Subpoenas: strict rules apply

A subpoena is, in effect, a court order that compels the party to whom it is addressed to produce documents or give evidence in relation to a matter before the court.[1] Failure to do so leaves a person open to being dealt with by the court for contempt.[2]

The policy behind the court having power to require people who are not parties to the matter to comply with subpoenas is to ensure that the litigants are able to bring before the court all relevant documents or people with knowledge of relevant facts to assist the court in the "proper administration of justice between [the] parties".[3]

This article examines the procedures for issuing, compliance with and objecting to subpoenas for the production of documents.

The rules relating to subpoenas are to be found in O.17 of the *Magistrate's Court Civil Procedure Rules* 1999, O.42 of the *Supreme Court (General Civil Procedure) Rules* 1996 and O.27 of the *Federal Court Rules* 1979. While only the Supreme Court procedure is considered in this article, most of the principles apply to subpoenas generally.

When issuing the subpoena it is important to ensure that the document correctly names the person to be subpoenaed[4] and directs that person to attend a specific court[5] on a specific day and time.

Where the subpoena requires the production of documents, it is vital, in order to avoid an application to set aside the subpoena, that the documents required are described with sufficient particularity as to enable the recipient to identify the documents to be produced.

The courts have been reluctant to impose on a stranger to the litigation the same burdens with regard to discovery as with a party to the litigation. In discovery, the party is required to form a judgment as to the relevance of all documents which are or have been in the possession of that party and to disclose that document, regardless of whether it advances or hinders the progress of the case of that litigant.[6]

Accordingly, you will be at risk of having the subpoena set aside if you have used the term "in relation to". The use of such a term might cause the recipient to "go to the trouble and perhaps the expense of ransacking his records in an endeavour to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated on issues of which he is presumably ignorant."[7]

The recipient is, however, required to read the subpoena "sensibly and with reference to circumstances as known to him".[8] Unlike discovery, a person to whom a subpoena is directed is not required to seek out documents not in their possession and power and produce them to the court.[9]

In most cases a court would have to look at the specific circumstances of a matter to determine whether the required test of specification has been satisfied "by taking into account the facts and circumstances within the knowledge of the party to whom the subpoena is addressed".[10]

It will always be preferable in drafting the subpoena that as much care as possible is taken to identify the documents to be produced. If possible, identify documents by title, date, author and subject matter. If that is not possible, then the class or type of documents sought ought to be narrowed as far as possible.

Resisting a subpoena

The most obvious basis for resisting compliance with the subpoena is that it is oppressive in that it fails to meet the specification test outlined above.

The subpoena may also be set aside if compliance would subject the recipient to unreasonable expense or require an inordinate amount of time to be used in collecting the documents to be produced.

The court must also be satisfied that the documents sought are sufficiently relevant in that their production will add to the evidence to be produced before the court.[11] Obviously a subpoena must not be used for purposes collateral to or unconnected with the specific proceeding in which the subpoena is issued.[12] Similarly, a court will not permit a subpoena to stand if the process is being used as a fishing expedition.[13]

Objection may also be taken to the production of a document on the basis of privilege. The privilege may be legal professional privilege where the document has come into existence for the dominant purpose of obtaining legal advice[14] or where the production might tend to incriminate the subpoenaed party.

Public interest immunity is most usually claimed by government departments or the police, although in each

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A solicitor issuing a subpoena can be in serious trouble if he or she does not ensure that the procedures laid down by the court are followed exactly. By Mark Yorston

case it will be necessary for the court to decide "which aspect of the public interest predominates, or in other words, whether the public interest which requires that the documents should not be produced outweighs the public interest that a court of justice in performing its duties should not be denied access to relevant evidence".[15] The general rule is that the court will not order the production of a document which may be relevant and otherwise admissible, if to do so would injure public interest.

A party may be reluctant to produce documents which are commercially sensitive and parties often object to producing documents which contain information of a confidential nature. The courts do not recognise commercial confidentiality as a ground for non-disclosure, but may impose conditions on the production of confidential documents which may include undertakings from all parties to keep confidential the contents of any document produced.

In such circumstances, practitioners will need to give careful consideration to the giving of such an undertaking, bearing in mind that a breach of the undertaking, whether inadvertent or not, may have extremely serious consequences. This may result in the court taking action against the practitioner. Also, the practitioner may face an action by the aggrieved party for recovery of any financial losses that the party suffers as a result of the breach.

Production of documents

Production of documents under a subpoena requires production to the court rather than to any party to the litigation or the party who issued the subpoena. The court takes custody of the documents on a temporary basis to enable the documents to be introduced as evidence in a hearing.

