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Guide to managing ‘visitations’ by the Environment Agency and Health & Safety Executive.

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Introduction

Advising clients

Active advice

In regulatory cases solicitors are frequently consulted well after the initial investigation has commenced and all too often after a summons has been issued and served. There is often opportunity to 'disable' the prosecution case before it gets off the ground. Once prosecuting authorities issue a summons someone will usually have to justify a decision to discontinue proceedings, particularly as a potential defendant's costs order will become a 'live' issue. Usually this involves the Defence lawyer persuading the prosecution that the prosecution is doomed to failure. Persuasion is not always successful after a summons has been issued. Before a summons is issued there tends to be considerably more scope for diverting the authorities from the path of prosecution.

For these reasons clients need to be 'trained' to involve their legal advisors at the earliest possible opportunity. Active advice involves preparing the client to handle situations involving the enforcement authorities and having an action plan that can be actioned at the first hit of trouble. Seminars, articles, newsletters and workshops targeted at clients can prove a valuable means of conveying the message.

Use of Experts

Health & safety and Environmental cases are often 'technical' in nature. An expert should also be involved early on in the case and for the reasons mentioned above where possible prior to the issue of any enforcement action. It is important to select an expert with the appropriate qualifications and experience and to ensure that the expert has had some experience of giving evidence in a Court or other tribunal or hearing.

Reactive advice

Reactive advice involves advising the client once an investigation is under way. It is important that the powers of investigating officers and any limitations placed on such powers are understood. It is at this stage when a solicitor can be extremely effective in controlling the investigation process to the advantage of the client by ensuring the investigating officers do not exceed their powers and by ensuring that the employees give a 'balanced' account – not just what the investigating officer wants to hear.

Advising the client under investigation:

Clients usually have no action plan for dealing with investigations by Enforcement Authorities.

The best advice is to seek professional advice as soon as there is any potential for or any 'inkling' of an investigation, i.e.: -

- ❑ A reportable accident or event.
- ❑ A pollution event
- ❑ A complaint from a member of the public
- ❑ Initial contact from the Enforcement Authorities (usually seeking an interview)

Investigations often involve the following: -

- ❑ The Health and Safety Inspector will almost certainly target employees for interview. Employees should be notified of their right to have a solicitor present. subject to any conflict of interest considerations that solicitor could be the company's solicitor.
- ❑ Investigating officers are not always fair-minded and may only request information that tends to provide evidence for enforcement action.
- ❑ If a PACE interview is required consideration needs to be given as to whether it is in the client's interests to attend a PACE interview or to provide an explanation by other means – such as in written statement form.
- ❑ Investigating officers will request statutory and other records. Advice needs to be given as to what records will need to be produced to comply.
- ❑ Often the client will have a clouded perception of events. It is vital to ascertain the facts and analyse the situation at the earliest possible opportunity.
- ❑ If the investigating officer has not required the premises or anything on it to be left undisturbed some 'housekeeping' may be possible, such as scheduled works or maintenance, clearing up spillages or removing hazards or other 'infringements' that the investigating officer may not have spotted.

The Health and Safety Executive and Environment Agency have certain statutory powers to assist them in evidence gathering. These powers tend to be extremely comprehensive giving their enforcement officers the right of entry and investigation for the purposes of exercising their investigatory powers without the need to obtain a warrant. Unlike a warrant the powers are not tied to a particular premises or time limited as a search warrant might be. However these powers are subject to conditions and close attention needs to be paid to the wording of each power in turn.

The statute giving power to enter and investigate will lay down conditions, which have to be satisfied before the officer can exercise his power. If the conditions are not met then the entry will be unlawful and the investigating officer will not only be a trespasser but also not acting in the execution of his duty.

Conditions may include the following: -

- ❑ The officer must have the appropriate authority – he may not necessarily have all the powers vested in him. It is therefore always important to check his authority.

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- The entry onto premises must be for specified purposes – i.e. the objectives of the authorisation
- Notice may be required to be given to the occupier of the premises
- Entry may only be permitted at certain times -i.e. at 'reasonable' times
- The officer must produce his authority before exercising his powers

Environment Agency:

Powers of entry are given under section 108 of the Environment Act 1995. This section regulates the rights of entry for investigating officers to investigate under the Environment Protection Act 1990, Parts I and II.

