Observer*

A Police Officer from the Local Area Command closest to the premises to be searched must be in attendance during the search for the purposes of stopping anyone attempting to obstruct or hinder a person executing the warrant, keeping the peace and for conducting a search of any suspected person for any suspected item as may be necessary.

**Duties**

**Risk threat assessment:** Assist the Case Officer in completing the assessment if requested.

**Independent Observer:** Carry out the duties of the Independent Observer if requested.

**Attend Briefing:** At the Briefing address any and all safety issues in relation to the site, premises and occupants.
Safety of searchers: Secure the premises, monitor the coming and going of people to and from the premises, ensure the occupier or the other persons on the premises do not inhibit the effectiveness of the search and generally keep searchers safe from harm throughout the search.

Attend the Debrief: Evaluate the search and provide feedback. Submit the signed Independent Observers Field Form to the Case Officer for reference in the Debrief to the Commissioner.
5.13 EXHIBIT HANDLING AND STORAGE

Some matters require collection of physical evidence e.g. contracts, invoices, tapes of interviews and electrical and/or gas articles for use in court. Careful management is essential as when a matter goes to court the Officer’s custody and care of exhibits may be tested and, if found wanting, may lead to failure of the proceedings.

5.13.1 Collecting exhibits

When exhibits are collected by an officer of the department they are done so in “good faith”. It is not the responsibility of the officer to check the authenticity of the exhibit. Whether an exhibit is seized on-site or submitted at an Office of Fair Trading, it is the responsibility of the seizing officer to:

1. Photocopy any original documents and return to the owner. If the investigation could lead to a prosecution keep the original document and give the owner a photocopy.

2. List items seized, date, time, place and from whom they were seized in their official notebook and obtain the signature of the owner or person from whom the items were taken.

3. Immediately after returning to the office, report to the Exhibits Officer for recording the exhibit in the exhibit book and depositing of the exhibits in the exhibit locker.

Recording exhibits seized

1. The Exhibits Officer must record all the required information and endorse entries where applicable in the exhibit book. Pages of the exhibit book are grouped in sets of three as follows:-

   ORIGINAL (white) – remains in the book;
   DUPLICATE (pink) – is a file copy and includes an evaluation report
   TRIPLICATE (blue) – is a receipt. Hand or post to owner of exhibit/s

   a) Only enter one item per line – items should be identified by 1, 2, 3, 4 etc. in the small column provided on the left hand side of the description box;

   b) List on one page, items seized from one person only;

   The detailed role and responsibility of the Exhibit Handling Officer can be found in the Exhibit Handling Guidelines at:

2. The seizing officer should sign and date immediately below the last item recorded. Details relating to his/her identity should be recorded ie. Signature, name, position and serial number

   ▪ Lines should under no circumstances be left between items recorded;

3. Fill out the file copy which includes the Evaluation Report on duplicate (pink) copy giving reasons for the seizure and the length of time the exhibit is required to be held by the office. Usually this will be until the completion of legal proceedings which includes appeal periods.

4. The Exhibit Officer will remove the blue triplicate copy from the exhibit book for the seizing officer to forward to the owner, providing confirmation of the Office’s seizure.
The seizing officer should also send a photocopy of his/her notebook entry confirming the officer’s seizure.

5. Place the blue triplicate copy on the file if we are the owner of the exhibit, e.g. Record of Interview tape.

5.13.2 Handling exhibits

1. The Exhibit Officer completes movement details on all occasions when an exhibit is moved or transferred to another location. If you require the movement of one or a number of items contained within a large quantity of exhibits the Exhibit Officer ensures that only those items being moved are identified by the recording of their respective number/s in the “purpose taken” column;

2. Photograph, test/analyse exhibits as required.

3. If books, records and documents are seized and require further examination, make two sets of photocopies, the first set as working copies and the second copy to make further copies as required.

5.13.3 Returning exhibits

1. When you become aware that the exhibit is no longer required for production at court or any other purpose advise the Exhibit officer in writing. Contact the owner of the exhibit and make arrangements for its return. The return of exhibit/s to owners is the responsibility of the seizing officer;

2. When the owner of the exhibit comes to an Office of Fair Trading s/he should be asked to sign the “receipt” section of the bottom left-hand side of the original (white) copy within the exhibit book. The returning officer is to sign and provide their details as witness to the return of the property.

3. When the returning officer delivers the exhibit to the owner at their residence the owner should be asked to sign an acknowledgement of receipt in duplicate. The owner is to retain one copy and the duplicate is to be forwarded to the Exhibit Officer for acquittal in the Exhibit book.

Use the pro-forma Receipt for Returned Exhibits at attachment “V” also located on the G drive at EUU/Procedures Templates\ Receipt for Returned Exhibits template

5.13.4 Destruction or disposal of exhibits

If the exhibit has no owner or the owner no longer wishes to claim the exhibit, send a memo with recommended action, to the Director.
5.14 THE CONDUCT OF SURVEILLANCE & COVERT OPERATIONS

An effective tool for gathering evidence to support a prosecution, show cause or injunction is to undertake surveillance or covert operations. Surveillance and covert operations are designed to obtain first hand documentary, video and still camera evidence which will support the Home Building Service’s proposed action against a person, partnership or company that is breaching the Act or other relevant legislation.

Surveillance: Is the carrying out of mobile or static observations of an individual or group of individuals and it involves the recording of the observations in writing, by still and/or video camera. Surveillance by the HBS will not involve the use of listening or telephone interception devices.

Covert Op: Covert Operation is the carrying out of static observations and interaction with a target by Officers from the Home Building Service. It involves direct contact with the target by an officer of the HBS operating under the guise of being a consumer.

Target: Is an individual who is the subject of surveillance or covert operation activity.

5.14.1 Approval to conduct surveillance or covert operation

The conduct of surveillance or covert operation activity requires the approval of either:

- The Manager, EUU; or
- The, Director, Mediation Services & Compliance Division; or
- The Assistant Commissioner; or
- The Operations Review Committee.

Officers seeking approval to conduct surveillance or a covert operation are required to complete a ‘Request to conduct Surveillance Operation’ form.

Use the pro-forma of this form located at Attachment “W” and also located on the G drive at EUU\Procedures Templates\Request to Conduct Surveillance template.

The approval form requires the completion of a target assessment. Amongst other things, this assessment is to involve a criminal record check to establish whether the target has a history of violence. This is of particular importance for consideration of whether to conduct covert operations.

Ideally, a photograph of the target/s should be obtained during the target assessment process to assist with surveillance.

Considerable planning and effort is required before surveillance or covert operation commences. The following things must occur prior to the commencement of any operation:

- Comprehensive Operational Orders must be prepared;
- Staff to be involved in the Operation must be trained in the use of all equipment to be used;
- A briefing must occur
5.14.2 Operational Order Requirements

Prior to the commencement of surveillance or covert operations the Officer in Charge of the Operation is to prepare Operational Orders which must contain the following information:

- The background of the investigation;
- The Situation – including identification of target/s;
- The Mission – what the surveillance or covert operation should achieve;
- The Execution – setting logistical detail sufficient that every team member is aware of their role and all contingencies have been considered and planned for;
- The Administration – information covering all administrative aspects of the operation. Should also include in formation regarding nearest
  - Police Station,
  - Hospital or FTC; and
  - Communications – mobile numbers, use of radio communication.

Operational orders prepared are to be vetted by Principal Investigator and lodged with the Manager, EUU prior to the operation commencing.

The Operational Orders are to clearly identify a Field Commander who will be responsible for the conduct of the operation in the field and the health and safety of all Officers involved in the operation.

A briefing for all staff involved in the surveillance or covert operation is mandatory before commencing the operation.

5.14.3 Rules governing surveillance operations

1. A surveillance log must be maintained. One surveillance team member is to be nominated to maintain a surveillance log prior to the commencement of the operation.

A copy of the ‘surveillance log’ format is located at Attachment “X”. An electronic version can be found on the G drive at EUU\Procedures Templates\Surveillance Log template.

2. The Officer in charge of the log is to record the time and details of all observations together with the name of the Officer/s making the observations. If video and camera footage is obtained during these observations then this should also be recorded.

3. During the course of mobile surveillance all road rules are to be obeyed. Under no circumstances are surveillance team members to exceed applicable speed limits; ignore traffic control lights; mount footpaths or disregard any other traffic rules or regulations.

4. Surveillance operatives must not enter private property without the prior consent or approval of the owner/occupier.

5. Recorded activities are to only consist of actions amounting to or likely to amount to a commission of an offence under an Act administered by the Office of Fair Trading. Actions of the target within their own private residence which are not related to the alleged offence are not to be recorded.
6. Any direction issued by the Field Commander (regardless of his/her grade), being the person ultimately responsible for the conduct of the operation and the surveillance operatives involved, must be followed by all surveillance team members.

7. A de-briefing must be held at the next available opportunity following the operation.

5.14.4 Rules governing covert operations

In addition to following the guidelines and rules outlined in 5.14.1 to 5.14.3 above, the following rules apply to the conduct of covert operations:

1. Full risk assessments of the target/s are to be completed prior to the commencement of the operation;

2. Only those Officer/s who are appropriately trained or possess considerable experienced in the conduct of covert operations are to have any contact with a target/s;

3. Immediately prior to the commencement of the operation the Field Commander is to contact a Duty Officer of the Local Area Command within the area which the covert operation is being conducted and advise him/her of the nature and purpose of the operation.

4. Should a target become agitated, all operatives are to retreat and allow the target to leave the scene. Under no circumstances should a target be detained.
5.15 ISSUING A WARNING LETTER

5.15.1 Deciding whether to issue a warning letter

Warning Letters are issued for minor offences where the trader has not bee subject to previous disciplinary action for the same offence. The Investigator may consider issuing a warning letter to a trader in the following circumstances:

1. The trader is alleged to have committed an offence under the Act or Regulation
2. The offence is minor
3. The Investigator has given the trader an opportunity to provide his/her version of events
4. The Investigator has checked the trader’s compliance history and believes that a warning letter is an appropriate compliance response as this is the trader’s first offence.

If a warning letter is to be issued it is the responsibility of the Investigator to;

- Prepare the letter and investigation report,
- Note the action on CAS,
- Transfer the file to the Principal Investigator on CAS

A warning letter template is at attachment “Y” and is located on the G drive at EUU/Procedures Templates/Warning Letter template

It is then the Principal Investigator’s responsibility to;

- Review the recommendation,
- Sign and post the warning letter to the trader,
- Note the action on CAS
5.16 ISSUING A PENALTY NOTICE TO THE TRADER

5.16.1 Deciding whether to issue a penalty notice

The Investigator may consider issuing a penalty notice to a trader in the following circumstances:

1. The trader is alleged to have committed an offence under the Act or Regulation

2. The offence is one for which a penalty notice may be issued

   Offences for which a penalty notice may be issued are located at Attachment “Z”.

3. The Investigator has given the trader an opportunity to provide his/her version of events

   This should be recorded in your Official Notebook

4. The Investigator has sufficient admissible evidence or is able to quickly acquire such evidence to prove each element of the offence.

   
   **Note:** If in any doubt as to the identity of the trader or the proofs of the offence do not issue the Penalty Notice and speak with the Principal Investigator.

5. The Investigator has checked the trader’s compliance history and believes that a penalty notice is an appropriate compliance response

6. The expense of prosecution may not be warranted because of factors such as the following:
   - Consumer detriment is low
   - The offence is not serious
   - This is the first time this trader is alleged to have breached the Act or Regulation
   - A penalty notice is likely to achieve the desired aim of encouraging the trader to comply with the Act (and therefore the expense of prosecution is not warranted)

7. The Home Building Service is not currently considering prosecution of, or an injunction against, the trader for similar breaches.

5.16.2 Issuing a Penalty Notice in the field

When issuing a penalty notice it is the responsibility of the Investigator to:

1. Ensure he/she is familiar with the procedures for:
   - Approaching and conducting a shop inspection
   - Recording Information from the inspection
   - Identification of contraventions while in the shop.
   - Recording interviews with defendants and
   - Identifying other contraventions of the Acts or Regulations

2. Complete the Penalty Notice Forms as outlined below:
Record the following information directly on the Penalty Notice [Part A] and forward to The Infringement Processing Bureau, P.O. Box 1001, Hunter Region MC, NSW 2310:

- Offence code (four or five numbers)
- Regulation code (three letters)
- Short title of the offence
- Penalty (in dollars)
- Name of the legislation that has been breached

Record the following information on the triplicate or trader’s copy of the penalty notice [Part C]:

- the date of the offence
- offence code; and
- penalty


3. Issue the Penalty Notice
   a) On-the-Spot
      - Penalty Notices may be issued on-the-spot for the following offence under the Electricity (Consumer Safety) Act:
      - Sell electrical article without prescribed markings – first offence
   b) By Delayed Issue
      Prepare Part C of the Penalty Notice and forward to the trader by mail.

      If it is anticipated that here may be a problem with the trader denying receipt of the penalty notice send the penalty notice by “person to person” Registered Mail"

4. Place a copy of the penalty notice on file and resubmit to RAAU for monitoring purposes.

5. Print a copy of the Investigation Completion Summary from CAS and place on the file.

5.16.3 Notifying the Supervisor that a penalty notice has been issued

Once the Investigator has sent the penalty notice to the trader, it is the Investigator’s responsibility to:

1. Prepare a file note recording:
   - What offence the trader has committed
   - What evidence you have collected to establish the offence

2. Refer the file, together with an Investigation completion summary and the file note, to Principal Investigator for review
5.16.4 Reviewing a Penalty Notice

Once the Principal Investigator receives the file from the Investigator, it is the Principal Investigator’s responsibility to review the file to ensure that:

1. The offence is one for which a penalty notice may be issued
2. A penalty notice is an appropriate compliance response given the trader’s compliance history
3. The penalty notice has been issued correctly

If the Principal Investigator believes that the penalty notice contained incorrect details or insufficient evidence to support the issue of the Penalty Notice it is his/her responsibility to:

4. Discuss his/her concerns with the Investigator concerned.

Where the Notice has been completed but NOT been issued to the trader

Cancel the Penalty Notice by writing the words “Cancelled – notice not issued due to error”, and send Parts A and C to the Infringement Processing Bureau (IPB) requesting that they acquit the PN number. The cancelled PN must be sent to the Cancellations Officer (D109), Data Integrity Unit, Infringement Processing Bureau, P.O. Box 999, Hunter Region MC 2310 within 10 working days of the penalty notice details being completed.

