COLLECTING EVIDENCE FOR TRIAL
DISCOVERY, SUBOPENAS, NOTICES TO PRODUCE & PRIVILEGE

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Introduction

In order to properly present a case in court proceedings there are numerous devices that might be utilised by practitioners in order to elicit and, ultimately, adduce necessary or desirable evidence that will assist that practitioner's client's case. I will concentrate mainly on the Federal Court rules. However, in each case, there are similar rules applicable in the Supreme Court of NSW.

I am asked to talk today about only three of these evidence-gathering devices (as well as the concept of privilege):

1. Discovery;
2. Notices to Produce (which includes Orders to Produce); and
3. Subpoenas.

The toolkit you will need for this exercise is:

(a) The *Federal Court Rules,* Forms and the various Practice Notes, Directions and Notices to Practitioners issued from time to time by the Federal Court provide the best outline of the scope of these devices. I will deal with each topic in turn. However there will be some necessary overlap. To some extent I will need to focus on what happens in the Sydney Registry of the Federal Court as the practice does vary between the registries.

(b) The *Supreme Court Rules* 1970 and the Practice notes and Directions; and

(c) The *Evidence Act* 1995 (Cth) & (NSW).

Discovery

As Justice Menzies said in *Mulley v Manifold* (1959) 103 CLR 341 at 345, discovery is properly described as:

> "...a procedure directed towards obtaining a proper examination and determination of [the issues in the pleadings] - not towards assisting a party upon a fishing expedition. Only a document which in some way relates to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of inquiry which would, either advance a party's own case or damage that of his adversary."

Discovery is provided for in Order 15 of the *Federal Court Rules,* styled "Discovery and Inspection of Documents".

An entirely new discovery procedure commenced in the Federal Court with effect from 3 December 1999. In some ways, the Federal Court went further than the changes made in the Supreme Court of NSW in 1996, when the *Supreme Court Rules* 1970 were amended to limit or restrict the volume of discovered materials and to give the Court powers to limit discovery to particular named classes of documents by reference to particular identified facts in issue (see, Part 23 rules 2 & 3 of the *Supreme Court Rules* 1970, which came into effect on 1 October 1996).

Prior to that, the kind of discovery that ordinarily prevailed in Federal Court litigation was (and still is) known as "general discovery". A good summary of the principles relating to general discovery that existed before the 1999 Federal Court changes is set out by Justice Gummow in *Commonwealth v Northern Land Council* (1991) 30 FCR 1at 23-24 (which part was not affected by the reversal in *Commonwealth v Northern Land Council* (1993) 176 CLR 604):

> "Discovery ordered by the Court under O.15 requires disclosure of documents which are or have been in the possession, custody or power of the party giving discovery, being documents "relating to any matter in question" between that party and the party to whom discovery is given (O.15 rr.2, 5 and 6). As appears from O.15 r.17, it does not pre-empt any claim for public interest immunity:
>
> > "This order does not affect any rule of law which authorises or requires the withholding of any document on the ground that its disclosure would be injurious to the public interest."
>
> A document relates to a matter in question between the parties if it is "reasonable to suppose" that the document "contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary." A document will answer that description if it may fairly lead to a train of inquiry which might have either of those consequences: see - *The Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55 at 62-63 (Brett L.J.) and 60 (Baggallay L.J.). This extended meaning was described by Lord Scarman in *Burmah Oil Co. Ltd v Bank of England* (1980) AC 1090 at 1141 as "a vital part of the law of discovery, enabling justice to be done where one party knows the facts and possesses the documents and the other does not". The class of documents thus discoverable is not limited to those which would be evidence to prove or disprove any matter in question in the action. A similar formulation appears in *Mulley v Manifoldend* (1959) 103 CLR 341 at 345 (Menzies J.) and *Temmler v Knoll Laboratories (Australia) Pty Ltd* (1969) 43 ALJR 363 (Windeyer J.). The dicta in *Peruvian Guano* (supra) were expressly applied by Menhennit J. in *Beecham Group Ltd v Bristol Myers Co.* (1979) VR 273 at 277 and by the Full Court of this Court in *Wellcome Foundation Ltd v V.R. Laboratories (Australia) Pty Ltd* (1980) 42 FLR 266 at 269. That is not to say that speculative possibilities or the mere suggestion that a document may contain relevant material would be sufficient to attract the obligation to give

