

# Entry and Search of Premises with Consent Guideline

March 2024 (Version 1)

## Purpose of this guideline

Under Part 4B of the *Essential Services Commission Act 2001* (the Act), a person appointed by the commission as an inspector may enter and search a premises where the inspector believes on reasonable grounds that a person may have contravened an essential services requirement. Inspection powers enable the commission to obtain information, documentation, and evidence to carry out its compliance and enforcement functions.<sup>1</sup>

The power to enter and search a premises may only be exercised by an inspector in accordance with any relevant direction given by the commission, and either:

- with the consent of the occupier of the premises
- under a warrant issued by a magistrate.

This guideline sets out information about an inspector's power to enter and search a premises **with consent**. The Entry and Search of Premises with Warrant Guideline sets out information about an inspector's power to enter and search a premises under a warrant.

The commission recognises the powers contained in Part 4B of the Act are intrusive. Accordingly, the commission will ensure that the powers are only used in appropriate circumstances and in accordance with the requirements of the legislation.

## Who is an inspector for the purposes of the Act?

The commission may appoint one of the following to be an inspector:

- an employee of the commission
- a person employed under Part 3 of the *Public Administration Act 2004*
- any other person employed by the State of Victoria

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<sup>1</sup> Note that section 10D of the Act specifies that the inspection powers contained in Part 4B of the Act do not apply in relation to the commission's functions under the *Victorian Energy Efficiency Target Act 2007*. Accordingly, the inspection powers discussed in this guideline do not apply to the commission's compliance or enforcement functions in relation to the Victorian Energy Upgrades scheme.

- any other person who the commission considers has appropriate skills, qualifications and experience.

The commission will only appoint a person as an inspector when it is satisfied that the person has appropriate qualifications, and/or has completed appropriate training.

All inspectors carry formal identification cards recording their appointment by the commission.

## **Steps that an inspector will take before exercising a power of entry and search of premises with consent**

### **An inspector will show identification and provide information to the occupier**

Before obtaining the consent of the occupier of a premises to enter and search the premises, an inspector will produce to the occupier of the premises their photo identification card issued by the commission.

The inspector will then inform the occupier of the premises:

- of the purpose of the search
- that the occupier may refuse to consent to:
  - the entry and search
  - the seizure of any document or computer found during the search
  - the taking of any copy or extract of a document found during the search, or
  - the making of any still or moving image, audio recording or audio-visual recording
- that the occupier may refuse to produce any document, and
- that any document or computer seized or taken during the search with the consent of the occupier may be used in evidence in a proceeding.

### **The inspector will obtain signed acknowledgement from the occupier**

Having been provided with the information listed above by an inspector, an occupier of a premises may consent to the entry and search of the premises by the inspector.

If consent is given by the occupier for the inspector to enter and search the premises, before entering the premises, the inspector will ask the occupier to sign an acknowledgement.

The acknowledgement will state:

- that the occupier has been informed of the matters listed above
- that the occupier has consented to the entry and search, and
- the date and time that the occupier consented.

The inspector will give a copy of the signed acknowledgement to the occupier before the inspector leaves the premises.

## **Powers of an inspector after entering a premises with consent**

With the consent of the occupier, an inspector may do any of the following:

- Seize any document or computer that the inspector finds on the premises, if the inspector believes on reasonable grounds that the document or computer is connected with the alleged contravention.
- Require any document on the premises to be produced for examination and, if the inspector believes on reasonable grounds that the document is connected with the alleged contravention:
  - make copies or take extracts from the document, or arrange for the making of copies or the taking of extracts, or
  - remove the document from the premises for so long as is reasonably necessary to make copies or take extracts from the document.
- Take photographs, or make audio or audio-visual recordings, if the inspector believes on reasonable grounds that it is necessary to do so for the purpose of establishing the alleged contravention.

An inspector may also:

- require a person to give information either verbally or in writing, or
- require a person to give reasonable assistance to the inspector.

Where an inspector requires a person to give information, or give reasonable assistance, the person must comply with the requirement unless the person has a reasonable excuse.

## **Seizure of a document or computer**

### **The inspector will obtain written consent before the seizure or taking of any document or computer**

If consent is given by the occupier for the inspector to seize or take any document or computer during a search of the premises, before seizing or taking a document or computer, the inspector will ask the occupier to sign an acknowledgement.

The acknowledgement will state:

- that the occupier has consented to the seizure or taking of the document or computer
- the date and time that the occupier consented.

The inspector will give a copy of the signed acknowledgement to the occupier before the inspector leaves the premises.

If an inspector retains a document seized from a person during the inspection of the premises, the inspector will give the person a copy of the document certified as correct by the inspector as soon as practicable.

### Return of any seized document or computer

An inspector will take reasonable steps to ensure that any document or computer seized from a person is returned to the person (or to the owner) not later than three months after its seizure if the inspector is satisfied that:

- The document or computer is no longer required for the purpose for which it was seized.
- It is not necessary to retain the document or computer to prevent the document or computer being used in connection with a possible contravention of an essential services requirement.
- The document or computer is not subject to a dispute as to ownership.