After ensuring the trader’s details are now correct and there is sufficient evidence to support a Penalty Notice, prepare and send a new one.

Where the Notice has been issued to the trader and details are incorrect or there was insufficient evidence to support the alleged offence

Cancel the Penalty Notice as above and discuss the matter with your supervisor. The Supervisor may, at his/her discretion, determine that a remedy other than issuing a Penalty Notice is appropriate. Where the Supervisor gives instructions to do so, send a new penalty Notice to the trader with a letter countersigned by the Inspector/Investigator involved explaining that the previous penalty notice has been withdrawn and the reason for the withdrawal e.g incorrect address details. In these circumstances, fax a letter to the IPB (fax no: 02 4937-9095) explaining that the trader has been advised of the error and that no further action should be taken in regards to the cancelled penalty notice. Send a copy of the IPB letter to Legal Services.

The Principal Investigator will continue to monitor the Penalty Notices being issued by the Inspector/Investigator concerned and if necessary remove that Officer’s authority to issue on-the-spot Penalty Notices.
5.17 RECOMMENDING AN UNDERTAKING FROM, OR PROSECUTION OF, (OR INJUNCTION AGAINST) THE TRADER

5.17.1 Deciding whether to recommend prosecution of, or an undertaking from, (or injunction against) the trader

Following advice from the Legal Services Division, the final decision to prosecute will be made by the Director Mediation Services & Compliance. Prosecution will only be pursued if, in each particular ACT, it is considered to be the best use of the OFT’s resources to ensure compliance with the Act.

The Investigator may consider recommending prosecution of, or an undertaking from a trader in the following circumstances:

1. The trader is alleged to have committed an offence under the Electricity (Consumer Safety) Act and/or Regulations and/or Gas Supply (Gas Appliances) Regulations
2. The alleged offence involves unapproved/unsafe electrical articles or natural gas appliances.
3. The alleged offender has the potential to cause high consumer detriment.
4. The alleged offence has the potential to cause personal injury.
5. The matter cannot be dealt with by issuing a penalty notice to the trader; for example, because:
   - previous penalty notices to the trader for the same offence have not resulted in better compliance with the Act (the trader is more likely to be persuaded to comply with the Act by way of prosecution than if a penalty notice is issued) or
6. Negotiations have been successful with the trader for the trader to accept a written undertaking (enforceable by the Supreme Court) to comply with the Act.
   **Note:** Obtaining an undertaking is the most cost effective way for OFT to obtain compliance with a trader.
7. The resources required to prosecute the trader are warranted, For example:
   - the offence is serious
   - consumer detriment is high (i.e. the number of consumers affected and/or the amount of monetary loss)
   - previous compliance action (e.g. penalty notice, warning letter) has not deterred the trader from continuing to offend
   - the offence is prevalent and prosecution of this trader is likely to deter others from committing the offence

5.17.2 Recommending prosecution of, or an injunction against, a trader

If the Investigator considers that a matter may be suitable for prosecution, it is the responsibility of the Investigator to:

1. Correctly identify the offender
   This may require an intelligence search with OP&I.
   See section 5.8 for more information about intelligence searches.
2. Obtain evidence that accurately establishes the date and location of the offence
   This will also ensure that the matter is within statutory time limits

3. Gather evidence to establish every element of the offence

   Consider whether there are any statutory defences available to the offender
   If so, the trader has not committed an offence and you must not take any action
   against him/her

5. If relevant, gather evidence from witnesses, including the complainant
   Evidence from a witness should be presented in the form of a typed and signed
   statement.
   See section 5.2 for further information

Give the alleged offender an opportunity to provide his/her version of events
   The alleged offender should be offered the opportunity to participate in an electronic
   record of interview. If the alleged offender is not willing to do so, offer him/her the
   opportunity to make a formal typed and signed statement.
   See section 5.10.3 for further information.

7. Draft a breach report for commencing a prosecution
   See example of a completed Breach Report – Prosecution at attachment “A1”

8. Attach supporting evidence to the report, and ensure that each document is clearly
   identified (tabbed) and referred to in the report

9. Submit the brief (i.e. the breach report and the attached documentary evidence) to
   the Principal Investigator for review

5.17.3 Reviewing a recommendation to prosecute a trader

Once the Principal Investigator receives the breach report recommending prosecution, it is
the responsibility of the Principal Investigator to:

1. In consultation with Legal Services Division review the breach report and
documentary evidence for accuracy.

2. Ensure that there is sufficient evidence to prove the offence

3. Consider whether prosecution is the most appropriate compliance response, taking
into account factors such as the trader’s compliance history, the seriousness of the
offence, the level of consumer detriment, the sufficiency of the evidence available,
and weighing these against the resources that prosecution will require.

4. Once approved it is the responsibility of the Principal Investigator to forward the
report onto the Manager EUU for approval
5.17.4 Recommending an undertaking from the trader

If the Investigator considers that a matter may be suitable for an undertaking, it is the responsibility of the Investigator to follow steps 1-6 in section 5.17.2 and then:

1. Draft the undertaking and have it reviewed by the Principal Investigator
   Use the pro forma at attachment “B1”, a copy of which is located on the G drive at EUU/Procedures Templates/Undertaking template
2. Send the draft undertaking to the trader for their comment. Once comments have been received, submit the undertaking (and the attached documentary evidence) to the Principal Investigator for approval.

5.17.5 Reviewing a recommendation for an undertaking from a trader

Once the Principal Investigator receives the report recommending an undertaking, it is the responsibility of the Principal Investigator to:

1. Review the report and documentary evidence for accuracy.
2. Ensure that there is sufficient evidence to prove the offence
3. Consider whether the recommendation is the most appropriate compliance response, taking into account factors such as the trader’s compliance history, the seriousness of the offence, the level of consumer detriment, the sufficiency of the evidence.
4. Liaise with Legal branch to have the undertaking formalised.
5. Once approved it is the responsibility of the Principal Investigator to forward the report onto the Manager EUU for approval
5.18 APPROVAL OF ELECTRICAL ARTICLES AND EQUIPMENT

5.18.1 Purpose of the Procedures Manual

The purpose of the procedures manual is to provide the Energy and Utilities Investigator (Safety Approvals Officer) a guide to correct procedures for assessment of applications for a Certificate of Approval, Certificate of Suitability for Declared Articles and Non-declared Articles respectively.

Further Modifications, Variations, Renewals and Changes to Particulars of Approval Certificates and Certificates of Suitability.

Departures from these procedures will be the exception rather than the rule and any divergence from the procedures shall be fully documented.

5.18.2 The Role of the Energy and Utilities Investigator (Safety Approvals Officer)

To provide a professional service in the assessment of approval applications for the sale of electrical appliances and equipment in Australia

5.19 Application for a Certificate of Approval or a Certificate of Suitability of Electrical Appliances and Equipment.

5.19.1 General

A description of ‘Declared Articles’ and ‘Non-declared Articles’, applicable certificates and requirements for approval may be found in the Official Explanatory Notes as posted on the Office of Fair Trading Web page.

Where test reports are provided with applications they must be from an appropriate accredited laboratory as referred to in the explanatory notes based on current Australian, International or European Standards.

Test reports based on International (IEC) and European (EN) Standards must address any Australian variations.
5.20 Applications for Model Approval or for a Certificate of Suitability

5.20.1 Procedure

1. Prioritise the work and choose applications first received.
2. Upon receipt of the application and by referring to the current declaring definitions in the explanatory notes confirm whether the article is declared or non-declared.
3. Review the investigators report form 7 and the EEA1 application form for correct information, whether modifications or variations apply, correct fees have been paid, whether information fields are complete and whether the form has been signed and dated.

An investigators report form 7 is at attachment “C1” and is located on the G drive at EUU/Procedures Templates/Form 7 template

4. Review the remainder of the application to include, if necessary a fully compliant test report.
5. The test report should include installation instructions and circuit diagrams where necessary, and
6. Comprehensive and detailed colour photographs showing:
   - Overall view with modifications or variations from the original
   - Supply terminals
   - Internal wiring, connections, earthing and components
   - Cord entry and cord anchorage
   - Name plate details and essential labelling
7. A sample shall be requested to satisfy the assessment where doubt exists with the information provided, however a sample is required for hair straightener’s.
8. If the application is incomplete where requirements of 2-7 above are not satisfied, advise the Administration Clerk and request the applicant or agent be contacted to address the deficiencies. The application is then held in abeyance to be completed when the required information is received.
9. The applicant must be contacted within one week of the application being held in abeyance. The purpose of the contact is to ascertain when the applicant envisages the deficiencies in the application can be addressed.
10. Provided points 1-7 above are satisfied, carry out an assessment of the test report against the gazetted Australian Standard, paying particular attention to:
   - Correct description and identification of the article intended for approval, the correlation with the model identification in the test report and the model identification requested in the application
   - Protection Classification (Earthed or Double Insulated)
   - Marking
   - Cord Anchorage
   - Temperature Rise (Results and Allowable Limits)
   - Abnormal Operation (Results and Allowable Limits)
   - Resistance to Heat and Fire
   - Australian Variations from the IEC (Annex ZZ)
   - Appendix J requirements of AS/NZS 3112 for Equipment with Integral Insulated Live Pins
   - Evidence of the use of an Australian approved plug, where applicable
   - Evidence of the use of an Australian approved or equivalent <HAR> certified supply flexible cord, where applicable
   - Evidence of approval of other ‘Declared’ articles used as component parts
11. If the information provided satisfies the requirements for a Certificate of Approval or a Certificate of Suitability, proceed to the approvals data base, if not, contact the applicant or agent to address the deficiencies. The application is then held in abeyance to be completed when the required information is received. See point 9 above.

12. Complete the data entry into the data base, complete the Investigators Report with key points to justify granting the approval.

13. Print the Certificate and Addendum, if required, covering letter and file copies and attach to the file.

14. Mark the file location in the approvals data base to the Principal Investigator and forward the file for signature.
5.21 Application for Modification to a Certificate of Approval or Certificate of Suitability

5.21.1 General

Where the article has not changed significantly from the approved or certified model, a test report is not required, however where the design, material and construction exceeds the provisions of the General Exemption of Appendix B of the explanatory notes then a test report must be provided and show evidence of the modified or varied article’s compliance with the current gazetted Australian Standard.

Whether or not a test report is required, comprehensive and detailed colour photographs as stated in point 6 of the model approvals procedures must be provided.

5.21.2 Procedures

1. For a modification or variation application with a test report refer to and carry out the procedures of points 1-7 of the model approvals procedures.

2. Review the photographs provided with the application to be satisfied the modification is genuine and a new approval is not warranted.

3. If the application is incomplete advise the Administration Clerk and request the applicant or agent be contacted to address the deficiencies. The application is then held in abeyance to be completed when the required information is received.

4. The applicant must be contacted within one week of the application being held in abeyance. The purpose of the contact is to ascertain when the applicant envisages the deficiencies in the application can be addressed.

5. Provided points 1-7 of the model approval procedures are satisfied, carry out an assessment of the test report against the gazetted Australian Standard paying particular attention to the clauses affected by the modification or variation.

6. Refer to and carry out the procedures of points 11-14 of the model approvals procedures.

7. Print the Addendum, covering letter and file copies and attach to the file.

8. Mark the file location in the approvals data base to the Principal Investigator and forward the file for signature.

9. For modification or variation applications where a test report is not required, refer to and carry out the procedures of points 12, 13 and 14 of the model approvals procedures.
5.22 Application for Renewal of a Certificate of Approval or a Certificate of Suitability

5.22.1 General

Where the design, relevant gazetted Australian Standard and components of an article has not changed a new test report is not required. However, comprehensive, detailed colour photographs as stated in point 6 of the model approvals procedures must be provided. If changes have occurred then a test report must be provided to show evidence of the article’s compliance with the current gazetted Australian Standard.

5.22.2 Procedures

1. Upon receipt of the application review the investigators report form 8 and the EEA2 application form for correct information, whether modifications or variations apply, whether all the information fields are complete and whether the form has been signed and dated.

An investigators report form 8 is at attachment “D1” and is located on the G drive at EUU/Procedures Templates/Form 8 template

2. If the application is incomplete, advise the Administration Clerk and request the applicant or agent be contacted to address the deficiencies. The application is then held in abeyance to be completed when the required information is received.

3. The applicant must be contacted within one week of the application being held in abeyance. The purpose of the contact is to ascertain when the applicant envisages the deficiencies in the application can be addressed.

4. Review the applicable standard and amendments to determine whether the article requires further testing to comply with the current standards requirements. If further testing is required, contact the applicant or agent to arrange further testing. The application is then held in abeyance to be completed when the required information is received. See point 3 above.

5. For a renewal application where no test report is required and point 1 of these renewal procedures is satisfied, proceed to the database and complete data entry, ensuring the expiry date is correct. Certificates of Approval and Certificates of Suitability are renewed every five years.

6. Print and attach the certificate, covering letter and file copies to the file and complete the investigators report with key points to justify granting the approval.

