

CPD

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Q&A



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Dealing with Regulators:

Matters to Consider for a Strategic Response

Tuesday 25 March 2025

TLANZ | CPD



Presenters



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What we will Cover

- Regulators and their investigatory powers
- Key issues to consider following contact from a regulator:
 - Risk assessment and strategy
 - Voluntary vs compulsory request
 - Protection of privilege
 - Confidentiality and privacy
- Practical tips
- Consequences



Regulators

- There are a number of regulators with wide remits to investigate potential breaches of legislation, including:
 - Commerce Commission
 - Commerce Act 1986
 - Fair Trading Act 1986
 - Credit Contract and Consumer Finance Act 2003
 - Specific sector legislation, including grocery, electricity, telco, dairy
 - Financial Markets Authority
 - Financial Markets Conduct Act 2013
 - Serious Fraud Office
 - Department of Internal Affairs
 - Anti-Money Laundering and Countering Financing of Terrorism Act 2009
 - Unsolicited Electronic Messages Act 2007



Regulator Investigatory Powers

- Dawn raid
- Search warrant
- Interview
- Request for information
- Request for documents



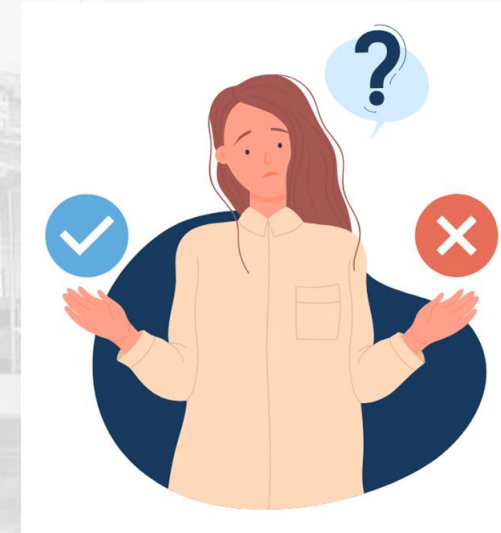
Key Issues – Risk Assessment and Strategy

- Important to consider the potential exposure for the client under the relevant legislation
- Defendant or witness?
- Criminal vs civil exposure?
- Company/individual or both?
- Conflicts
- Seek specialist advice early



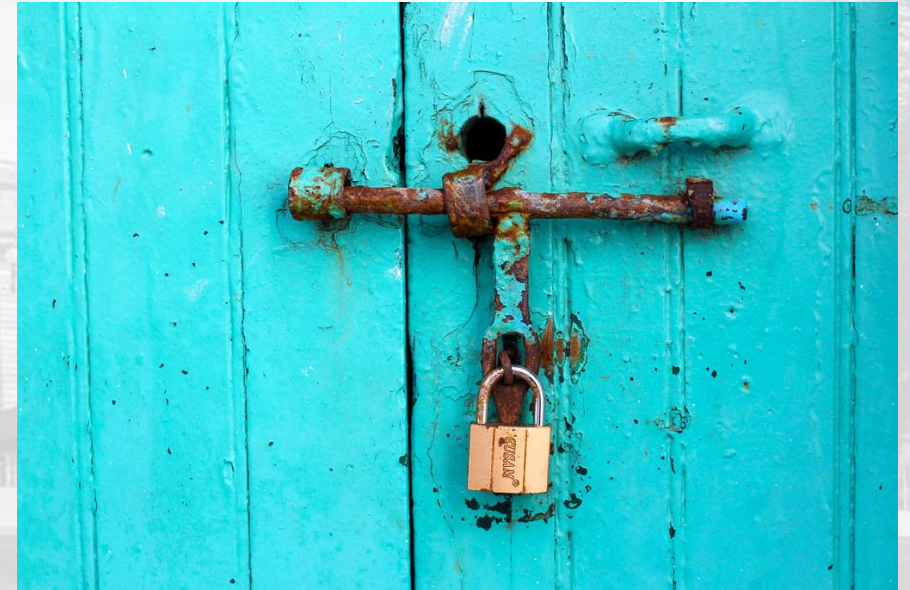
Key Issues – Voluntary vs Compulsory

- Initial request may be on a voluntary basis
- Pros with responding to a voluntary request:
 - Seen to be co-operative and build relationship with regulator
 - More control
 - No sanction or offence for failure to comply
- Reasons for requiring a compulsory request:
 - Privacy concerns
 - Protection around the use of information
 - Confidentiality



Key Issues – Privilege



- A regulator is not entitled to privileged information and standard privilege rules apply
- Categories of privilege:
 - Legal professional privilege/legal advice privilege
 - Litigation privilege
 - Without prejudice privilege
- Care should be taken to protect privilege:
 - Review all material to be provided for privilege
 - Agree a protocol for protection of privileged information if regulator is searching documents
 - Redact documents (eg board minutes) where required





Key Issues – Confidentiality and Privacy

- Confidentiality is not a reason to withhold information/documents
- Regulators' information-gathering powers override confidentiality and privacy obligations
- This is often a key concern for clients and there are no guarantees the regulator will protect the confidentiality of the information:
 - Identify confidential information
 - Official Information Act 1982
 - Confidentiality orders

Practical Tips – Request for Information or Documents



- **DO:** 
 - Stop all routine document destruction
 - Consider where the documents are located
 - Consider whether the client can comply within the timeframe
 - Consider whether the client can compile the information or is there a need to obtain specialist forensic support
 - Seek clarification if necessary
 - Answer all questions
- **DO NOT:** 
 - Provide information or documents that go beyond the questions asked
 - Mislead the regulator
 - Destroy or hide relevant documents

Practical Tips – Interview

- **DO:** 
 - Make sure the interviewee has legal representation
 - Consider potential conflicts of interest
 - Prepare for the interview
 - Answer the questions (unless it is a voluntary interview)
 - Request a break or consult with your lawyer
- **DO NOT:** 
 - Speculate or guess
 - Volunteer information outside the questions asked
 - Mislead the regulator



Practical Tips – Search Warrant or Dawn Raid

- Regulators can enter and search, use reasonable force, search for and remove documents, copy documents, clone computer hard drives or servers
- Regulators cannot interview staff
- **DO:** 
 - Call a lawyer and ask the regulator to wait for the lawyer to arrive
 - Request a copy of the warrant
 - Nominate a person to co-ordinate the response and deal with the regulator
 - Assert privilege over documents where relevant
- **DO NOT:** 
 - Resist, obstruct or delay the regulator
 - Answer questions about the issues under investigation



Consequences

- Criminal offence to fail to respond or mislead the regulator
- Reputation
- Enforcement action for breaches of the relevant legislation can have serious consequences – criminal and civil penalties
- Co-operation as a mitigating factor?
- Important to seek specialist advice early to help shape the response and the dealings with the regulator

Further queries?



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A group of people in business attire are shown in profile, clapping their hands. They are in a dimly lit room, possibly a conference or seminar. The focus is on the clapping hands and the expressions of the people in the foreground.

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