discovery of it: see *Garden City Traders Association Ltd v Brisbane City Council* (1972) Qd R 82 at 86-87."

The 1999 Federal Court changes were extremely significant. They were properly described as a "quite new and restrictive policy" (*South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 519 at [10] (Finn J)).

From there being provision for traditional, broad general discovery, without intervention (or even knowledge) of the Court, the new rules now provide for:

- a limited notion of "general discovery";
- Court supervised discovery in a hands on fashion;
- new and difficult work for litigation practitioners to be undertaken at a time well before such work used to be undertaken, if it ever was;
- early decisions need to be made that might well affect the course of the trial; and
- have created a new industry of work in discovery applications and interlocutory appeals.

The three major changes may be described as follows:

1 There is no longer any rule that the obligation to give discovery extends to a document that does no more than relate in some way to a matter in issue, including, leading to a train of inquiry or does no more than throw light on the case;

2 There is a change from the general obligation to discover documents "which may - not which must" advance or adversely affect a party's case;

3 The obligation to undertake exhaustive searches has been modified to a party conducting a "reasonable search" within the meaning of Order 15 rule 5 (*Reading Entertainment Australia Pty Ltd v Birch Carroll & Coyle Ltd* [2002] FCAFC 109 at [63]-[64])

The primary new rules (and the practice note that must be read with it) are in the following terms:

Practice Note No 14 "*Discovery*" (1999) 84 FCR 153, issued by Black CJ on 12 February 1999 provides:

> 1 Practitioners should expect that, with a view to eliminating or reducing the burden of discovery, the Court:
>
> a will not order general discovery as a matter of course, even where a consent direction to that effect is submitted;
>
> b will mould any order for discovery to suit the facts of a particular case; and

c will expect the following questions to be answered:

i is discovery necessary at all, and if so for what purposes?

ii can those purposes be achieved:

- by a means less expensive than discovery?
- by discovery only in relation to particular issues?
- by discovery (at least in the first instance - see (iii)) only of defined categories of documents?

iii particularly in cases where there are many documents, should discovery be given in stages, eg initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?

iv should discovery be given in the list of documents by general description rather than by identification of individual documents?

2 In determining whether to order discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.

3 To prevent orders for discovery requiring production of more documents than are necessary for the fair conduct of the case, orders for discovery will ordinarily be limited to the documents required to be disclosed by Order 15, rule 2(3)."

As Justice Hill explained in *Cassidy & Anor v Medical Benefits Fund of Aust Ltd* [2001] FCA 700 at [24]:

> "That Practice Note was issued in response to concerns in the Court, in the profession and in the community over the costs incurred in granting discovery being out of all proportion to the relevance of the material discovered. The traditional process of discovery which required a detailed affidavit of documents that were or had been in the possession or power of a party divided into categories of documents in respect of which privilege was claimed and documents where no privilege was claimed and which included correspondence in the ordinary course passing between the parties to the litigation not being privileged, was often enormously burdensome. In the interests both of expedition and cost, the Court indicated, by its Practice Note, its view that general discovery should not ordinarily be directed but rather that discovery be limited to particular issues of significance in the case. Discovery will ordinarily be limited beyond the general principle articulated by Menzies

> J in *Mulley v Manifold* (1959) 103 CLR 341 at 345. However, the Practice Note should not be taken as indicating that discovery will now no longer be ordered in cases where documents sought are not of direct relevance but merely may be seen to initiate a chain of inquiry towards relevant material. Ultimately, each case will need to be determined by reference to its own facts. For example, it would be relevant to know whether the material of which discovery is sought is material the contents of which are wholly within the peculiar knowledge of the person against whom discovery is sought. In the present case, had the grant of discovery not been so burdensome, as it became obvious it was, I might well have been prepared to make an order for discovery on the motion."