7. Mark the file location in the database to the Principal Investigator and forward the file for signature.

8. For a renewal application provided with a test report carry out an assessment of the test report, a sample may be requested if doubt exists with the information provided, however a sample is required for hair straightener’s.

9. If the information satisfies the requirements for the renewal of the certificate of approval or the certificate of suitability, proceed to the database and complete data entry. If not, contact the applicant or agent to address the deficiencies. The application is then held in abeyance to be completed when the required information is received.

See point 3 above.

10. For complete applications, refer to and carry out points 5, 6 and 7 of these renewal procedures.
5.23 Application for a Change of Particulars to a Certificate of Approval or a Certificate of Suitability

5.23.1 Procedures

1. Upon receipt of the application review the ‘Change of Particulars Form 10’ for correct information.

A Change of Particulars Form 10 is at attachment “E1” and is located on the G drive at EUU/Procedures Templates/Form 10 template

2. Review the EEA3 application form for correct information. Verify whether required changes to particulars are complete, information fields are complete, signed and dated. If incomplete, advise the Administration Clerk and request the applicant or agent be contacted to address the deficiencies. The application is then held in abeyance to be completed when the required information is received.

3. The applicant must be contacted within one week of the application being held in abeyance. The purpose of the contact is to ascertain when the applicant envisages the deficiencies in the application can be addressed.

4. If the application is complete proceed to the database and complete data entry.

5. Print the Addendum, covering letter and file copies and attach to the file.

6. Mark the file location in the database to the Principal Investigator and forward the file for signature.
**INVESTIGATOR:**

**TRADER’S DETAILS:**

<table>
<thead>
<tr>
<th>FILE REFERENCES:</th>
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</thead>
<tbody>
<tr>
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**OFFENCES:**

**COMPLIANCE HISTORY:**

**DATE TO HBS:**

**SUMMARY:**

**CONTENTIOUS ISSUES:**

**RECOMMENDATION:**

<table>
<thead>
<tr>
<th>ORC DECISION:</th>
<th>1. NFA</th>
<th>2. Warning Letter</th>
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<tbody>
<tr>
<td>3. Investigation Required</td>
<td>4. Prosecution</td>
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<tr>
<td>5. Further Information required</td>
<td>6. Injunction</td>
<td></td>
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<tr>
<td>7. Other</td>
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**DATE:**

**SIGN OFF BY ORC MEMBERS:**

<table>
<thead>
<tr>
<th>Steve Griffin</th>
<th>Support (Yes/No)</th>
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</thead>
<tbody>
<tr>
<td>Robert Duffy</td>
<td>Support (Yes/No)</td>
</tr>
<tr>
<td>Paul Burgess</td>
<td>Support (Yes/No)</td>
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<tr>
<td>Michael Cooper</td>
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<td>Les Wrigley</td>
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<td>Paul Dengate</td>
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<tr>
<td>Cheok Lee</td>
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<tr>
<td>Mark Tuckwell</td>
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<tr>
<td>Don van Keimpema</td>
<td>Support (Yes/No)</td>
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Investigation Report  
Energy & Utilities Unit 

<table>
<thead>
<tr>
<th>File No.</th>
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<tbody>
<tr>
<td>Matter</td>
<td>Raised By</td>
</tr>
<tr>
<td>Retailer / Supplier</td>
<td></td>
</tr>
<tr>
<td>Retailer / Supplier’s Address</td>
<td></td>
</tr>
<tr>
<td>Contact Person</td>
<td>Role</td>
</tr>
<tr>
<td>Type of Equipment</td>
<td></td>
</tr>
<tr>
<td>Brand &amp; Model</td>
<td>Approval / Certification</td>
</tr>
<tr>
<td>Approval /Certification Holder</td>
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<tr>
<td>Australian Manufacturer / Importer</td>
<td></td>
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<tr>
<td>Breaches Detected</td>
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<tr>
<td>Background</td>
<td></td>
</tr>
<tr>
<td>Recommendation</td>
<td></td>
</tr>
<tr>
<td>Name of Investigator</td>
<td></td>
</tr>
<tr>
<td>Signature</td>
<td>Date</td>
</tr>
<tr>
<td>Photos of Equipment</td>
<td></td>
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<td>--------------------</td>
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</tbody>
</table>
Prosecution Brief
Energy & Utilities Unit

DEFENDANT/S:

Defendant 1: {Insert name of first defendant}
Defendant 2: {Insert name of second defendant}

1 BREACHES:

1.1 {Insert details of breach/s}

2 BACKGROUND:

2.1 {Insert background details}

3 EVIDENCE

3.1 {Insert details of evidence gathered}

4 COMMENT:

4.1 {Insert comments}

DEFENCES:

The Electricity (Consumer Safety) Act 2004 in Section 18 allows for the information and the offence to be dismissed if it is proved that the defendant received an acquisition guarantee from the supplier, that the article was approved and marked. The defendant did not claim this defence.

INVESTIGATION NARRATIVE:

The facts presented to the Court should explain that a consumer is at risk of receiving a fatal electric shock while using these {Insert name of article}.

RECOMMENDATION:

That a prosecution action be commenced for the breaches outlined in this report.

{Investigator's name}
{Position Title}
Energy & Utilities Unit
{Insert date}

1. Principal Investigator
2. Manager, Energy & Utilities Unit
3. Manager, Legal Services Branch
# Energy & Utilities Unit

## INVESTIGATION PLAN

<table>
<thead>
<tr>
<th>INVESTIGATOR:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>TRADER:</td>
<td></td>
</tr>
<tr>
<td>FILE No</td>
<td></td>
</tr>
</tbody>
</table>

| DATE STATUTE BARRED: | Note: A prosecution matter becomes barred by statute 2 years from the date the ESU (HBS) was made aware of the offence. |

| COMPLAINANT/s: |  |
| Investigation Start date: | Completion date: |

<table>
<thead>
<tr>
<th>Investigation Category: (Circle one)</th>
<th>(a) Preliminary (30 days)</th>
<th>(b) Minor (90 Days)</th>
<th>(c) Major 180 Days</th>
</tr>
</thead>
</table>

| Consumer Notification Sent: | Date: |
| Progress Review dates |  |

<table>
<thead>
<tr>
<th>Breaches of E(CS)A &amp; Regulation</th>
<th>Short Title of Offence</th>
<th>Section &amp; Act</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Breaches of E(CS)A &amp; Regulation to be investigated:</th>
<th>Short Title of Offence</th>
<th>Section &amp; Act</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Goal of Investigation: (Circle one)</th>
<th>(a) Penalty Notices to Issue</th>
<th>(b) Prosecution of Breaches</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(c) Disciplinary Action</td>
<td>(d) Supreme Court Injunction</td>
</tr>
<tr>
<td></td>
<td>(e) Under Taking</td>
<td></td>
</tr>
</tbody>
</table>

| Evidence Currently on File: e.g. sales invoices, correspondence. | Documents etc: |

<table>
<thead>
<tr>
<th>Evidence Required to Prove Breaches: E.g. invoices, photos of articles, seized samples of articles.</th>
<th>Type of Evidence</th>
<th>What does it Prove?</th>
<th>Who can give the evidence</th>
</tr>
</thead>
</table>

| Witness Statements to be obtained: | The following evidence from witnesses (including the consumer and expert witnesses) needs to be obtained to prove the alleged offences. Consider whether the witness has relevant and admissible evidence to support the matters which are the subject of the investigation. |

<table>
<thead>
<tr>
<th>Witness</th>
<th>Address</th>
<th>Evidence</th>
<th>Completion date</th>
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</table>

<table>
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<tr>
<th>ROI with Trader Required:</th>
<th>YES</th>
<th>NO</th>
<th>Date of ROI</th>
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<tbody>
<tr>
<td>Date Rec'd by Investigator:</td>
<td></td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Date Submitted to Principal Investigator ESU:</th>
<th>Note: The investigation plan must be completed and submitted to the Principal Investigator within 10 working days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date Approved by PI ESU:</td>
<td>Signature:</td>
</tr>
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</table>

63
<table>
<thead>
<tr>
<th>Review 1</th>
<th>Date:</th>
<th>Signature of PI:</th>
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<tbody>
<tr>
<td>Comments/Instructions:</td>
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<td></td>
</tr>
<tr>
<td>Review 2</td>
<td>Date:</td>
<td>Signature of PI:</td>
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<tr>
<td>Comments/Instructions:</td>
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<td>Review 4</td>
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<tr>
<td>Comments/Instructions:</td>
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</tbody>
</table>
SEARCH INFORMATION APPLICATION – GENERAL
(ONLY ONE PERSON OR ENTITY PER REQUEST)

Material Classification: Restricted

The Requesting Officer remains responsible for the security of the information contained in or attached to this document. All information is to be used solely for the purpose requested and is not to be circulated to any third party without the express permission of the Commissioner, Office of Fair Trading or delegation.

<table>
<thead>
<tr>
<th>FILE NUMBER</th>
<th>(Mandatory for action to progress)</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Individual Name/s:</td>
<td>D O B : / /</td>
</tr>
<tr>
<td>□ Trader Name/s:</td>
<td>A.C.N. or A.B.N:</td>
</tr>
</tbody>
</table>

Address:

Reason for Request:

Special Instructions for Item No. : (e.g. licence type, full historical company details, specific variations, land & property details)

Requested by:  Position Title:
Branch:  Your email address:
Location:  Phone:  Fax:

INFORMATION REQUESTED (TICK BOX)

1. □ Company Extract
   (Extract only, show in Special instructions if full history required)
   □ No Record  □ See Print
2. □ Business Name Extract
   □ No Record  □ See Print
3. □ Complaint Details (CAS)
   □ No Record  □ See Print
4. □ Land & Property
   (Show in Special Instructions property details)
   □ No Record  □ See Print  □ Search Ordered
5. □ Electoral Roll
   □ No Record  □ See Print
6. □ Bankruptcy Records
   □ No Record  □ See Print
7. □ Trader Licence
   (Specify licence type in Special Instructions)
   □ No Record  □ See Print
8. □ Specify request in Special Instructions.
   □ No Record  □ See Print

RESULT OF SEARCH

Date Lodged by Applicant:  Date Finalised by Intel:  Initials of Intel Assistant:
INFORMATION APPLICATION – TELEPHONE/POST OFFICE

(ONLY A SINGLE NUMBER, PERSON OR POST OFFICE BOX PER REQUEST)

Material Classification: Restricted

The Requesting Officer remains responsible for the security of the information contained in or attached to this document. All information is to be used solely for the purpose requested and is not to be circulated to any third party without the express permission of the Commissioner, Office of Fair Trading or by delegation.

NOTE: This form will be returned with the search results. It and the results must be placed on the relevant file for auditing purposes.

REASON FOR APPLICATION (State full details. Must be for current investigation)

File Number: Name of Matter:

Act and Section breached:

State why information is required:

TELEPHONE INFORMATION REQUESTED (Tick item required and state details)

☐ Lessee name and address from phone number:

☐ Phone number from lessee name and address:

(Telstra and Optus will be initially checked)

☐ Other search requirements:

POST OFFICE INFORMATION REQUESTED (Tick item required and state details)

☐ Holder of Post Office Box number situated at: Post facility

☐ Details of persons receiving mail at (address):

☐ Details of any mail re-direction notices for (address):

DETAILS OF OFFICE OF FAIR TRADING APPLICANT (Must not be officer approving search)

Name: Signature:

Designation: Location & Branch/Unit:

Phone: Fax:

APPROVAL OF APPLICATION (Must be by Team Leader or Branch Manager not the applicant)

I approve this request for information as it is reasonably necessary for the enforcement of a law administered by the Office of Fair Trading which imposes a pecuniary (that is, a monetary) penalty.

Name: Signature:

Designation: Date:

RESULT OF SEARCH

☐ Intelligence information is forwarded to the above named applicant for attention.
1. INTRODUCTION

1.1 This guideline sets out the minimum criteria that should be implemented to ensure adequate control over the issue, use, return, security and quality of information recorded in official notebooks.

1.2 The use of an official notebook or diary is generally related to inspection type activities for the recording of evidence, observations, conversations, and interviews with witnesses and defendants that may lead to prosecution or the issue of a penalty notice.

1.3 An official notebook may also be used as a “duty diary”. In this case the notebook also becomes a useful management tool, that can assist with accountability, information gathering for statistical purposes and fraud prevention.

1.4 The use of an official notebook is not intended to replace file notes or information on official OFT files.

1.5 The Penalty Notice Manual requires that sufficient evidence be recorded on-site, in the officers’ notebook or diary for the issue of penalty notice. The Manual also requires the recording of evidence (not recorded on the penalty notice) that may be relevant should the trader choose a court election and where a penalty notice is not issued what actions have been requested of the trader.

1.6 The Guidelines on the use of Electronic Records of Interview by OFT Investigators specify the offences or contraventions in relation to which electronic records of interview should be used. The guidelines also state that for the remaining offences other means, including an official notebook, may be used for the recording of interviews.

1.7 The introduction of the Evidence Act in 1995 has made conversations with a defendant more difficult to enter into evidence. The prudent use of contemporaneous notes will increase the likelihood that such conversations will be admitted into evidence and assist in successful prosecution.

1.8 The court places much scrutiny on the way in which these contemporaneous notes are recorded. Two of the important factors considered by the court are:-

(i) **When were the notes of the conversation made?**
   If the record of the conversation is not made at the time or as soon as practicable after the conversation took place, it is probable that the conversation will not be allowed into evidence.

(ii) **How was the conversation recorded?**
   If the conversation is not recorded in an official and accountable way that ensures the integrity of the notes, it is probable that the conversation will not be admitted into evidence.
1.9 The use of an official notebook for the recording of conversations with persons will assist in minimising the chances of a conversation being ruled inadmissible.