A person may be authorised in writing by the Environment Agency to exercise, in accordance with the terms of the authorisation, any of the powers specified in section 108 (4).

The terms of the authorisation are important, as they will affect the validity of the exercise of the powers. The investigating officer will need to be authorised in writing and when acting will need to act in accordance with his authorisation. Failing which, the enforcement officer will be exceeding his powers.

Even if authorised the exercise of the powers must not only be within the ambit of section 108 (4) but also for one of the following three purposes: -

- Determining whether pollution control law is being or has been complied with
- Exercising or performing one of the pollution control functions of the authority
- Determining whether and, if so, how such a function should be performed.

The investigating officer is required to produce evidence of his authority before exercising a statutory power under S 108 and to produce evidence of his warrant if acting under one.

Section	Power	Commentary
108 (4)(a)	Entry to premises ('Premises' include any land, vehicle, vessel or mobile plant)	<p>Entry must be at any reasonable time or any time in the event of emergency. The Officer must have reason to believe it is necessary to enter for the purpose of compliance monitoring and investigation of possible offences as well as supervision of licensed facilities etc.</p> <p>There must be reasonable grounds to on which the belief is based, such that a reasonable person could hold that belief.</p> <p>Forcible entry is only permissible in cases of emergency – i.e. there is an immediate risk of serious pollution or serious harm or circumstances exist that are likely to endanger life or health and immediate access to the premises is necessary.</p>

		<p>Except in the case of emergency entry onto residential premises or onto any premises with heavy equipment can only be effected after giving 7 days written notice to the occupier and then only with the occupier's consent or under a warrant.</p> <p>In any other case – i.e. entry has been refused or it is likely to be refused, entry without consent can only be effected under a warrant.</p> <p>It is usually reasonable to want to enter business premises during normal business hours or when the business is 'open'.</p> <p>It would probably not be reasonable to enter domestic premises after dark, in the late evening or in the early hours of the morning.</p>
108 (4)(b)	To take with him any other person duly authorised, or a constable if he has reasonable cause to apprehend any serious obstruction in the execution of his duty.	
108(4)(c)	Examine and investigate.	
108 (4)(d)	To require premises or anything in them to be left undisturbed.	This can be requested verbally or in writing for so long as is reasonably necessary for the purposes of any examination or investigation.
108(4)(e)	Take measurements, photographs and make recordings	As necessary for the purposes of any examination or investigation under S 108 (4)(g).
108(4)(f)	Take samples of articles or substances found on premises and of air land and water in on or in the vicinity	
108 (4)(g)	Subject any article or substance found to any process or test (but not so as to damage or destroy it unless that is necessary)	<p>The article or substance can be taken possession of and detained for so long as is necessary to examine it, prevent it from being tampered with or to ensure it is available for use in evidence in any proceedings for an offence under pollution control enactments. (S 108 (4) (h))</p> <p>Any person present on and having responsibilities in relation to the premises can require that any process or test be done in their presence.</p> <p>Before exercising the power under S. 108 (4) (g) there is a duty to consult with the person having duties on the premises or such other persons as seem appropriate for the purpose of ascertaining any possible hazards involved in taking the proposed action.</p>
S 108(4)(j)	To require information	Any person whom the enforcement officer has reasonable cause to believe to be able to give any information relevant

