

The perceived “concerning weak” enforcement practices of both the Department of Water and Environment Regulation (DWER) and the Department of Mines, Industry Regulation and Safety WA (DMIRS) remain a matter of parliamentary discussion and media scrutiny.

The implementation timeframe of each agency to take action to meet audit recommendations varies from first quarter 2023 to December 2023,¹ meaning businesses can expect to start experiencing those regulators increasing compliance and enforcement action, including their scrutiny and propensity for prosecution of alleged infractions. With this in mind, it is timely for businesses to consider:

- Whether they have adequate policies and procedures in place for management of “dawn raids”.
- Their policies and procedures for internal investigations and whether those provide the maximum possible protection by legal professional privilege.
- How they might respond if they receive a notice for production of documents, answering of questions or attendance at an interview.

This short article provides some short guidance on requests for documents, information, and interviews. See our short guidance about [dawn raids](#) and internal investigations.

Incidents of regulatory scrutiny will frequently result in a regulator exercising its statutory powers to obtain documents or information. Regulators may also seek to conduct interviews or examinations with company executives and employees. In either case, this will usually occur in the form of a written “notice” from the regulator identifying the statutory power (or powers) being exercised, the action the recipient is required to take and the timeframe within which it must occur. The timeframes provided are rarely generous. It is vital that recipients of a notice seek legal advice promptly to ensure that an informed and cohesive strategy is adopted for the response and that any documents which may be protected from production can be identified and withheld.

Request for Documents or Information

Important questions when a notice is received will include:

- Whether the statutory source of the power extends to the notice issued (considering the purpose of the power conferred on the regulator and the scope of the notice).
- Whether the notice is sufficiently clear and comprehensible so there will be certainty when compliance has been achieved.
- Whether an extension of time is needed to comply.
- Whether any third parties might seek access to documents produced to the regulator, and any resulting exposure for the producing party.
- Whether the production of certain documents can be resisted based on legal professional privilege. In the absence of express legislative powers, regulators cannot compel the production of privileged communications. Legal privilege is recognised by the courts as a fundamental common law immunity to a regulator’s legislative powers. Careful review of any documents within the scope of the notice is required to identify and categorise legitimate privilege claims. On occasion, there may be strategic reasons to provide a regulator with privileged documents; however, a framework will need to be agreed with the regulator for the provision of that material.

In our experience, problems with notices issued are common. Various factors will be relevant in considering the response in such a case, including strategic considerations, the issue in question and the relationship with the regulator.

¹ Compliance with Mining Environmental Conditions, Office of the Auditor General

Request for Interviews

Most regulators also have statutory powers to require individuals to attend interviews or examinations. Important questions when a notice is received and during the conduct of an interview include:

- Whether the statutory source of the power extends to the notice issued and the questions being asked (considering the purpose of the power conferred on the regulator and the scope of the notice).
- Whether an extension of time is needed to arrange the interview.
- Whether legal professional privilege has any relevance to the questions asked or answers given.
- Whether privilege against self-incrimination should be claimed. This entitles a person to refuse to answer questions or provide documents if it would tend to incriminate that person. The test is not whether the answer or document would be a dramatic confession of criminality. It is sufficient that the disclosure would be a "link in the chain" towards incrimination. The privilege against self-incrimination does not apply to corporations in Australia. Complex evidentiary issues can arise when an employee is compelled by a regulator to answer questions that tend to incriminate the employer, and legal advice should be always sought.

Careful preparation of the interviewee is key. Consider the questions that may be asked and the information likely to be conveyed in an answer.

Tips for the Interview

- Listen carefully to the question asked and only answer that question.
- Take time to think before answering.
- Seek clarifications if needed.
- Say if you do not know or cannot answer completely on the spot without reference material.
- Answers should be kept brief and accurate.
- Speculation should be avoided.
- Unless asked to provide an opinion, keep answers confined to facts.
- Qualify answers where necessary.
- Remain calm, polite and professional.
- Ask for regular breaks.

In the event the interviewer then presents a written statement based on the interview and asks for it to be signed, time should be requested for review. Statements should only be signed if they are an accurate reflection of the oral statements provided and otherwise reflect the position accurately.

Given the potential for issues to arise, it is recommended that legal counsel is requested to attend any interviews and provide assistance as required.

Documents and information provided as a result of notices or interviews is often critical in decisions to prosecute and then plays a key role as evidence during any prosecution. Being well prepared and having the right advisers can make a difference. Our team has experience in assisting clients respond to both DWER and the DMIRS investigations in a way that minimises risks to the business and favourably positions the business in respect of further enforcement action (and experience defending enforcement proceedings at trial if they are commenced).

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