An inspector may apply to the Magistrates' Court for an order for an extension (not exceeding three months) of the period for which the inspector may retain the document or computer.

### Right to make application for return of seized document or computer

At any time following the seizure of a document or computer from a person by an inspector, the person, or another person who claims to be the owner of the document or computer, may make an application to the Magistrates' Court for the return of the document or the computer. Any person who makes such an application must serve a copy of the application on the commission.

## Offences, reasonable excuses and direction to comply

### Failing to comply with a requirement of an inspector

It is an offence for a person to fail to comply with a requirement of an inspector without reasonable excuse.

### Protection against self-incrimination

It is a reasonable excuse for a natural person to refuse or fail to **give information** or **provide assistance**, if doing so would tend to incriminate the person or expose the person to a penalty.

However, it is not a reasonable excuse for a natural person to refuse to **produce a document** on grounds that doing so would tend to incriminate the person or expose the person to a penalty.

### Legal professional privilege

Legal professional privilege may be a reasonable excuse not to give information, or produce a document.

Where a person claims privilege in relation to documents or electronic files, an inspector may secure (or ask the claimant to secure) the relevant documents or files in a sealed container clearly marked as containing documents or files subject to a claim of legal professional privilege.<sup>2</sup>

The commission will provide an opportunity for the person to substantiate the claim for legal professional privilege. The commission will then consider whether or not to accept the claim. If the commission accepts the claim the relevant documents or files will be promptly returned. If the commission does not accept the claim the person may withdraw the claim or make an application to a court seeking a declaration that the information is privileged.

### **Duties of confidence**

A person is not excused from complying with the requirements of an inspector on the grounds that to do so would amount to a breach of any duty of confidence, including in relation to commercially-sensitive documents or information.

### **Offence to hinder or obstruct an inspector**

It is an offence for a person, without reasonable excuse, to hinder or obstruct an inspector who is exercising a power of entry and search.

### **Offence to give false or misleading information or documents**

It is an offence for a person to give an inspector information required by the inspector that the person knows to be false or misleading in any material particular.

It is an offence for a person to produce a document to an inspector that the person is required to give to the inspector if the person:

- knows that the document is false or misleading in any material particular, and
- the person does not indicate the respect in which the document is false or misleading.

If a court finds a person guilty of an offence of providing false or misleading information or documents, the court may make a 'monetary benefits order'. This order may require the person to pay an amount to the commission that the court is satisfied represents the amount of any monetary benefits acquired by the person, or accrued or accruing to the person, as a result of the commission of the offence.

### **Direction to comply with requirement of inspector**

Where the commission is satisfied that a person has failed, without reasonable excuse, to comply with the requirement of an inspector, the commission may apply to a court for an order directing

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<sup>2</sup> Electronic files will be saved on a USB storage device to be placed in the sealed container.

the person to comply with the requirement. The commission will not make such an application if the person has been charged with an offence of failing to comply with a requirement of an inspector.

## **Use and disclosure of information or documents obtained under power to enter and search premises with consent**

The use and disclosure of information and documents obtained by the commission is subject to statutory protections and restrictions.

### **Protection for confidential information**

The commission does not disclose confidential or commercially-sensitive information obtained during an investigation unless it is for a permitted purpose, such as use or disclosure that is made in the exercise of a power of the performance of a function in connection with the Essential Services Commission Act or relevant legislation.

### **Use in proceedings**

Any information, document or evidence obtained by an inspector exercising powers to enter and search a premises under the Essential Services Commission Act may be used in a criminal or civil proceeding brought by the commission against a person or body corporate.

### **Disclosure under information-sharing arrangements**

The commission has information-sharing arrangements with 'relevant agencies'. Relevant agencies include those responsible for fair trading, essential services regulation, and law enforcement.

Under these arrangements, the commission can share information that it obtains during an investigation with a relevant agency, if sharing the information is reasonably necessary to assist in the exercise of functions under the Act or relevant legislation, or the functions of the relevant agency.

### **Referral of a matter about fair trading or a matter that affects consumers**

The commission may refer any matter with respect to fair trading, or that affects the interests of consumers, to a fair trading agency or law enforcement agency. The power to refer a matter may be exercised, whether or not the commission has an information sharing arrangement with that agency.

### **Protection of personal information**

Where information, documents or evidence obtained by an inspector contains personal or sensitive information about individuals, the commission protects that information in accordance with the requirements of the *Privacy and Data Protection Act 2014*.

## Complaints

A person may complain to the commission about the exercise of a power by an inspector in relation to the entry and search of a premises using the commission's [external stakeholder feedback webform](#). The commission will investigate the complaint and provide a written report to the complainant on the results of the investigation.

*This guideline has been approved for publication by the commission pursuant to section 13 of the Essential Services Commission Act 2001.*

*The commission has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information. This guideline is for general guidance only and does not constitute legal or other professional advice and should not be relied on as a statement of law. You should obtain professional advice if you have a specific concern.*

## Revisions to this guideline

Version no.	Date effective	Nature of amendment
1	March 2024	First published