The party producing the documents is entitled to object to the documents being handed to the parties for inspection. It is then for the court to hear the objection and decide whether the documents may be inspected by the party issuing the subpoena. It must be remembered that the party issuing the subpoena has no automatic right to inspect the documents produced[16] nor to receive copies of those documents without the court's leave.

It is vital that practitioners and their staff remember that it is a contempt of court for a practitioner to intercept documents which are to be produced before they have in fact been given to the court. Even in a situation where the practitioner is trying to assist the subpoenaed party by arranging to collect the documents and deliver them to the court on his or her behalf, that "assistance" may result in the court referring the matter to the Prothonotary with a recommendation that proceedings for contempt of court be commenced against the practitioner. While a court would need to be satisfied beyond reasonable doubt that a contempt had occurred, once it is satisfied it will impose its own punishment on the practitioner.

In addition, such behaviour may constitute misconduct or unsatisfactory conduct under s137 of the *Legal Practice Act* 1996. This may result in the imposition of a fine or a range of other penalties, and in the case of a finding of misconduct, may also include the cancellation of a practitioner's practising certificate (ss159–160).

While it cannot be over emphasised that practitioners must ensure the correct procedures are followed, it should be noted that there is nothing impermissible in arranging (in appropriate circumstances), if the subpoenaed party is willing, for that party to give the practitioner a copy of any documents that are being produced under the subpoena. If this course is to be adopted, great care must be taken to ensure that no misunderstanding of the procedure to be followed by the subpoenaed party arises, especially as in many cases the subpoenaed party is not experienced in the litigation process.

It should also be noted that it would be improper to adopt such a procedure if there is any possibility that the documents to be produced might be the subject of a claim for privilege or confidentiality.

It has been suggested that where a corporation is producing the document[17] care should be taken that, if an inspection of a copy document is to take place before the production of documents to the court, the officer of the corporation permitting inspection of that copy is properly authorised by the corporation to do so.

To alleviate the need for a subpoenaed person to physically attend the court, r42.06 allows for production of documents to the Prothonotary by hand or by post so that the Prothonotary receives it no later than two days before the first day on which production is required by the subpoena. This rule does not apply if the subpoena was issued for production and to give evidence under r42.02(2). In this case, production of documents and items may be made two days before the first date on which the witness is required to attend; however, the witness is still required to attend court to give evidence.

Production and inspection before hearing

In the event that production of the document to the court and inspection by the parties is required at a time earlier in the proceeding than at the hearing, r42.10 enables the return of the subpoena to the Prothonotary on a date specified in the subpoena. This procedure is now also available in the County Court.[18]

The procedure is limited to circumstances where the documents are required for evidence at the trial. It is not available where the matter has not been fixed for trial and the party is seeking discovery from a non-party. In those circumstances, the appropriate procedure is to make an application to the court under r32.07.[19]

Under r42.10(8) and (9) the subpoenaed party or a party to the litigation can object either to the production of the document or to any party inspecting the document produced. On receipt of the objection the matter will be referred to a master or judge for determination of the objection.

It should be noted that ordinarily an inspection and copying of documents will take place at the court. If, however, a large number of documents are required to be copied an inspecting party may make an application to the Prothonotary to release the documents with permission to photocopy. The Prothonotary may, in his discretion,

permit the documents to be removed from the court providing the solicitor undertakes in writing to:

(a) "keep the documents in his personal custody or in the custody of a barrister briefed by the solicitor in the proceeding until the document is returned to the Prothonotary"; and

(b) "return the documents to the Prothonotary at the time appointed by him".[20]

On inspection of the subpoenaed material, parties are not permitted to interfere with or alter the presentation of the documents nor use those documents for any purpose other than for the legitimate forensic one connected with the proceedings.[21]

Practitioners will recognise that, as with all undertakings given by them, a breach of an undertaking will constitute misconduct under s137 of the *Legal Practice Act* as mentioned above.

Other aspects to consider when serving a subpoena

Under r42.04 service of the subpoena is required to be effected personally where the subpoenaed party is a natural person or, in the case of a corporation, in accordance with r6.04(a) unless provision is made under another Act for a different mode of service on the corporation.

The subpoena must allow the recipient a reasonable time to comply and at the time of service, the recipient must be supplied with conduct money under r42.05. A failure to do so excuses the subpoenaed party from complying with the subpoena.

Conduct money is detailed in r42.01 to mean "a sum of money or its equivalent sufficient to meet the reasonable expenses of a person named in complying with a subpoena in relation to the day on which he is required by the subpoena to attend". "Reasonable expenses" will include travelling expenses, meal allowance and, in appropriate circumstances, accommodation expenses.[22]

Under r42.08 if the subpoenaed person is not a party to the proceeding then the court may, in the absence of an agreement between the parties, order the issuing party to pay the expenses incurred in complying with the subpoena.