Order 15 rules 2 & 3 of the *Federal Court Rules* provide:

> "**Discovery on notice**
>
> 2(1) A party required to give discovery must do so within the time specified in the notice of discovery (not being less than 14 days after service of the notice of discovery on the party), or within such time as the Court or a Judge directs.
>
> (2) A party must give discovery by filing and serving:
>
> (a) a list of documents required to be disclosed; and
> (b) an affidavit verifying the list.
>
> (3) Without limiting rule 3 or 7, the documents required to be disclosed are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given:
>
> (a) documents on which the party relies; and
> (b) documents that adversely affect the party's own case; and
> (c) documents that adversely affect another party's case; and
> (d) documents that support another party's case; and
> (e) documents that the party is required by a relevant practice direction to disclose.
>
> (4) However, a document is not required to be disclosed if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given.
>
> (5) In making a reasonable search for subrule (3), a party may take into account:
>
> (a) the nature and complexity of the proceedings; and
> (b) the number of documents involved; and

(c) the ease and cost of retrieving a document; and
(d) the significance of any document likely to be found; and
(e) any other relevant matter.

(6) If the party does not search for a category or class of document, the party must include in the list of documents a statement of the category or class of document not searched for and the reason why.

Limitation of discovery on notice

3(1) The Court may, before or after any party has been required under rule 1 to give discovery, order that discovery under rule 2 by any party shall not be required or shall be limited to such documents or classes of documents, or to such of the matters in question in the proceeding, as may be specified in the order.

(2) The Court shall, on application, make such orders under subrule (1) as are necessary to prevent unnecessary discovery."

In *Reading Entertainment Australia Pty Ltd v Birch Carroll & Coyle Ltd* [2002] FCAFC 109 (Beaumont, Carr and Tamberlin JJ), the Full Federal Court considered the general principles and the modern practice governing discovery in the Federal Court (at [63] to [70]). Justice Beaumont (with Carr and Tamberlin JJ agreeing) stated at [69]-[70] :

> "In 1999, in recognition of the perceived need for this Court, in the discharge of the docket Judge's overall managerial responsibility to supervise closely the discovery process lest unnecessary expense be incurred, our Rules of Court were amended by the introduction of, inter alia, the provisions of r 2(3), and Practice Note 14 was published. They must, of course, be read together.
>
> The present position is conveniently summarised by the editors of Butterworths, *Practice & Procedure of the Federal Court* at [40.760], by reference to the cases there cited, to the following effect:
>
> - The Practice Note contemplates the possibility that O 15 r 2 would continue to authorise orders for general discovery as traditionally understood, i.e. the discovery of any document which may fairly lead to a train of inquiry which may directly, or indirectly, enable one party to advance its own case, or damage that or its opponent.
>
> - However, as the Practice Note indicates, ordinarily, the Court will not now make such an order; rather, discovery will, ordinarily, be limited to documents in the five categories specified in rule 2(3). Moreover, the Court may further restrict the scope of discovery by applying the power conferred by O 15 r 3.
>
> - Yet, where, extraordinarily, the Court judges that it is, in the particular circumstances, appropriate to order general discovery, in the absence

of any special (ad hoc) restriction, the traditional (broad) obligation to discover any document relating to any matter in question in the proceeding will continue to apply.

