

Dawn raids – how do I survive?

With Hong Kong's competition laws now in force, what would your staff do if inspectors from the Hong Kong Competition Commission showed up at your business with a warrant and started removing key records and IT equipment or sealing off your premises?

Firstly don't panic this brief overview will assist you in the event of an inspection by the Commission at your premises (also known as a 'dawn raid'). Dawn raids get their name as inspections can occur early in the business day when a company may be least prepared and are usually unannounced.

Being well prepared is key to minimise possible disruptions to your business. Under the new law, the Commission has powers to seek evidence from persons who can assist or may have evidence of a contravention of a competition rule. This includes seeking evidence from current or former employees, competitors, customers, distributors, suppliers and trade association representatives.

Four key rules

- Know who to contact and which information is subject to LPP
- Act quickly, check validity and scope of inspectors documents
- Accompany inspectors at all times
- Take a copy of all documents reviewed and note questions asked

What should I do now?

- Consider whether your business is at risk of contravening the competition law, see our checklist here
- Train staff on competition rules most relevant to your business, including compliance, dawn raids and defences
- Adopt a competition compliance policy that includes a tailored dawn raid manual

The dawn raid has started, what should I do?

On arrival the secretary will usually greet the inspectors, they need to:

Ask for all inspectors' ID and authorising documents. Inspectors must provide these if you ask, including;

- ID cards
- section 47 authorisation
- section 48 warrant

Copies should be made.

Urgently call

- the legal adviser
- senior manager

and ask how quickly they can arrive.

Will the inspectors wait for the legal adviser and/or senior manager to arrive?

Inspectors at their sole discretion can wait a reasonable time for external advisers to arrive but only if you have requested your legal advisers to be present during the search and there is no in-house lawyer already on the premises. Issues such as privilege, relevancy and liability will often arise.

- Seat the inspectors in an empty waiting room and make sure someone stays with them at all times
- Keep conversation purely administrative at this stage and keep them updated on legal adviser's and senior manager's arrival times

Inspectors do not have to wait and can immediately commence its search particularly if legal advisers cannot commit to a timely arrival or waiting for them will adversely impact the search.

- Do not obstruct the inspectors but make sure someone stays with them at all times on the premises
- Ask if the inspectors can delay the substantive questioning of any individuals
- Ask what category of documents they are looking for
- Open up a bridge call with legal adviser and senior manager if possible until they arrive and identify documents not subject to legal professional privilege (LPP) that the inspectors can start with

What about other staff?

- Validity and scope of inspectors documents should be copied and checked with legal adviser's help
- A shadower should be designated to each inspector to 'shadow' them at all times. The 'shadower' should take notes of the inspector's actions and ask for a copy of all documents taken by the inspector
- IT department to be on standby if their co-operation is needed by the inspectors, including to assist block emails temporarily and provide 'administration rights'
- All staff should be informed of search as set out in your dawn raid manual, including the process for co-operating with the inspectors and not to communicate details of the search outside of the business

During the dawn raid, what can the inspectors do?

Inspectors' powers are broad. They can, amongst other things:

- search for relevant documents and other evidence including desks, bookshelves and cabinets, and copy, take extracts or take away anything which might be or contain relevant evidence (including electronic equipment and devices such as hard drives, servers, USB keys and mobile phones)
- question and request any person present at the premises to produce relevant documents
- use reasonable force to gain entry/access to evidence and remove any obstructions
- take such action and steps necessary to preserve any relevant evidence, prevent tampering or tipping off competitors (including, instructing employees to move away from the desk, stopping external communications, sealing offices or filing cabinets)

During the dawn raid, how should I generally act?

Do

- Be polite to the inspectors
- Make sure someone shadows each inspector at all times and takes notes
- Make sure that the inspectors are properly authorised and that you understand the scope of the investigations or are informed by the ‘shadower’, legal adviser or senior manager (as applicable)
- Respond as quickly as possible to requests made by the inspectors
- Make sure your answers are short, factual and accurate
- If any requests are vague, unclear or complex ask the inspectors to send you a written request. If they insist on an immediate reply alert your legal adviser and/or senior manager to assist, give a short answer but reserve the right to supplement the answer later
- Allow inspectors to inspect any part of the premises specified in the warrants (including electronic equipment and devices such as hard drives, servers, USB keys and mobile phones)
- Help the inspectors access any encrypted, password protected or ‘administration rights’ documents with the assistance of your IT manager
- Comply with your company’s dawn raid response manual and any instructions from your legal adviser and senior manager

Don’t

- Be hostile to inspectors
- Leave the inspectors unsupervised whilst on the premises
- Obstruct the officers, otherwise you may be liable for penalties including a fine and jail
- Provide LPP or information to the inspectors that is or you suspect is subject to LPP without legal advice
- Destroy or falsify, dispose, conceal or permit any of these actions (intentionally or recklessly), otherwise you may be liable for penalties including a fine and jail
- Volunteer any information not requested by the inspectors. If they do not know an answer tell the inspector this but do not guess any answer
- Answer any self-incriminating questions from the inspector without the immediate assistance and presence of legal advice
- Provide false or misleading documents or information (intentionally or recklessly), otherwise you may be liable for penalties including a fine and jail. (You may also be asked to verify the truth of the information provided by statutory declaration after the search)
- Enter or tamper with any area sealed by an inspector during the search
- Tip-off competitors or communicate information about the search outside of the business

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