		<p>to any examination or investigation under S 108 (4)(c) is required to answer such questions as the enforcement officer thinks fit to ask and to sign a declaration of the truth of such answers.</p> <p>Failure to comply with the request for information without reasonable excuse is an offence - £5000.</p> <p>The interviewee is protected against self-incrimination – no answer given will be admissible in evidence against the interviewee in any proceedings. However the protection against self-incrimination extends only to the individual who answers the question – i.e. in the case of questions asked of a director or other employee, not the company/ employer.</p> <p>The interviewee can nominate a person to be present at the interview.</p>
S 108(4)(k)	Production of Records	<p>The enforcement officer can require the production of any such records required to be kept under pollution control enactments or which is necessary for him to see for the purpose of an examination or investigation under S 108 (4) (c) and to inspect or take copies of such records.</p> <p>‘Records’ includes computer records and any other records kept otherwise than in a document.</p> <p>Case law suggests that ‘records’ only extends to primary sources of information and so may not cover reports, files of correspondence, memoranda or consignment notes, which are secondary, rather than primary sources.</p> <p>Documents covered by legal professional privilege cannot be required to be disclosed. This covers all <u>communications</u> between clients and legal professional advisors.</p> <p>There is no power to remove documents. If there are no copying facilities on site this could be a problem. It would also be a problem if the S 108(4)(l) power was not conferred on the enforcement officer.</p>
S 108(4)(l)	To require facilities and assistance as are necessary to enable the enforcement officer to exercise his powers	Use of photocopier machine! Use of equipment, office or changing facilities.

S 109 EA 1995 - There is a general power to seize any article or substance found on the premises if there is reasonable cause to believe that it is a cause of imminent danger or serious pollution or the environment or serious harm to human health. Such article or substance may be rendered harmless (whether by destruction or

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otherwise). Care must be taken to ensure whether or not the investigating officer is using his powers under S 108 (4) (g) and (h) or under S109 as the procedural requirements are different – e.g. S109 (2) requires a written report of the circumstances of seizure to be prepared and given to the occupier of the premises and to the owner of the article or substance.

It is an offence to intentionally obstruct an authorised investigating officer in the performance of his powers or duties or to fail, without reasonable excuse, to comply with any requirement of S 108.

Other environmental regulations, authorisations and licences will require the keeping of records and the production of such records for inspection and examination.

E.g.: The Duty of Care Regulations requires the making and retention of documents for a period of 2 years. Such documents must be furnished to the authorities on demand.

Powers to obtain Information

S 19 EPA 1990

S. 71 EPA 1990.

The above sections enable the enforcement authorities (i.e. Local Enforcing Authority and Environment Agency) to serve notice on any person requiring that person to provide such information as the authority reasonably considers that it needs in such form and within such period following service of the notice as specified in the notice.

Failure to comply is an offence as is making a statement, which is false or misleading in a material particular. An offence attracts a £5,000 maximum fine. (On indictment up to 2 years imprisonment and/ or unlimited fine).

R –v- Hertfordshire County Council ex parte Green Environmental Industries Limited and John Moynihan (1998).

A notice can be served to obtain answers, which may incriminate the recipient of the notice.

Self-incrimination affords no good reason for declining to reply to a reasonable requirement for information made in a notice although it is open to the recipient of a notice, having replied to it, to apply under S 78 PACE to have the answers excluded.

Brown –v- Stott (2001) (a case involving compulsory statutory powers of the police under S 172 (2) (a) RTA 1988 to require a person to confirm whether or not they were driving a vehicle) held – the implied right against self-incrimination protected by

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ECHR, Article 6, is not an absolute right and answers under compulsion under statutory powers are not thereby automatically inadmissible in a subsequent trial. The right may be infringed to a limited extent in pursuance of a legitimate aim and where the infringement is proportionate.

Do sections 19 and 71 of the EPA 1990 strike a fair balance between the general interests of the community and the rights of the individual? It seems odd that information required under S 108 affords protection against self-incrimination but not information requested under S 71 EPA!

Health & Safety at Work etc Act 1974

The powers of a Health and Safety Inspector are conferred by Section 19 and set out in Section 20 HSWA. Under S 19 the powers conferred on Inspectors must be in writing and must state which of the powers under S 20 are to be conferred. The Inspector, if required, when exercising or seeking to exercise his powers must produce his instrument of appointment or a duly authenticated copy thereof.

The powers must not only be within the ambit of Section 20 (2) but must also be exercised for the purpose of carrying into effect any of the relevant statutory provisions (i.e. Part I HSWA and all health & safety regulations) within the field of responsibility of the Health and Safety Executive.