- The "fishing" objection is, in truth, based upon a notion of "oppression", which may justify the imposition of a limit to the discovery obligation to particular issues. Yet, as Lindgren J observed in *Trade Practices Commission v CC (New South Wales) Pty Limited* (1995) 58 FCR 426 (at 437):

  > "A particular advantage of discovery is that the party required to give it must search for documents by reference to a judgment which that party is required to make and is in a position to make. This process is apt to bring to light documents the existence of which will often be beyond the other party's knowledge."

- Documents which relate only to credit do not relate to a matter in question within the meaning of the traditional formulation. (This may be seen as an example of the general principle, still valid, that the Court must always be satisfied that any order for discovery (including, as here, a specific order) must be "reasonably" necessary for the fair disposing of the case (see the *CC case* above, at 436 – 437 and the cases there cited).)"

I expect that the significant increase in discovery litigation and interlocutory appeals as a result of the 1999 changes will continue over the next few years concerning the meaning of these new provisions until both practitioners and the Courts are comfortable with their meaning and administration.

I apprehend that some major battles are brewing concerning the true meaning of the limited discovery ordered in many cases as being " necessary to prevent unnecessary discovery" (whatever that expression means) (see, eg: *O'Neil v National Australia Bank Ltd* [2000] FCA 220 at [18] (Katz J)).

As to the new discovery rules in NSW that commenced in 1996, Part 23 rules 2 & 3 of the *Supreme Court Rules* 1970, see, eg: *National Australia Bank Ltd v Idoport Pty Ltd* [2000] NSWCA 8 (Mason P, Priestley and Fitzgerald JJA) and *Century Medical Inc v THLD Ltd* [2000] NSWSC 428 (Rolfe J).)

In addition to the rules set out above, the <u>other</u> main kinds of discovery processes available under the *Federal Court Rules* should always be kept in mind. In short, the rules provide for the following kinds of discovery:

1 traditional broad general discovery (extraordinarily given);

2 the new limited discovery (now sometimes given) (in Order 15 rule 2);

3 a further limited kind of discovery (in Order 15 rule 3) (ordinarily given);

4 supplementary discovery (a continuing obligation - Order 15 rule 7A);

5 orders for particular discovery relating to "any matter in question in the proceedings" (Order 15 rule 8); and

6 preliminary discovery & non-party discovery (in Order 15A).

As to preliminary discovery under Order 15A of the *Federal Court Rules*, it can be a very useful (but expensive) process to invoke in order to obtain the necessary evidence in order to properly commence proceedings in the first place - see, eg: *Hughes Aircraft Systems International v Civil Aviation Authority*, unreported, 28 June 1995, FedCt(NSW) NG913/94 (Davies J) in which preliminary discovery was ordered concerning a contractual tender process that went massively wrong resulting in enormous liability & exposure for a Commonwealth entity (see: *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 (Finn J)).

There is insufficient time for me to cover in this paper the other primary areas mainly associated with discovery, namely, inspection and the administration of interrogatories.

Other interesting discovery issues include the special case of judicial review proceedings see:

(i) *Nestle Australia Ltd v Federal Commissioner of Taxation* (1986) 10 FCR 78 (Wilcox J) esp at p 82.7 & 83.6; and

(ii) *Australian Securities Commission v Somerville* (1994) 51 FCR 38 (Black CJ, Ryan & Olney JJ) esp at 52B to 52B and 55C & E.

As to discovery of documents against the Crown generally, see the good discussion of the principles in *Commonwealth v Northern Land Council* (1991) 30 FCR 1 (Black CJ, Gummow and French JJ) at pages 22 to 24 (per Gummow J) [This discussion was unaffected by the successful High Court appeal in the matter in *Commonwealth v Northern Land Council* (1993) 176 CLR 604.]

The consequences of failing to discover documents are potentially enormous. A pleading could be struck out or stayed (Order 15 rule 16) as happened in the recent Victorian tobacco case, *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Eames J) or a judgment could ultimately be set aside, see: *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134

Notices to Produce

Notices to Produce normally derive their force or power from legislation and not from a court. They are usually served inter-parties with no court seal or court involvement at all. They are a very useful way of obtaining specific documents from a party quickly for use or consideration for use in proceedings.