1.10 The court may allow that a witness is allowed to ‘revive’ their memory from notes made in an official notebook. Revival of memory from a document while giving evidence is only permitted with the leave of the court. Section 32(2) of the Evidence Act 1995 specifies matters that the court may take into account in deciding whether to give leave. These are whether the witness can recall without the document, the document was written when events were fresh in memory and the record was accurate at the time.

2. THE ISSUE AND SAFEKEEPING OF NOTEBOOKS

2.1 Notebooks are OFT property as records of the Office’s activities subject to the provisions of the State Records Act 1998. Managers/Supervisors are to institute systems and procedures that:
- Identify each notebook (e.g. consecutively numbered or other means),
- Record the notebook identification, date of issue and officer receiving the notebook,
- Record the return of completed notebooks,
- Ensure the security of unused and returned notebooks, and
- Ensure the storage and disposal of completed notebooks in accordance with departmental records management policies and procedures.

2.2 On receipt of a new notebook officers are to immediately complete the identification details on the inside front cover of the notebook.

2.3 It is the officer’s responsibility to ensure that notebooks are secure at all times to guard against theft, loss and tampering.

2.4 The loss or theft of a notebook must be reported immediately, in writing, to the appropriate supervisor.

2.5 When a notebook is near completion a further notebook can be obtained from the appropriate issuing officer.

2.6 Completed notebooks are to be returned to the appropriate issuing officer for storage and safekeeping.

3. THE USE OF NOTEBOOKS

3.1 The notebooks are to be used for the recording of the following details:
- date, time,
- premises visited,
- persons present,
- corroborating investigator/inspector,
- recording of conversations (in the first person) that may be used in a brief of evidence,
- statements from witnesses,
- investigator’s observations, and
- references to official departmental files, reports or other documentation.

3.2 Pages in the notebooks are consecutively numbered and under no circumstances are pages to be removed. If a mistake is made whilst making an entry, place a line though the error so it is still readable and initial it.

3.3 Records can be made on both sides of each page. Rule a margin on each page to allow for a reference number or other comments to be inserted.
3.4 Before recording a conversation, statement or information record the time, dates and place. Also record the names of those present, especially corroborating investigators.

3.5 When recording conversations, the conversation is to be recorded in the first person i.e. “I said,……. He/She said,……..”.

3.6 The officer conducting the interview should be ready to issue a caution to avoid the possibility of the conversation being excluded from evidence. The need to issue a caution arises when the investigating officer forms the belief that there is sufficient evidence to establish that an offence has been committed. The forming of this belief will, more often than not, occur prior to the conversation with the person. In these circumstances, as in formal records of interview, the caution should be issued at the beginning of the record of conversation and noted in the notebook. Officers should take care in giving a person to be interviewed the caution specified in section 139(2) of the Evidence Act 1995: “that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.” (It is recommended that a copy of the official caution be pasted on the inside back cover of the notebook for reference).

3.7 The preferred method for recording conversations is to record the conversation as it takes place. However, if this is not possible then record the conversation/ observations/ information as soon as possible afterwards.

**Recording the conversation as it is taking place:**

3.8 A document prepared by an investigating official which records an oral admission made by a defendant to an investigating official is not admissible to prove the question and response unless the defendant has acknowledged that the document is a true record of the response. Section 86(3) of the Evidence Act 1995 provides that, acknowledgement must be made by signing, initialling or otherwise marking the document (section 86(a) provides that “document” does not include a sound recording or a transcript of a sound recording). At the conclusion of an interview invite the interviewee to read and sign the notes of the conversation as to their correctness. If the interviewee wishes to sign, have them place their signature and date immediately below the last entry and initial all other pages. Do not insist or force the interviewee to sign the notebook, to do so is voluntary.

3.9 If a corroborating investigator is present have them initial each appropriate page of the notebook.

3.10 Where possible, provide the interviewee with a photocopy of the notes made in the notebook.

**Recording the conversation etc. immediately afterwards:-**

3.11 Have the corroborating investigator initial all entries as per 3.8 above. Where a subsequent formal record of interview is conducted with the interviewee show them the record of the conversation recorded in the notebook and have them agree to the correctness of the conversation. Invite them to sign the entries as to their correctness.
3.12 The conversation recorded in the notebook can be used to prepare the Investigator’s statement, should one be required. The conversation appearing in the statement must be identical with that recorded in the notebook.

3.13 Whilst direct production in type is the preferred method of obtaining a statement, statements can be effectively captured in the notebook. When recording statements from witnesses in the notebook, any conversation that took place between the witness and the person subject to investigation is to be recorded in the first person. As in 3.8 invite the witness to sign each page of the notebook that contains their statement. (It is recommended that a copy of the Evidence Act jurat, ie, the first paragraph requirement for statements, be pasted on the inside back cover of the notebook for reference).

3.14 For inclusion in a brief of evidence, transcribe the statement from the notebook and at the end of the statement identify that the original of the statement is contained in the official, identified notebook with page numbers. (e.g. “The original of this statement is contained in Official Notebook No. A12345, pages 10 to 15 inclusive, on issue to Investigator Lee Smith.”)

3.15 The notebook should also be used for the recording of observations. For example observations regarding the condition of books, records, accounts and employees of an agency may be important evidence. Immediately record observations. These will be useful when required to make Investigator’s statement and are important if an investigator is asked to recall observations when in the witness box under cross-examination. It should always be remembered that an Investigator’s notebook is likely to be called for and admitted as evidence in any subsequent court proceedings. The entries therefore must be self-explanatory and leave no room for confusion or argument.

3.16 On completion of a record in the notebook, a line is to be drawn across the page immediately below the last entry.

3.17 There should be no space between the last and subsequent entry in the notebook as it could be claimed that entries, conversation/observations were made at a later time.

3.18 The use of ‘scrap’ or loose-leaf paper for the recording of conversations is to be avoided. However, if unavoidable it is most important that the original record be retained, after transcription into the notebook.

4. RESPONSIBILITIES OF SUPERVISORS/MANAGERS

4.1 Supervisors are to conduct regular inspections of Investigator’s notebooks to ensure that the guidelines are being followed and entries are properly recorded.

4.2 After inspecting the notebook the supervisor must sign and date directly below the last entry recorded as a means of recording the notebook inspection.
OFFICE OF FAIR TRADING

Statement in the matter of: Keep-m-Clean brand Dishwashing Machine

Place: Parramatta NSW

Date: 10 February 2009

Name: Bartholomew Simpson

Address: Known to Office

Occupation: Accounts Manager

Phone Number: Known to Office

1. This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

2. I am 32 years of age

3. On 14th July 2007 my then partner and I purchased a Keep-m-Clean model KC12345 Dishwashing machine from The Old Guys, Liverpool. The appliance continually broke down and we were dissatisfied with the performance and continual problems so we negotiated a replacement machine through Recall Home Products Pty Ltd.

4. On 18 December 2007 we received a replacement Keep-m-Clean model KC12345 dishwasher from the National Consumer Replacement Account of Recall. When we took delivery we were handed Advice Note No 03987654.

5. The appliance was installed in our home and we were satisfied with the replacement machine. We used the appliance in a normal situation, using it regularly as we needed it.

6. On 12 January 2008 my then fiance was notified that the fire alarm was sounding in our home. My next door neighbour saw smoke coming from the house and immediately called the fire brigade.

7. The fire brigade arrived and forced our front door and put the fire out which started in our dishwasher. They removed the appliance from the kitchen. The Fire Brigade
assumed it to be due to a fault in the dishwasher, which was later confirmed by their internal investigation unit.

8. Later that day Peter Kemp from Fair Trading arrived and we spoke with him and he took a number of photographs and left. Around the same time that Fair Trading arrived, our insurance company sent an assessor and he also examined the fire scene.

9. Our insurance has covered most costs, however we are now left out of pocket and still chasing reimbursement, including an $1,100 excess payable to our insurer. Both my partner and I had to take numerous days off work to meet with insurers, investigators, builders etc. We were left without a home to live in for six (6) weeks, therefore having to arrange temporary accommodation. But most of all, the potential risk to our lives – how do we put a price on that? After trying to contact Recall to inform them of the events that had occurred, we were advised that we would be contacted shortly (phone call 17th March 2008). We still to this day are yet to receive any sort of correspondence, not even a simple letter of apology. Recall knowingly replaced our faulty dishwasher with a product that had already been recalled from the market 2 weeks prior; we feel Recall Home Products Pty Ltd should now be held accountable.
ELECTRONIC RECORDS OF INTERVIEW MANUAL
SECTION 1
INTRODUCTION & HISTORY OF ELECTRONIC RECORDS OF INTERVIEW

1.1 In the history of our legal system, the regular use of records of interview is of a comparatively recent nature (approximately 30 years). Prior to the use of records of interview officers of the crown were restricted to verbal evidence recorded in the form of notes. This practice was sometimes supported by handwritten statements or typed dictated statements.

1.2 The advantages in the use of records of interview are many. The main advantage being that it is given to the jury to take it into the jury room where they can read it, re-read it and compare it with other evidence.

1.3 The second advantage is that you can go into issues in great depth, introduce items of evidence for identification by the offender/suspect, introduce statements/records of interviews of others, allow you to put allegations for comment by the accused, use “Do you agree” questions to re-enforce events.

1.4 The record of interview as we know it today has been pushed and pulled into its current shape through being tested in various Courts of Appeal. Through these court decisions a number of practices have been established which are essential if a record of interview is to be accepted into evidence, especially if it is challenged by the defence. We will discuss these essential practices and relevant court decisions later.

1.5 Intelligent questioning of the offenders/suspects with the aim of establishing the ‘proofs’ of the offence, is one of the best ways of securing a prosecution. There is no substitute for admissions from the offenders'/suspects’ mouth, properly recorded in an interview admitting not only to his/her actions but also his/her state of mind at the time (intent).

WHY ELECTRONIC RECORDS OF INTERVIEW

1.6 Electronic records of interview are a quick method of interviewing the offender/suspect, when we consider the limitations put on us by the Williams ACT.

1.7 It conveys to the magistrate or jury the actual demeanour of the offender/suspect at the time of the interview. It also displays the emotion of the offender/suspect, ie. whether s/he displayed feelings of remorse for the crime committed, or conversely s/he displays his/her pride in committing the crime or his/her malicious nature.

1.8 All these things a written or typed record of interview cannot convey to the magistrate or the jury. It is for this reason that the video tape (if obtained) is not produce in evidence at the court proceedings unless allegations by the defence are raised.

1.9 Electronic records if interview also eliminate or minimise the opportunities for offenders/suspects to make allegations of assault, intimidation, or coercion and, more importantly, allegations of verballing.

1.10 Whilst, the Evidence Act does not require confessions or admissions made in respect to many of the breaches investigated by the Department to be recorded on audio tape, Department Policy dictates, however, that you use the machine for all offences/breaches encountered by you that will result in a prosecution. This will enable you to become more
confident with the medium. The more electronic interviews you do the better you will become at interviewing via this medium.

**AIM OF RECORDS OF INTERVIEW**

- TO ESTABLISH THE FACTS OF THE MATTER
- BY INQUIRY RATHER THAN ACCUSATION
- WITH REGARD TO FAIRNESS & VOLUNTARINESS
- ALLOW THE ACCUSED TO PUT FORWARD HIS/HER VERSION OF EVENTS
SECTION 2
RECORDS OF INTERVIEW PROCEDURES

PLANNING

Be Fully Prepared Before Commencing The Interview

2.1 The success of an electronic record heavily depends upon the amount of planning done prior to commencing it.

2.2 Before calling the offender/suspect take the time to sit down and write down any prior conversation that you may have had prior with the offender/suspect (so that you can include and adopt that conversation in your record of interview).

2.3 Then write out the questions that you wish to ask in the interview. Keeping in mind the different tacks that the offender/suspect may take.

   ie. Is s/he going to admit to the offence, is s/he going to completely deny the offence, or is s/he going to put forward an alibi defence.

2.4 Your plan should include the following aspects:

   ▪ Proofs of the offence/s
   ▪ Alibi’s and Defences
   ▪ Facts established
   ▪ Fact not established (that you want to establish)

2.5 Have all your exhibits with you in the interview room so that you don’t have to leave every five minutes to get an exhibit to show the offender/suspect.

2.6 When showing the offender/suspect exhibits, fully describe them.

The Structure Of The Interview

2.7 The record of interview should have the following Terriers:-

   ▪ Chronological
   ▪ Continuous
   ▪ Comprehensive
   ▪ Controlled
   ▪ Co-ordinated

2.8 The record of interview should have continuity and flow from beginning to end. It should have as little pauses or interruptions as possible.

2.9 Hence, best practice is to show all documents and exhibits to the accused before starting the interview. Give the accused all the time they need to look at, sign, and adopt the records/documents that you will be asking questions about in the interview. See section 86 of the evidence Act.

2.10 During the interview the following questions will be sufficient to formerly adopt the documents and records to the court’s satisfaction:-

   “Do you agree that prior to the commencement of this interview I showed you a number of documents/records, numbered 1 to 100?”
“Do you agree that you have examined all of these documents/records?”

“Do you agree that these documents are exact copies of documents taken from your office by me during my inspection on the (date)?”

“Do you also agree that after examining these documents/records that you placed your initials on each page?”

This system should save you a lot of time in the interview.

2.11 Speak clearly and slowly. Take your time. Always be mindful of the medium in which you are interviewing the offender/suspect.

2.12 Especially, don’t criticise the offender about the answers s/he gives. eg “Oh, come on. You don’t expect me to believe that!”, or, “Yeah, right, ok!”