The powers are broadly similar to those under S 108 Environment Act 1995 but there are some differences, i.e. there is no express right to use force to effect entry and no requirement to obtain a warrant in the event that entry is refused.

S 20 (2) HSWA 1974 Inspectors Powers of Investigation

Section	Power	Commentary
S 20(2) (a)	To enter premises (Premises includes any place, vehicle, vessel, aircraft, hovercraft, any installation on land, any offshore installation, any tent or moveable structure).	An Inspector may enter premises at any reasonable time (or, in a situation which in his opinion is or may be dangerous at any time). TS 20(2) (a) does not expressly confer the power to use force to enter premises – compare S. 108(4) (a) EA 1995 which authorises force in an emergency) It is usually reasonable to want to enter business premises during normal business hours or when the business is 'open'.
S 20(2) (b)	To take a constable	If the Inspector has reasonable cause to apprehend any serious obstruction in the exercise of his duty.
S 20(2) (c)	Any other person duly authorised by HSE and any equipment or materials required for any purpose.	
S 20(2) (d)	To make such examination and investigation as is necessary	
S 20(2) (e)	To require premises or anything	E.g. for the purposes of examining and

	therein to be left undisturbed for so long as is reasonably necessary	investigating under S 20 (2) (d).
S 20(2) (f)	To take measurements, photographs and make such recordings as he considers necessary.	E.g. for the purposes of examining and investigating under S 20 (2) (d).
S 20(2) (g)	To take samples of any articles or substances found in any premises and of the atmosphere in or in the vicinity of any such premises	
S 20 (2) (h)	To require any article or substance which appears to have caused or to be likely to cause danger to health or safety to be dismantled or subjected to any process or test	But not so as to damage it unless it is necessary to do so in all the circumstances The article or substance can be taken possession of and detained for so long as is necessary to examine it, prevent it from being tampered with or to ensure it is available for use in evidence in any proceedings for an offence under pollution control enactments.
S 20 (2) (j)	To require any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation under S 20 (2) (d) to answer such questions as the Inspector thinks fit to ask.	The interviewee can be required to sign a declaration of the truth of such answers. Failure to comply with the request for information is an offence - £5000 The interviewee is protected against self-incrimination – no answer given will be admissible in evidence against the interviewee or the spouse of such interviewee in any proceedings. However the protection against self-incrimination extends only to the individual who answers the question – i.e. in the case of questions asked of a director or other employee, not the company/ employer. The interviewee can nominate a person to be present at the interview.
S 20 (2) (k)	To require the production of, inspect and take copies of or of any entry in:- (i) Any books or documents which by virtue of any health & safety legislation are required to be kept, and (ii) any other books or documents which it is necessary for the Inspector to see for the purpose of any examination or investigation under S 20 (2) (d)	Documents covered by legal professional privilege cannot be required to be disclosed. Note the gloss contained in the Cantabrica case (post) authorising the removal of original records (as opposed to merely taking away copies)
S 20 (2) (l)	To require such facilities and assistance as are necessary to enable the Inspector to exercise his powers	
S 20 (2) (m)	Any other power which is necessary	i.e. for the purpose of carrying into effect any of the relevant statutory provisions (i.e. Part I HSWA and all health & safety regulations) within

		the field of responsibility of the Health and Safety Executive
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It is an offence to contravene any requirement imposed by an inspector under S. 20 or to prevent or attempt to prevent any other person from answering any question put to such person by virtue of S 20(2).

**CANTABRICA COACH HOLDINGS LTD v VEHICLE INSPECTORATE (2001)
(Tachograph Case)**

HELD: (1) The operator was required by s.99 "to produce" records and permit them to be inspected. That requirement included by necessary implication: (a) the handing over and retention for inspection of those records; and (b) that the taking away of the records for effective and thorough examination in the offices of the Vehicle Inspectorate was within the ambit of the power of inspection. (2) It was a matter for the discretion of the authorised officer, depending on the circumstances, to decide whether to go to the offices of the transport operator to require production of the records which he might then take away or to give ten days' notice requiring the records to be produced at the offices of the traffic commissioner.