The court may also allow the costs of obtaining advice on compliance, especially in situations where the confidential nature of the documents or the applicability of legal professional privilege may arise.[23]

A party may be ordered to pay these costs, and the costs of preparing a bill in taxable form on a solicitor/client basis and, in certain cases, on an indemnity basis.[24] The courts have taken the view that there is an entitlement to compensate a person whose liberty has been interfered with by being compelled to attend to a party's litigation.

Where service is effected on a company, the courts have allowed the hourly rate of pay of the employee involved in searching out and collating the documents but also the added costs of employment.[25] Solicitors engaged in searching for documents in their files are entitled to be paid at their normal charge-out rates.

Conclusion

If used appropriately, a subpoena to produce documents can be one of the most useful tools available to a practitioner to advance his or her client's cause. A poorly detailed subpoena may, however, achieve precisely the opposite effect.

The subpoena is an integral part of the process of administration of justice by our courts and a failure to ensure that the rules relating to the use of subpoenas are followed may constitute a contempt of court, which could have the most serious consequences for a practitioner. ●

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1. *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 143; 43 ALR 659 at 665.
2. See *R v Daye* [1908] 2 KB 333; *Gibbons v R* (unreported, Court of Appeal (Vic), no 5602/1996, 30 June 1997). For a detailed analysis of the importance of the subpoena, see *Ditfort v Calcraft* (unreported, Court of Appeal (NSW), no 40503 of 1989, 22 December 1989) per Kirby P at 2-7.
3. *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555 at 570 per Smithers J.
4. Or in the case of an organisation, association, government department or company, is addressed appropriately to the proper officer. See *Re Commission of Water Resources and Leighton Contractors Pty Ltd* (1998) 96 ALR 242. In the case of a partnership, the summons should be addressed to all the partners of the partnership. A subpoena addressed to a corporation to produce documents by its "proper officer" is addressed to the corporation itself: *Air Pacific Ltd v Transport Workers Union of Australia* (1993) 40 FCR 1.
5. Note that Practice Note 7 of 1995 of the Supreme Court of Victoria states that it is insufficient to state the "Supreme Court at Melbourne" as the address for the subpoenaed person to attend. The subpoena should instead state the Supreme Court's address as "210 William Street, Melbourne".
6. *National Employers' Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372 at 382; *Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 921 at 929. Note that in order to compare that burden it would be necessary to seek an order for non-party discovery under O.37 of the *Supreme Court Rules*.
7. *Commissioner for Railways v Small* (1938) 38 SR (NSW) 565 at 573 per Jordan CJ.
8. *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555 at 571; *McColl v Lehmann* [1987] VR 503 per Kaye J.
9. *Air Pacific Ltd v Transport Workers Union of Australia* (1993) 40 FCR 1.
10. *McColl v Lehmann* [1987] VR 503, per Kaye J who adopted the opinion of Smithers J in *Lucas Industries Ltd v Hewitt*, note 8 above.
11. Note 6 above. For instances of subpoenas held to be an abuse of process, see *Purnell Bros Pty Ltd v Transport Engineers Pty Ltd* (1984) 73 FLR 160; *Botany Bay Instrument & Control Pty Ltd v Stewart* [1984] 3 NSWLR 98.
12. Note 7 above.
13. Note 7 above.
14. Note 6 above. See also *Grant v Downs* (1976) 11 ALR 577, which sets out the common law "sole purpose test" as the criterion of legal professional privilege.
15. *Sankey v Whitlam* (1978) 142 CLR 1 at 38 per Gibbs ACJ.
16. See *Burchard v McFarlane; Ex parte Tindall and Dryhurst* [1891] 2 QB 241 at 247-8, [1891-94] All ER 137.
17. *Professional Conduct Bulletin* No 1 of 1991, Victorian Bar.
18. Practitioners are referred to the County Court Practice Note of 19 November 2002.
19. *Belstart Pty Ltd v Man Po Holdings (Australia) Ltd* (SC VIC), Beach J, No. 5742/1998, 31 August, 1998, unreported.
20. Rule 42.10 (14).
21. Note 6 above.
22. *Harris/D-E Pty Ltd v McClelland's Coffee and Tea Pty Ltd* (1999) 149 FLR 204.
23. See *Charlick Trading Pty Ltd v Australian National Railways Comm* (1997) 149 ALR 647 at 647 per Mansfield J.
24. *Pyramid Building Society (in liq) v Farrow Finance Corp Ltd (in liq)* [1995] 1 VR 464.
25. *Deposit and Investment Co Ltd (Receivers Appointed) v Peat Marwick Mitchell and Co* (1996) 39 NSWLR 267 at 291.