Reason being: R -v- Pritchard vic vlr.
Supreme Court decision in Elizabeth although not binding highly persuasive. Facts of the ACT are…

Dicta That the scornful remarks of disbelief made by the interviewing police officer prevented the offender putting forward his right to express his denial of the offence and “extricate himself from difficulty.”

More on the legal issues later.

2.13 Don’t cross examine the offender/suspect. However if you’re stuck for a question, there’s nothing wrong with suspending the interview, leaving the interview room and going out and asking someone else what other questions you should ask.

2.14 Also after you have concluded your questions with the offender give your observer the opportunity to ask the offender/suspect some further questions. Although s/he may only be a junior officer they may have picked up on something that you have missed, maybe even a necessary proof of the offence.

2.15 The observer’s job during the interview is to take notes as to the answers given by the accused and advise the interviewer what additional questions need to be asked and/or ask those questions when called upon by the interviewer.

2.16 The record of interview must be structured compartmentally when dealing with multiple offences/breaches. Deal with each offence/breach in individual sections of the interview.

2.17 Each different offence/breach being examined in the record of interview must be preceded by a caution. Hence, each time you ask questions about a different offence/breach/issue you must issue a caution.

2.18 The issuing of a caution must be in the format stated in the Evidence Act. It is recommended by prosecutors that you not stray too far away from this format as you run the risk of having your record of interview ruled inadmissible. Hence, you should attempt to stick to the following format for the caution:-

“I want you to understand that you are not obliged to say or do anything unless you wish, but whatever you say or do will be electronically recorded and may later be used in evidence. Do you understand that?”

2.19 Also with an interview involving multiple breaches don’t have the observer ask questions about all breaches covered in the interview at the end. Rather, invite the observer to ask
questions at the end of each section of the interview before moving on to the next breach/issue.

2.20 There is no requirement to re-caution the offender/suspect prior to questioning by the observer about the same offence/breach. The interview should proceed in the following fashion:-

<table>
<thead>
<tr>
<th>Step 1</th>
<th>Pre-interview questions (show any voluminous documentation during this time).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 2</td>
<td>Set up interview equipment and unwrap tapes in the presence of the accused and place into the interview machine (ensure “A” side of tapes is facing upwards).</td>
</tr>
<tr>
<td>Step 3</td>
<td>Opening/Introduction questions.</td>
</tr>
<tr>
<td>Step 4</td>
<td>Personal details of accused.</td>
</tr>
<tr>
<td>Step 5</td>
<td>Allegation regarding the offence/breach 1.</td>
</tr>
<tr>
<td>Step 6</td>
<td>Caution.</td>
</tr>
<tr>
<td>Step 7</td>
<td>Questions to obtain proofs of the offence by interviewer.</td>
</tr>
<tr>
<td>Step 8</td>
<td>Additional questions by assistant investigator/observer.</td>
</tr>
<tr>
<td>Step 9</td>
<td>Further clarification questions by interviewer (if required).</td>
</tr>
<tr>
<td>Step 10</td>
<td>Allegation regarding offence/breach 2.</td>
</tr>
<tr>
<td>Step 11</td>
<td>Caution… then repeat steps (7) to (9)</td>
</tr>
<tr>
<td>Step 12</td>
<td>Adoption of questions.</td>
</tr>
<tr>
<td>Step 13</td>
<td>Adoption of Senior Officer not connected with the investigation (if criminal offence or could form part of a later criminal prosecution).</td>
</tr>
<tr>
<td>Step 14</td>
<td>Have interviewee sign the master tape copy. Supply copy of audio tape to offender/suspect and obtain receipt.</td>
</tr>
<tr>
<td>Step 15</td>
<td>Recording &amp; Storage of Master tape in exhibit area within CL&amp;S (or safe within your branch).</td>
</tr>
</tbody>
</table>

### Interview Technique

2.21 Your interview should employ the following interview techniques:-

- Be inquisitive
- Open questions
- Active listening
- Non-interruptive
- Use of silence
- Note taking

2.22 During the interview you should avoid the following:-

- Asking leading questions
- Asking double-barrelled questions
- Making opinion statements

2.23 Don’t leave the offender/suspect alone in the interview room with the interview equipment. If s/he knows what it’s all about they may try to damage it.
2.24 After you tell him/her that you intend interviewing them on the electronic interview machine and they say that they don’t want to be interviewed then you should get that refusal on audio if possible.

2.25 Ask the offender/suspect if s/he would prefer to be interviewed in other conventional methods ie. typed ROI or handwritten statement. If yes proceed by that method.

2.26 If the offender/suspect refuses even to record his/her refusal to be interviewed on audio tape record that in your file notes and proceed by other means as mentioned above.
SECTION 3
INTERVIEW FORMAT GUIDELINES

4. Questions prior to interview

Q. What I propose to do is ask you further questions in relation to this matter. My questions and any answers given by you will be electronically recorded on audio tape as the interview takes place. Do you understand that?

A.

Q. The interview will be recorded simultaneously, on three audio cassette tapes. Do you understand that?

A.

Q. At the conclusion of the interview, you will be given one of the audio cassette tapes of the interview. Do you understand that?

A.

Q. Do you agree to be electronically recorded?

PRO-FORMA FOR ELECTRONIC RECORD OF INTERVIEW

THIS IS AN ELECTRONIC RECORD OF INTERVIEW BETWEEN INVESTIGATOR BILL BLOGGS AND WILLIAM SMITH AT LEVEL 5, 1 FITZWILLIAM STREET, PARRAMATTA ON MONDAY THE 4TH OF OCTOBER 2007

Time Commenced: Mr. Smith do you agree that the time is now 9:21am?

A. Yes.

Also Present: For the purposes of voice identification would each person present please state his/her name?

V1. Interviewer
V2. Observer
V3. Interviewee

Q. Mr Smith do you agree that apart from yourself, Investigator Johnson and I that there are no other persons present in this room?

A. That's correct.

Q. Mr Smith, Investigator Johnson and I are making inquiries into your (state what you are investigating) employment of an uncertificated person, Jason Apple, at your real estate agency “Western Real Estate” Penrith between the 26th April, 1998 and the 2nd of February, 2001. I intend asking you further questions about this matter, but before I do I want you to understand that you are not obliged to say or do anything unless you wish, but whatever you say or do will be electronically recorded and may later be used in evidence. Do you understand that?
A. Yes.

Q. Do you agree that prior to the commencement of this interview I told you that I intended asking you further questions in relation to this matter?
A. Yes.

Q. Do you agree that I also told you that my questions and any answers that you choose to give to those questions would be recorded on audio tape as the interview took place?
A. Yes.

Q. Do you agree that I also told you that at the conclusion of the interview you would be given a complete audio tape copy of the interview?
A. Yes.

Q. Do you agree that you then agreed to be electronically recorded?
A.

Q. For the purpose of this interview could you please tell me your full name, address and date of birth?
A. William Smith, 5 Crook Street, Hicksville. Date of Birth 26.9.55.

QUESTIONS REGARDING PRIOR CONVERSATION

Q. Do you agree that I first spoke to you at your office on the 27th July, 2001?
A. Yes.

Q. Do you agree that I asked you………?
A.

Q. Do you agree that you replied………?
A.

QUESTIONS REGARDING THE OFFENCE/BREACH BEING INVESTIGATED

Q. I have been informed that between the 2/1/01 and 21/7/01 that you misappropriated $100,000 from the trust account held by your office. What can you tell me about that?
A.

BREAKS AND PAUSES

Q. I wish to check some of the information that you have just provided to me during the interview. I now intend to suspend the interview for a short time so that I can carry out some checks on that information. Do you understand that?
A. Yes.

The time is now 10:30am this interview is now suspended.

Continuation of record of interview between Investigator BLOGGS and William SMITH. The time is now 10:35am.

Q. Mr Smith do you agree that I briefly suspended the interview for the purposes of checking some of the information that you provided me today?

A.

If resuming from a long break: ie. 1 or more hours.

Continuation of record of interview between Investigator BLOGGS and William SMITH. The time is now 12:35pm.

Q. Mr Smith do you agree that I suspended the interview to allow you to converse with your solicitor?

A.

Q. Do you agree that you have spoken to your solicitor for the entire 2 hours of the suspension of the interview?

A.

Q. Before we proceed with the interview I want you to understand that caution issued to you earlier still applies. Do you understand that?

A.

CONCLUDING QUESTIONS

Q. Investigator Johnson, are there any questions you would like to ask in relation to this matter?

A. No.

Q. Is there anything further you would like to say about this matter?

A. No.

Q. Do you wish to make a handwritten statement about this matter?

A. No.
ADOPTION QUESTIONS

Q. Have the answers that you have given, as recorded in this interview, been made of your own free will?

A. Yes.

Q. Has any threat, promise or inducement been held out to you to give the answers which have been recorded in this interview?

A. No.

THIS INTERVIEW IS NOT CONCLUDED. THE TIME IS NOW 10:45AM.

ADOPTION BY SENIOR OFFICER IF CRIMINAL PROSECUTION:

Q. I will now have a senior officer not connected with this matter speak to you about the manner in which this interview was conducted. Do you understand that?

A. 

INVESTIGATOR BLOGGS NOW LEAVING THE ROOM.

Q. Mr Smith this is Senior Investigator Jones. He will now ask you some questions about the interview that we have just conducted?

A. 

INVESTIGATOR BLOGGS AND JOHNSON NOW LEAVING THE ROOM.

Senior Officers Questions:

Q. Are you Mr Smith?

A. 

Q. Have you made this record of interview of your own free will?

A. 

Q. Has any threat, promise or inducement been held out to you to give the answers recorded in this interview?

A. 

Q. Have you any complaints to make about the manner in which you were interviewed here today?

A. 

INVESTIGATOR BLOGGS AND JOHNSON RETURN TO THE ROOM.

THIS INTERVIEW IS NOW CONCLUDED. THE TIME IS 10:50AM.
SECTION 4
LEGAL CONSIDERATIONS

LEGISLATION & ACT LAW GOVERNING THE CONDUCT OF RECORDS OF INTERVIEW.

4.1 Section 410(1) of the Crimes Act states:

“No confession, admission, or statement shall be received in evidence against an accused person if it has been induced-

(a) by any untrue representation made to him by the prosecutor, or some person in authority; or

(b) by any threat or promise, held out to him by the prosecutor, or some person in authority.

4.2 In relation to who is a “person in authority”:
R -v- IBRAHIM, 1914, AC pg 609, House of Lords.

Dicta: “The expression “Person in authority” includes officers of police and the like, the prosecutor, and other concerned with the preferment of charges.”

4.3 Don’t cross examine the offender/suspect. Confessions, admissions or statements made by a person during a record of interview must be voluntary. The voluntariness rule states:

“If his statement is the result of duress, intimidation, persistent importunity, sustained or undue persistence or pressure it cannot be voluntary.”

R -v- McDERMOT, 1948, 76, CLR.

4.4 Further the ACT of R –v- McDERMOT held that:

“Although the (interview) procedure was virtually to put the accused on trial and the aggressive style of all interrogations was undesirable.”

4.5 This ruling is supported by a more the recent ACT of:
R –v- CLELAND, 1982, 151, CLR.

“A confession will not be admitted unless it was made voluntarily, that is, the exercise of a free choice to speak or be silent.

“But, even if the statement was voluntary, and therefore admissible, the trial judge has discretion to reject it if he considers that it was obtained in circumstances that would render it unfair to use it against the accused.”

4.6 In relation to making false representations and tricks to obtain confessions etc.
R –v- Van Der MEER, 1988, 35, ACR.
Dicta:  “Trickery, misrepresentations, deliberate omissions by the interviewer may lead the exclusion of evidence of the interviews on the basis that they were unfair.”

4.7 This ACT also provided a ruling in regard to cross examining a person and the use of an aggressive style.

4.8 As mentioned in Section 3 don’t criticise the offender about the answers he/she gives. eg. “Oh, come on. You don’t expect me to believe that!”, or, “Yeah, right, ok!”

Reason being: R -v- PRITCHARD, VLR.
This ACT is a supreme court decision in Elizabeth, although not binding, is highly persuasive. Facts of this ACT are:

Dicta:  “That the scornful remarks of disbelief made by the interviewing police officer prevented the offender putting forward his right to express his denial of the offence and “extricate himself from difficulty”.”
IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
SYDNEY REGISTRY

On {Insert date} , I {Name of deponent} of 
{address}, {Position title}, in the State of 
New South Wales, say on oath:

No. {Matter number} of {Year}

________________________________________

1.

________________________________________

2.

AFFIDAVIT

Deponent:  {Insert name}
Date sworn: {Insert date}
Filed for the Commissioner for Fair Trading

COMMISSIONER FOR FAIR TRADING
Plaintiff

{Name of defendant}
First Defendant

{Name of defendant}
Second Defendant

{Insert name of Director, Legal Services}
Solicitor
For Commissioner for Fair Trading
1 Fitzwilliam Street
PARRAMATTA NSW 2150
DX 28437 PARRAMATTA
Ref:  {Legal Officer}
Ph:  9895 {Insert number}
Fax:  9895 {Insert number}
Sworn or affirmed at {Place sworn} )
On the {Date} day of {Month & year} )
Before me: )

..............................................
{Deponent}

..............................................
Justice of the Peace or Solicitor
IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
SYDNEY REGISTRY

No. 08/12345 of 2008

AFFIDAVIT
Deponent: Clark Kent
Date sworn: 13 March 2008
Filed for the Commissioner for Fair Trading

COMMISSIONER FOR FAIR TRADING
Plaintiff

Recall Home Products Pty Ltd
First Defendant

Bartholomew Simpson
Second Defendant

On 13 March 2008, I Clark Kent of 1
Fitzwilliam Street Parramatta, in the State of
New South Wales, say on oath:

1. I am a Senior Investigator appointed
by the Commissioner for Fair
Trading and I am attached to the
Energy & Utilities Unit.

2. I am a qualified Electrical Mechanic
having completed the Electrical
Trades Course at the Granville
College of Technical and Further
Education and a 4 year
apprenticeship with the then Public
Transport Commission. My role as
an Investigator with the Energy &
Utilities Unit requires me to examine
electrical articles displayed for sale
in retail and other outlets around
New South Wales to ensure their
electrical safety and compliance with
Australian Standards.

3. Some time in July, 2007 the Office
of Fair Trading commenced an
investigation of the activities of
Recall Home Products Pty Ltd
regarding the sale of counterfeit
electrical articles.
4. On 2 August 2007 I attended the premises of Recall Home Products Pty Ltd (the company). In the front window of these premises I saw a display of hair stylers for sale, with the brand name “Youbeut”.

Annexed hereto and marked with the letter “A” are photos taken by me of the articles on display.

5. I then entered the premises and was approached by a man who said:

“I’m Bartholomew Simpson the Director of Recall”

I said: “My name is Clark Kent, I’m an Investigator with the Office of Fair Trading. We have received a complaint alleging that the company is selling counterfeit electrical articles”.

He said: “No, not this company. We only sell the genuine article”.

I said: “The hair stylers in the front window with the “Youbeut” brand, are they genuine”?

He said: “Yes”.

I said: “Can I have a look at one please”.

He said: “Why. I just told you they were genuine, don’t you trust me”.

I said: “Mr Simpson in accordance with section 26 of the Electricity (Consumer Safety) Act I am seizing two of these articles for the purpose of examination and testing”.

6. I then removed a hair styler from the display and another located on the premises. I then issued Mr Simpson with a “Seizure of Article(s)” receipt and left the premises. Annexed hereto and marked with the letter “B” is a true copy of that document.

Sworn or affirmed at Parramatta )
On the 13th day of March 2009 )
Before me: )

........................................
Clarke Kent

........................................
Justice of the Peace or Solicitor
IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
SYDNEY REGISTRY

No. 08/12345 of 2008

________________________________________

AFFIDAVIT

Deponent: Kerry A Kennelly
Date sworn: 2 September 2008
Filed for the Commissioner for Fair Trading

________________________________________

COMMISSIONER FOR FAIR TRADING
Plaintiff

Recall Home Products Pty Ltd
First Defendant

Bartholomew Simpson
Second Defendant

On 2 September 2008, I Kerry A Connolly of 28 John Street Sydney, in the State of New South Wales, say on oath:

1. I am a Brand Protection Officer employed by Detector Australia Pty Ltd (“Detector Australia”). I assist Detector Australia’s in-house lawyer, Dick Tracey, in dealing with the importation and distribution of counterfeit Youbeut stylers in Australia.

2. I have been involved in the identification of counterfeit Youbeut stylers since about November 2007 and I am very familiar with the various models of the Youbeut stylers (“ghd stylers”) distributed by Detector Australia. I am able to identify counterfeit Youbeut stylers from either pictures, written descriptions or a review of the actual product.

3. I have inspected the “Youbeut” stylers delivered to Detector Australia by the Office of Fair Trading. Those stylers are not genuine Youbeut stylers, rather they are inferior counterfeit products.
4. On the 10 August 2008 I received an express post package from Mr Clark Kent of the Office of Fair Trading containing two hair stylers with the Youbeut brand.

5. Upon my inspection of the product, I immediately identified them as counterfeit. There are a number of identifying features of the counterfeits (relatively small differences in the appearance of the product) but the easiest way to identify the product as counterfeit is:

   (a) The overall appearance of the packaging for the styler is substantially inferior to that of the genuine ghd styler; and

   (b) The two verification codes on the stylers are “2hju y3vp1 crd21” and “9dusw hn7pk dtiv6”. I have received numerous counterfeit stylers with those codes on them – and all of them have been counterfeit.

6. Each genuine Youbeut styler has two unique verification codes on it which allows registration of the Youbeut styler on the Youbeut hair website. The counterfeit stylers generally have “copied” codes.

7. Annexed hereto and marked “KMG1” are the stylers that were sent by the Office of Fair Trading and delivered to Detector Australia by Clark Kent.

Sworn or affirmed at Sydney )
On the 3rd day of September 2009 )
Before me: )

................................…………
Kerry A Connolly

................................……
Justice of the Peace or Solicitor
# RECOMMENDATION FOR THE ISSUE OF A NOTICE TO OBTAIN INFORMATION UNDER SECTION 20, FAIR TRADING ACT 1987

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Dear {Name of contact person}

NOTICE TO PRODUCE DOCUMENTS PURSUANT TO SECTION 20 OF THE FAIR TRADING ACT 1987 (NSW)

I have reasonable grounds to believe that {Name of organisation receiving notice} is capable of producing documents in relation to possible contraventions of section 16 of the Electricity (Consumer Safety) Act 2004 ("the E(CS)A") by a person known as {Insert name}.

My grounds of belief are set out in the enclosed Notice of Belief and the documents are described in the Schedule to the enclosed Notice to Produce Documents issued by {Officers name}, {Position title}, pursuant to section 20 of the Act.

Please read the Notice to Produce Documents carefully. You will see that it requires you to produce documents to the Investigator at 1 Fitzwilliam Street, Parramatta, postal address, PO Box 972 Parramatta 2124 on or before the time and date specified in the Notice.

A refusal or failure to comply with this Notice, so far as {Name of organisation receiving notice} is able, is an offence under section 20(3) of the Act and may expose it to a pecuniary penalty not exceeding $2,200.00. The same penalty will apply if it knowingly gives information, which is false or misleading.

Sub-section 20(4) of the Act provides that a person is not excused from producing a document, or giving evidence in response to a notice under section 20 on the grounds that the information, document or evidence may tend to incriminate that person.

An extract of the relevant statutory provisions is enclosed.

Yours sincerely

Michael COOPER
DIRECTOR, MEDIATION SERVICES & COMPLIANCE
HOME BUILDING SERVICE
{Insert date}
FAIR TRADING ACT 1987 SECTION 20(2)(c)
NOTICE TO PRODUCE DOCUMENTS

WHEREAS, the Director, Mediation Services & Compliance, does on reasonable grounds as set out in the attached Notice of Belief under section 20 of the Act dated {Insert month & year only}, believe that {Name of organisation receiving notice} is capable of producing documents in relation to possible contraventions of section 16 of the E(CS)A by a person who identified themselves as {Insert name}:

- {Insert brief description of alleged contravention}

NOW I, {Insert officers name}, duly appointed {Insert position title} of the Office of Fair Trading pursuant to the powers conferred under section 20(2)(c) of the Act HEREBY REQUIRE you to:

- produce the documents specified in the schedule to this notice to me at 1 Fitzwilliam Street, Parramatta on or before {Insert time} on {Insert month & year only}, in relation to the above-mentioned possible contraventions.

Dated this {Insert month & year only} day of {Insert month & year only}.

..............................................
{Insert position title}
SCHEDULE TO NOTICE TO PRODUCE DOCUMENTS PURSUANT TO
SECTION 20 OF THE FAIR TRADING ACT 1987

• {Insert documents required}

EXPLANATORY NOTE

In this schedule, “document” means any record or information, and includes:

(a) anything on which there is writing;

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else;

(d) a map, plan, drawing or photograph; or

(e) any source of information, whether or not the information is available only after the source is subjected to electronic or other processes.

By way of example, “document” includes but is not limited to:

• Minutes of meetings or discussions
• Facsimile transmissions
• Letters
• Telegrams
• Telexes
• File notes
• Notes of conversations
• Phone records
• E-mail or voice mail messages
• Telephone messages
• Database records
NOTICE OF BELIEF UNDER SECTION 20 FAIR TRADING ACT 1987

I, Michael Cooper, Director Mediation Services & Compliance do on the reasonable grounds set out in the Schedule, believe that {Name of organisation receiving notice} is capable of producing documents in relation to possible contravention of section 16 of the Electricity (Consumer Safety) Act 2004 by {Insert brief description of alleged contravention}

Dated: {Insert month & year only}

.................................................................
Michael COOPER

SCHEDULE TO NOTICE OF BELIEF:

1. {Insert background of investigation}
APPLICATION FOR A SEARCH WARRANT
(Search Warrants Act 1985)

(OTHER THAN A PART 2 SEARCH WARRANT)**(1)**

On  ..........................................................................................................................................................
(date)

I, ...............................................................................................................................................................,
(name)

being a person with authority to apply for a search warrant under Section........................................
of the ..............................................................................................................................................Act,**(2)**

apply for a search warrant to enter the premises known as ...............................................................
..........................................................................................................................................................
(address)

in the State of New South Wales, being a ...........................................................
(description of premises, e.g. dwelling house)

I swear/solemnly, sincerely and truly declare and affirm that:

1. (a) I am an authorised officer/inspector/authorised person**(3)** employed by
   ..........................................................................................................................................................

(b) I am a police officer of the rank of...........................................................

(c) I am ...........................................................

2. I have reasonable grounds for believing the following matters which justify this
   application for the issue of a search warrant:**(5)**

3. I seek to be able to perform the following specific functions on entry:**(6)**

4. **(To be completed if a previous application for the warrant has been made and refused.)**(7)**

The following are details of the refusal of the previous application:

(The following need not be completed if the previous application was made to an
authorised justice who was not a Magistrate and this application is made to a
Magistrate.)

The additional information which I consider justifies the making of this further
application is:

Sworn/declared and affirmed**(3)** before me on the ......... day
of ..........................................................................................................................................................

at ..........................................................................................................................................................
in the State of New South Wales

...........................................................
(Applicant’s signature)

Justice of the Peace**(8)**

..........................................................................................................................................................
(1) This Form is to be used for all warrants (except Part 2 search warrants). An application for a Part 2 search warrant (indictable, firearms, prohibited weapons and narcotics offences and stolen goods) should not be on this Form but should be on Form 1.

(2) Insert the Act and section under which the search warrant is sought.

(3) Delete whichever is inapplicable.

(4) Where (a) and (b) are not applicable to describe the person authorised to seek a search warrant, use (c) and describe the person seeking the warrant and any authority required.

(5) Include all those matters which justify the issue of a search warrant to enter the named premises. If an offence or breach of an Act or Regulation is alleged, specify the particular offence. If the experience of the applicant or source of the information is relevant, then include this in the grounds. If space is insufficient continue overleaf or attach a separate sheet.

(6) Include the powers which the applicant seeks to exercise on entry. If any items are to be seized they should be specified. If the exact location of these items is known, include that information. General powers which are given under the Act authorising the issue of the search warrant should be included where relevant.

(7) Attach copy of previous application to this Form.

(8) This application may be sworn before the authorised justice to whom the application is made for the issue of the warrant.

NOTE: IT IS AN OFFENCE UNDER SECTION 12B OF THE SEARCH WARRANTS ACT 1985 TO GIVE INFORMATION IN THIS APPLICATION KNOWING IT IS FALSE OR MISLEADING IN A MATERIAL PARTICULAR. THE MAXIMUM PENALTY IS A FINE OF $11,000 AND 2 YEARS IMPRISONMENT.
Schedule “A”
Search Warrant

(Address: )

(List reasonable grounds for believing the following matters justify this application for the issue of a search warrant )

Include all those matters which justify the issue of a search warrant to enter the named premises. If an offence or breach of an Act or Regulation is alleged, specify the particular offence. If the experience of the applicant or source of the information is relevant, then include this in the grounds.
Schedule “B”
Search Warrant
(Address: )

(Explain the specific functions you seek to exercise)

Include the powers which the applicant seeks to exercise on entry. If any items are to be seized they should be specified. If the exact location of these items is known, include that information. General powers which are given under the Act authorising the issue of the search warrant should be included where relevant.
SEARCH WARRANT
(Search Warrants Act 1985)

(OTHER THAN A PART 2 WARRANT)

This search warrant expires at ............. a.m./p.m. on ............................................................... ..........................
and must not be used after that time.

NOTE: If no time for expiry is specified above, the warrant expires 72 hours after the time it was issued or, in the case of a telephone warrant, 24 hours after the time it was issued.

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(1) Insert the Act and section under which the warrant is issued.
(2) Add any additional necessary person (e.g. a police officer) who is required to accompany applicant.
(3) If there is a need for execution by night, specify the other times.
(4) Note any restriction under the enabling Act on the category of places that can be entered.
(5) Specify the type of search or inquiry and the purpose of the search or inquiry to be performed on entry. Functions on entry must be within those authorised by the enabling Act. Specify with particularity anything to be seized. Specify the offence(s), if any, with respect to which search or inquiry is to be made.
(6) Specify (if relevant) any special additional powers of personal search, seizure, arrest, inspection, etc, provided under the enabling Act.
(7) Where the application is made in person or by facsimile transmission the authorised justice should sign and date the warrant and initial any corrections. In the case of a telephone search warrant in circumstances where facsimile facilities are not available, the justice should use this Form as a copy of the terms of the warrant and the applicant should complete the warrant in the terms dictated by the justice and then sign and date the warrant.

NOTE: The applicant must deliver this search warrant when reporting to the issuing justice within 10 days after the execution of the warrant, or if not executed, within 10 days after the expiry of the warrant.
OCCUPIER'S NOTICE
(Search Warrants Act 1985)

OCCUPIER'S NOTICE OTHER THAN FOR A PART 2 WARRANT

IMPORTANT INFORMATION FOR OCCUPIERS CONCERNING THE SEARCH WARRANT

A search warrant has been issued by an authorised justice. It gives the authority and power to the persons named in the search warrant to enter and search the premises at

................................................... ................................................... ................................................... .......(address)

being a ........................................... ................................................... ...................................................

description of premises, e.g. dwelling house

Expiry
The search warrant will expire at ................. a.m./p.m. on .................................................
(time) (date)

Force
The persons granted the power to enter under the warrant may use such force as is reasonably necessary to gain entry to the premises and to carry out the purposes of the warrant.

YOU HAVE THE RIGHT TO INSPECT THE SEARCH WARRANT BUT YOU MUST NOT HINDER OR OBSTRUCT THE PERSONS EXECUTING IT, AS TO DO SO MAY BE A CRIMINAL OFFENCE. UNDER SECTION 9 OF THE SEARCH WARRANTS ACT 1985, THE MAXIMUM PENALTY FOR OBSTRUCTING OR HINDERING A SEARCH WITHOUT REASONABLE EXCUSE IS A FINE OF $11,000 AND 2 YEARS IMPRISONMENT.

The powers given by the search warrant
The search warrant gives the power to the persons executing it to:
(a) Enter the named premises.
(b) Search for/inspect the following things:(1)
(c) Perform the following functions:(2)
(d) Exercise such other powers as are specified in the ...... ...................................................

Issue details
The search warrant was granted by .................................................................
an authorised justice under .................................................................(3)
on .................................................................at .................................................................
(date) (time)

The search warrant was issued on the application of(4) .................. who is ..................

BASIS FOR THE ISSUE OF THE WARRANT
The warrant was granted on the basis that the authorised justice found that there were reasonable grounds for the issue of the warrant and, in particular, that the applicant had reasonable grounds to believe:(5)
Challenging the issue of the warrant or conduct of the search

If you are dissatisfied with the issue of the warrant or the conduct of the people executing the warrant you should seek legal advice. This advice may assist you to decide whether your rights have been infringed and what action you can take. If your rights have been infringed you may be entitled to a legal remedy.

You should keep this notice as it will assist you if you seek advice.

You should produce this notice at the court when seeking to inspect the application.

Limitations on the powers conferred

1. The warrant must be executed before the date and time of expiry given above.
2. Any force used must be reasonably necessary.
3. The warrant authorises entry only between the hours of 6.00 a.m. and 9.00 p.m. unless other times are specified on the warrant.
4. The warrant must be shown to you if you ask to see it.
5. Only functions and powers authorised under the warrant or by the Act authorising the issue of the warrant may be performed.

Inspection

The application for the warrant, written reasons for the issue of the warrant and other associated documents are to be held at (6) .......................................................... Local Court. You may seek to inspect those documents by arrangement with that Court.

Signed .......................................................... Date ..........................................................
(Authorised Justice/Applicant Officer)(7)

(1) List the items to be searched for.
(2) List the powers and functions that are specified in the Act authorising the issue of a search warrant specifically required by the applicant.
(3) Insert Act and section under which the warrant was issued.
(4) Insert name, address, title (e.g. inspector) and the organisation to which applicant belongs.
(5) Insert in summary form the grounds on which the search warrant was issued.
(6) Insert the Local Court to which the issuing justice is attached or to which it is intended to forward the documentation.
(7) In the case of telephone search warrants in circumstances where facsimile facilities are not available, the notice must be signed by the applicant officer. In cases of application in person or by facsimile transmission, the authorised justice must sign the notice.
SEARCH WARRANT
OPERATIONAL ORDERS

{INSERT NAME OF TRADER}

SITUATION
{Insert details of the situation}

MISSION
{Insert details of the mission}

EXECUTION
{Insert details of the execution}

ADMINISTRATION
{Insert administration details}

COMMAND AND COMMUNICATION
{Insert command and communication details}

Position: Name of Officer: Phone number:
{Investigators Position title} {Investigators Name} {Insert Phone no.}

Briefing Location
{Insert Location}
Time
{Insert Time}
Date
{Insert Date}

De-briefing Location
{Insert Location}
Time
{Insert Time}
Date
{Insert Date}

All communication will be directed through the Operational Commander.

{Investigators Name}
{Investigators Position title}
Energy & Utilities Unit
Home Building Service

1. [Insert name of Principal Building Investigator]
   Team Manager

2. Steve Griffin
   Assistant Commissioner, Home Building Service
REPORT TO AUTHORISED JUSTICE ON THE EXECUTION OF A SEARCH WARRANT\(^{(1)}\)

(Search Warrants Act 1985)

This report is made to the authorised justice who issued the attached search warrant.\(^{(2)}\)

\textbf{(If the Warrant was not executed)}

1. The warrant was not executed for the following reasons:

\textbf{(If the Warrant was executed)}

2. The warrant was executed on \textbf{.................... ................................................... ...........................................} \textbf{(day)}
   \textbf{at ...................... a.m./p.m. on .................... ................................................... ...........................................} \textbf{(date)}

3. The result of the execution of the warrant (including a description of the things seized) is briefly as follows:\(^{(3)}\)

4. The things seized are now in the custody of \(^{(4)}\)

5. The occupier's notice was not served/served on \(^{(5)}\)

Signed \textbf{.................................................................................................................................}

Date \textbf{..................................... Name ..........................................................................................}

Rank or Designation \textbf{..........................................................}

Place of Work \textbf{..........................................................}

Date of Receipt of Report by Authorised Justice \textbf{..........................................................}

Signed \textbf{.................................................................................................................................}

\textbf{(Authorised Justice)}

\(^{(1)}\) This report must be made within 10 days after the execution of the warrant or the expiry of the warrant, whichever first occurs.

\(^{(2)}\) Unless completed on the back of the warrant, attach the original warrant issued by the authorised justice or telephone search warrant completed by the applicant.

\(^{(3)}\) If a receipt is given for anything seized, attach copy.

\(^{(4)}\) Specify the person who has responsibility for the safekeeping of the things seized. Unless the security of the things seized is thereby endangered, specify the place where they are held.

\(^{(5)}\) Specify manner of service and on whom notice was served.

\textbf{NOTE: On completion of the Report, forward the Report and attachments to the Local Court named in the Occupier’s Notice.}
BRIEFING FOR COMMISSIONER

ISSUE
Recall Home Products Pty Ltd.

BACKGROUND
Recall Home Products Pty Ltd (“the company”) principal business activity is importer and vendor of miniature over-current circuit breakers and socket outlets. The principal business address is 666 Whatsaname Street Sparkville. The sole director of the company is Bartholomew Simpson of 666 Whatsaname Street Sparkville.

The Home Building Service received information from the Australian Consumer and Competition Commission, an investigation was commenced into the sale of non-original HOT branded miniature over-current circuit breakers and socket outlets. During the course of the investigation it was revealed that the socket outlets were significantly different to those approved and were therefore, unapproved.

The MCBs were found to be different internally to genuine articles. However, the differences were not significant enough from the original and were found to be compliant and an approved type. The importer was not found to be a registered importer with Standards Australia to use the RCM.

The sale of the socket outlets was made by direct sales by direct contact with independent electrical wholesalers throughout the metropolitan area and by internet sales via Ebay. Market(s) inspections were also carried out at Paddys Markets, Sydney, Prestons Markets, Prestons and Penrith Markets, Penrith Paceway.

CURRENT POSITION
Investigations have revealed that the Director of Recall Home Products Pty Ltd, Mr Bartholomew Simpson of 666 Whatsaname Street Sparkville, has arranged for the manufacture of HOT branded circuit breakers through a third party in China. A check with the Australian Customs Service in line with Section 16 of the Customs Administration Act 1985 has confirmed an importation of MCBs by Recall Home Products Pty Ltd and further investigation has revealed the direct sale of these articles in the Port Macquarie area by the importer.

Testing of MCBs seized from the purchaser in Port Macquarie has revealed that they are compliant with relevant standards and are the same type as those approved. However, the marking required under Section 21A of the ESA and Section 16 of the E(CS)A has been identified as an area of concern and consideration of breaches of the marking pertaining to electrical articles.

In this instance, a Regulatory Compliance Mark (RCM) is evident on the articles. This mark has been affixed in lieu of the approval number. The RCM is administered by Standards Australia and is a system where registered importers are permitted to use the mark as a means of showing electrical compliance, administered by Fair Trading and electro-magnetic compliance, administered by the Australian Communications and Media Authority (ACMA). This mark replaces the requirements to mark the article with both the electrical approval number and the ACMA registered mark and replace both marks with one readily identifiable trademark.
Inquiries with Standards Australia have revealed that neither Bartholomew Simpson as an individual or Recall Home Products Pty Ltd are authorised to use the RCM. It is therefore submitted that the articles are unmarked within the meaning of either Section 21A of the ESA or Section 16 of the E(CS)A. Further, it is submitted that there are also breaches under Sections 42 and 49 of the FTA in relation to the manufacture, importation and sale of the MCBs.

Attached at Tab (A) is a copy of the search warrant and relevant documents.

On 5 April 2008 a search warrant was granted under the provisions of 26 of the Electricity (Consumer Safety) Act to search the registered business and residential address of the company and Bartholomew Simpson located at 666 Whatssame Street Sparkville for documents and business records associated with these offences.

The execution of this search warrant is scheduled to take place at 1.00pm on Tuesday 6 April 2008. This warrant will be executed with the assistance of officers from the Sparkville Police Station as per the requirements of the Act.

**RECOMMENDATION**
For information and approval.

Prepared by: Peter King  
Principal Investigator  
Energy & Utilities Unit  
Telephone: 98950709  
5 April 2008

1. Manager, Energy & Utilities Unit  
2. Director, Mediation Services and Compliance  
3. Assistant Commissioner, Home Building Service  
4. Ministerial Liaison Branch  
5. Commissioner  
6. Actioning Officer
SEARCH WARRANT – INDEPENDENT OBSERVER FIELD FORM

DATE: ________________ TIME: ________________ OF EXECUTION

INDEPENDENT OBSERVER

NAME: _________________________ POSITION: _________________________

If the independent observer is a police officer, complete the following:

RANK: _________________________ STATION: _________________________

PHONE: _________________________ EMAIL: _________________________

LOCATION OF PREMISES SEARCHED:

NAME OF CASE OFFICER:

NAME OF EXHIBIT OFFICER(S):

WARRANT SIGHTED: YES / NO

TO BE EXECUTED BETWEEN HOURS OF:

MEMBERS OF SEARCH TEAM:

NAME OF OCCUPIER(S): _________________________ PRESENT: YES / NO

OCCUPIERS NOTICE LEFT WITH:

ROLE OF INDEPENDENT OBSERVER EXPLAINED TO OCCUPIER: YES / NO

ITEMS LOCATED: YES / NO

MONEY: $ OTHER PROPERTY:

COMMENTS:

EXHIBITS CONVEYED TO: [Insert address of OFT office] ………………………………………………………………………………………………………………………………

…………………………………………………………………………………………………………………………… SIGNATURE:…………………………………………………………………………

TIME & DATE:………………………………………… NAME:…………………………………………………
SEARCH WARRANT PROCEDURES – SCENE PLAN

ADDRESS OF PREMISES:

PREPARED BY:
RECEIPT

I, {Insert name of person receiving returned exhibit/s)

of {address of recipient}

hereby certify that I have received possession of the following item/s

from {insert name of Officer}

of {insert name of Branch}

at {address exhibit/s returned to}

At {insert time} am/pm on the {insert date}:-

List of items taken into possession:-

1. {insert details of item}

2. {insert details of item}

3. {insert details of item} etc

........................................................................................................ {insert date}
Signature of owner or person receiving exhibit on owner’s behalf

........................................................................................................ {insert date}
Signature of Returning Officer
## REQUEST TO CONDUCT SURVEILLANCE OPERATION

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<tr>
<th>TARGET/S</th>
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<th>BACK GROUND INFORMATION</th>
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<tr>
<th>CONDITIONS</th>
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HOME BUILDING SERVICE
SURVEILLANCE LOG

Target/s:
CAS File No:
Date of Surveillance:
Surveillance Team Members:

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<tr>
<th>Time</th>
<th>Observations</th>
<th>Team Member/s</th>
<th>Initials</th>
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Dear {Retailer's/Supplier's name}

**WARNING LETTER**

I refer to an electrical article safety inspection at your premises at {Insert address} on {Insert date} by an officer of the Office of Fair Trading.

The Office of Fair Trading is responsible for the administration of the Electricity (Consumer Safety) Act 2004 (the Act).

The officer has reported that the following declared article/s offered for sale, did not carry an approval mark and could not be identified as being approved.

- {Insert declared article}

Your attention is drawn to section 16 of the Act which in part states that a person must not sell an electrical article that has not been approved, registered by a relevant authority, not marked in accordance with the regulations or does not comply with specifications.

Please note that the term ‘sale’ under the Act includes auction or exchange; offer, agree or attempt to sell; advertise, expose, send, forward or deliver for sale; cause or permit to be sold or offered for sale; hire or cause to be hired; and display for sale or hire.

After careful consideration of all relevant circumstances I advise that Fair Trading does not intend to pursue disciplinary action against you on this occasion. However you must take immediate steps to ensure that any declared articles offered for sale comply with the above requirements. In future, it is suggested that a Written Guarantee under Section 17 of the Act be sought from your supplier.

Should you require any information concerning your obligations under the Act or a copy of the explanatory notes and applications forms to have these or other declared articles approved please go to our website at www.fairtrading.com.au.

Yours sincerely

Peter King
Principal Investigator
Energy & Utilities Unit
*for Commissioner for Fair Trading*

{Insert date}
### Electricity (Consumer Safety) Act 2004

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
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<tr>
<td><strong>Offence under the Act</strong></td>
<td><strong>Penalty</strong></td>
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<td>Section 16(1)(b)</td>
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<td>Section 24(1)</td>
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<tr>
<td>Section 24(2)</td>
<td>$10,000</td>
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<td>Section 24(3)</td>
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<tr>
<td>Section 33(1)(b)</td>
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<tr>
<td>Section 36</td>
<td>$10,000</td>
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<tr>
<td><strong>Offences under this regulation</strong></td>
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<td>Clause 13(1)</td>
<td>$200</td>
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<td>Clause 25(1)</td>
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<tr>
<td>Clause 35(2)</td>
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</tbody>
</table>
Prosecution Brief
Energy & Utilities Unit

DEFENDANT/S:

Defendant 1: Recall Home Products Pty Ltd

5 BREACHES:

1.1 Sell unapproved declared electrical article
   Section 16(1)(i) Electricity (Consumer Safety) Act 2004
   Recall brand 90W Automatic AC Adaptor with LED display for laptop model RP-123.

1.2 Sell unapproved declared electrical article
   Section 16(1)(a)(i) Electricity (Consumer Safety) Act 2004
   Recall brand 120W Automatic AC Adaptor with LED display for laptop model RP-321.

   Date of offence: 10 December 2007
   Expiry date: 10 December 2009

6 BACKGROUND:

6.1 An issue was raised by a consumer through the Australian Communications and Media Authority with the Energy & Utilities Unit of Fair Trading relating to the sale of a declared electrical article which was not appropriately marked. Attempts to contact the initial consumer were to no avail, an email address was the only contact details and mails were unanswered.

6.2 On 10 December 2007, I attended the NSW office of Recall Home Products Pty Ltd (the company) at 666 Whatsaname Street, Sparkville, the vendor of the unmarked declared electrical article identified in the original consumer issue. The resultant inspection revealed that there were a number of unmarked declared electrical articles displayed in the foyer area of the premises, all of which were cable tied to a metal display.

6.3 No price tags were evident and as it could be argued that the articles were not ‘for sale’ the Director, Mr Bartholomew Simpson was spoken to. At this meeting Mr Simpson was advised not to sell any unmarked declared electrical articles as he may be in breach of NSW Laws.

6.4 Accordingly, as the supplier dealt in computer related products routine inspections of a number of suburban retail outlets specialising in computer related products were conducted. On 8 January 2008 a routine inspection was carried out at Dodgy Computers Pty Ltd in the Parramatta Westfield Shopping Centre.

6.5 The subject declared electrical articles were located displayed for sale within the premises. A copy of an invoice stating that Dodgy Computers Pty Ltd purchased the articles from Recall Home Products Pty Ltd on the 10 December 2007 was obtained from Mr Henry Sampson director Dodgy Computers Pty Ltd at the time of inspection.
6.6 It was evident at the time of inspection that none of the declared articles were marked in accordance with the Electricity (Consumer Safety) Regulation 2006. This trader was advised to withdraw the articles from sale and appropriate action was taken for the detected breach on this occasion.

6.7 The company Director, Mr Simpson was invited to attend the Parramatta Offices of Fair Trading to participate in a formal interview on 10 February 2008. No advice was received from Mr Simpson relating to this interview and no person attended on behalf of the company.

6.8 The subject articles have not been issued with a Certificate of Approval from the NSW Office of Fair Trading. Subsequent inquiries with all Certifying Regulators and Recognised External Approval Agencies have resulted in information to the effect that no other agency has issued a Certificate of Approval for the subject declared electrical articles to date.

6.9 Accordingly, Certificates pursuant to Section 46 of the Electricity (Consumer Safety) Act have been produced in relation to the subject declared electrical articles.

7 EVIDENCE

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Previous warning letter sent to Recall Home Products Pty Ltd on 10 July 2007</td>
</tr>
<tr>
<td>B</td>
<td>ASIC information relating to Recall Home Products Pty Ltd</td>
</tr>
<tr>
<td>C</td>
<td>Statement of Investigator Peter Kemp</td>
</tr>
<tr>
<td>D</td>
<td>Certificate of Authority Investigator Peter Kemp</td>
</tr>
<tr>
<td>E</td>
<td>Copies of emails between Recall Home Products Pty Ltd &amp; Fair Trading relating to subject declared electrical articles</td>
</tr>
<tr>
<td>F</td>
<td>Photographs taken at Dodgy Computers Pty Ltd of subject declared electrical articles</td>
</tr>
<tr>
<td>G</td>
<td>Invoice received from Dodgy Computers Pty Ltd relating to purchase of subject declared electrical articles</td>
</tr>
<tr>
<td>H</td>
<td>Letter inviting company Director of Recall Home Products Pty Ltd to participate in formal interview</td>
</tr>
<tr>
<td>I</td>
<td>Certificates pursuant to Section 46 of the Electricity (Consumer Safety) Act signed by A/Manager, Energy &amp; Utilities Unit</td>
</tr>
<tr>
<td>J</td>
<td>Statement of Mr Sampson – Dodgy Computers Pty Ltd</td>
</tr>
</tbody>
</table>

8 COMMENT:

8.1 This organisation was issued with a Warning Letter by Fair Trading on the 10 July 2007 for selling unapproved declared electrical articles. The law was clearly explained to the Director of this company on that occasion and assistance offered.
8.2 The company continued to trade after receipt of the Warning Letter. Further the company sold the articles subject to this investigation on the day that Investigators attended the premises and advised cessation of all sales.

DEFENCES:
The Electricity (Consumer Safety) Act 2004 in Section 18 allows for the information and the offence to be dismissed if it is proved that the defendant received an acquisition guarantee from the supplier, that the article was approved and marked. The defendant did not claim this defence.

INVESTIGATION NARRATIVE:
The facts presented to the Court should explain that a consumer is at risk of receiving a fatal electric shock while using these computers.

RECOMMENDATION:
That a prosecution action be commenced for the breaches outlined in this report.

Peter Kemp
Senior Investigator
Energy & Utilities Unit
5 March 2008

4. Principal Investigator

5. Manager, Energy & Utilities Unit

6. Manager, Legal Services Branch
UNDEARTAKING TO THE COMMISSIONER for
FAIR TRADING FOR THE PURPOSES OF
SECTION 73A OF THE FAIR TRADING ACT 1987
by

{Insert company name}
{Insert ACN}

1. INTRODUCTION

1.1 {Insert company name & then abbreviated name in brackets} is a proprietary company registered in Australia that has its registered office and principal place of business at {Insert address}. Its directors are {Insert name/s}.

1.2 {Abbreviated name} markets {Insert nature of business}.

1.3 The Commissioner for Fair Trading (the “Commissioner”) has a statutory responsibility to take action for remedying infringements of, and for securing compliance with, the *Fair Trading Act 1987* (the “FTA”) and other legislation administered by the Minister for Fair Trading. The *Electricity (Consumer Safety) Act 2004* (the “ECSA”) is an Act administered by the Minister for Fair Trading.

1.4 Section 16 of the ECSA prohibits the sale of an electrical article that is a ‘declared electrical article’ pursuant to section 5 of the ECSA unless the model of electrical article has been approved by the Commissioner pursuant to section 11 (or has been approved by the relevant authority of another State or Territory, or under a recognised external approval scheme) and has been marked in accordance with a certificate of approval.
1.5 The protections afforded to consumers under ECSA (including without limitation section 16 of the ECSA) are an important means of protecting the interests of consumers and ensuring public confidence in traders in electrical articles.

1.6 {Insert investigation narrative}

1.7 Without making any admission, this undertaking is given by {Abbreviated name} pursuant to section 43 of the ECSA and section 73A of the FTA to the Commissioner to address issues related to Farnell’s electrical safety compliance obligations.

2. INTERPRETATION AND DEFINITION

Unless the context otherwise indicates:

“FTA” means the *Fair Trading Act 1987*;

{Abbreviated name} includes reference to any related company of {Insert company name} (as defined by section 50 of the Corporations Act 2001 Cth);

“Certificate of approval” means written notice of approval by way of certificate or otherwise.

“Commencement Date” means the date upon which the undertaking takes effect.

“ECSA” means the *Electricity (Consumer Safety) Act 2004*;

"Commissioner" means the person acting in, or occupying, the office of Commissioner for Fair Trading for the time being, and includes any of his/her officers;

"Undertaking" means the undertakings given by {Insert company name} as set out in clauses 3 and 4;

Expressions in this document have the same meaning as they do in the *Fair Trading Act 1987* unless otherwise specified, (except where the expressions are not defined under the FTA, in which case expressions relating to electrical items have the same meanings as they do under the ECSA);
A reference to a statute includes any statute amending, consolidating or replacing it from time to time.
OBLIGATIONS UNDER THE UNDERTAKING

3. CORRECTIVE COMPONENT

{Abbreviated name} undertakes for the purposes of section 43 of the ECSA and section 73A of the FTA that it:

3.1. Will not, for a period of {Insert time period} from the Commencement Date, supply or offer for sale any declared electrical article as defined by the ECSA without first obtaining a certificate of approval directly related to the declared electrical article being supplied or offered for sale.

4. COMPLIANCE AND AUDIT COMPONENT

{Abbreviated name} undertakes to do the following:

4.1. {Insert the undertaking}

5. COMMENCEMENT OF THE UNDERTAKING

5.1 This Undertaking comes into effect when the Commissioner accepts and executes it.

6. ACKNOWLEDGMENTS

{Abbreviated name} acknowledges that;

6.1 In accepting this Undertaking, the Commissioner is doing so in connection with a matter in relation to which the Commissioner has a function pursuant to section 9 of the Act;

6.2 It may only withdraw or vary this Undertaking with the written consent of the Commissioner;
6.3 If the Commissioner considers that [Abbreviated name] has breached any of the terms of this Undertaking, the Commissioner may apply to the Supreme Court for an order under section 73A(4) of the FTA;

6.4. The Commissioner or Minister for Fair Trading may from time to time publicly refer to this undertaking, at the discretion of the Commissioner or Minister, as the case may be, and the contents of this undertaking may be made available to other persons at the discretion of the Commissioner or Minister; and

6.5. This undertaking in no way derogates from:

   (a) The power of the Commissioner to take any action in respect of a contravention of the ECSA or FTA or any other legislation administered by the Minister; or

   (b) The rights and remedies available to any other person arising from the alleged conduct.

7. **SEVERABILITY**

7.1. If any provision of this Undertaking is determined by a court to be illegal, void or unenforceable, then that provision will be deemed to be severed from this Undertaking to the extent of the illegality, voidness or unenforceability (as the case may be) and the remainder of this Undertaking will continue in full force and effect in all other respects.

8. **HEADINGS**

8.1 Headings have been inserted for ease of reference only and must be disregarded in construing this document.
This Undertaking is given by {Insert company name} by its directors

Dated

__________________________    _______________________
Director,                      Director

I, Lyn Baker, COMMISSIONER do hereby accept this undertaking given by {Insert company name}, pursuant to section 43 of the Electricity (Consumer Safety) Act 2004 and section 73A of the Fair Trading Act 1987.

DATED

........................................

LYN BAKER
Commissioner for Fair Trading
INVESTIGATOR’S REPORT

☐ Certificate of Approval   ☐ Certificate of Suitability   ☐ Variation   ☐ Modification

<table>
<thead>
<tr>
<th>Certificate No.</th>
<th>Transaction No.</th>
<th>No. of Samples</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Insert No.]</td>
<td>[Insert No.]</td>
<td>[Insert No. or N/A]</td>
</tr>
</tbody>
</table>

Applicant Name: ___________________________  Product: ___________________________

Inspector Allocation: ___________________  Date: ___________________  Fee: _____________

TEST REPORTS

Is test report required?  ☐ Yes  ☐ No

If No, give reasons

If Yes, list specification

Does article show satisfactory compliance with nominated (AS) specification?  ☐ Yes  ☐ No

Is the laboratory recognised under criteria (a), (b), (c) or (d) [Insert criteria]

If (d), identify the Laboratory [Insert Laboratory name] and state reason why it is accepted.

Reason: ___________________________

Comments: ___________________________

RECOMMENDATION

It is recommended that (pick one or both):

☐ Approval be given to the original modified varied article described above.

☐ Approval be given, subject to the use of alternative approvals marking, specified below is allowed.

INVESTIGATOR

Name: [Insert name]  Date: [Insert date]

Signature: ___________________________

APPROVED

Name: ___________________________  Date: ___________________________

Signature: ___________________________
INVESTIGATOR’S REPORT

APPLICATION FOR RENEWAL

Certificate No.  Transaction No.  No. of Samples
[Insert No.]  [Insert No.]  [Insert No.or N/A]

Applicant Name:  

Product:  

Inspector allocation:  Date:  

Fee  

$  

The original article [Identify article] has been assessed as complying not complying  with the appropriate requirements of AS [Insert Standard No.]

Modification models [Identify model] have been assessed as complying not complying  with the appropriate requirements of AS [Insert Standard No.]

Comments  

RECOMMENDATION

It is recommended that the article and its modification(s)

☐ be renewed

☐ be rejected

INVESTIGATOR

Name:  [Insert name]  Date:  [Insert date]

Signature:  ______________________

APPROVED

Name:  

Date:  

Signature  ______________________
# CHANGE OF PARTICULARS

<table>
<thead>
<tr>
<th>Certificate No.</th>
<th>Transaction No.</th>
</tr>
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<tbody>
<tr>
<td>[Insert No.]</td>
<td>[Insert No.]</td>
</tr>
</tbody>
</table>

Applicant Name:

[Insert name]

Date: [Insert date]  Fee: $ [Insert amount]

## Details Of Change Of Particulars

<table>
<thead>
<tr>
<th>Name</th>
<th>From</th>
<th>To</th>
</tr>
</thead>
</table>

Model Reference Code

Trade Name

Other Description

Manufacturing Location

## OFFICER

Name: [Insert name]  Date: [Insert date]

Signature: ______________________