Order 33 rule 12 of the *Federal Court Rules* provide that a party to proceedings may serve on another party a notice requiring the other party to produce at the trial or hearing, or before any judge, officer or examiner or any other person having authority to take evidence in the proceedings, any document or thing for the purpose of evidence, and if the document or thing is in the possession, custody or power of the party served, he/she must, unless the court otherwise orders, produce the document or thing, without the need for a subpoena for production (form 45 of the Federal Court Rules is the appropriate form).

There is provision for such Notices to Produce in Part 36 Rule 16 of the *Supreme Court Rules* (NSW) (form 45 of the *Supreme Court Rules*).

These notices to produce are a special category in that, as in discovery, the documents caught by such a notice are produced to the party and not to the Court. They do not have the coercive effect of a subpoena.

An appropriate remedy in the event of non-production is to seek an order for production pursuant to Order 33 rule 13 of the *Federal Court Rules* (Part 36 rule 12 of the *Supreme Court Rules* (NSW)) with costs in the event that the hearing is disrupted or adjourned by reason of failure to produce in accordance with the rule. The appropriate time at which to make this application is usually at the substantive hearing.

Where the document sought was not produced to the party so requesting under the notice to produce procedure, Order 33 rule 12(2) provides that the party serving the notice may lead secondary evidence of the contents or nature of the document or thing. This gives the party calling on the Notice to Produce a further advantage in so calling on the Notice.

Orders to Produce

Order 33 rule 13 of the Federal Court Rules gives to the court the power to make orders for the attendance of any person and production by that person of any document or thing specified or described in the order and the order may be made for his attendance before, and the production to, the court or judge or any officer of the court, examiner, or other person authorised to take evidence on the trial, hearing or other occasion (see also Part 36 rule 12 *Supreme Court Rules* (NSW)).

The *Evidence Act 1995* (Cth) & (NSW)

Note that the *Evidence Act 1995* provides for a number of other ways in which documents may be ordered to be produced by the Court.

When a witness is attempting to revive his or her memory in court in the course of giving evidence, the witness must not, pursuant to s 32(1) of that Act, use a document to try to revive that memory without the leave of the Court. The tests by which the Court will decide to grant leave are set out in s 32(2). The witness may, with leave, read out that part of the document needed to be referred to - s32(3). Further, the Court, on the application of a party, may order the production of that part of the document to be given to the requesting party - s32(4).

Similarly, when out of court, a witness sometimes attempts to revive his or her memory with documents. The court may make orders regarding the production to a party of those documents (s 34(1) and it might not admit the oral evidence if those orders are not complied with (s34(2).

Section 35 of the *Evidence Act 1995* provides for the consequences of a "call" for a document by a party while a trial is under way. The party who called for it and inspected it no longer has to tender it or see it tendered.

Section 36 of the *Evidence Act 1995* provides that the Court may order a person be examined and/or must produce "documents or things" even if a subpoena or other similar process has not been served. The order has the same effect or operation as a subpoena (s36(2)) and the document need not be tendered in court by party (s365(3)). The word "things" is not defined in the Dictionary of the Act.

One should also bear in mind that the *Evidence Act 1995* also provides for a detailed procedure for requesting and authenticating documents in certain cases, provided the appropriate "request" is first made under the Act -see, for example ss 166 & 167.

It is also very useful to bear in mind the additional powers possessed by the Court in s 193(1) of the *Evidence Act 1995*, which provides:

> "**Additional powers**
>
> 193. (1) The powers of a court in relation to:
>
> (a) the discovery or inspection of documents; and
>
> (b) ordering disclosure and exchange of evidence, intended evidence, documents and reports;
>
> extend to enabling the court to make such orders as the court thinks fit (including orders about methods of inspection, adjournments and costs) to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect documents of the kind referred to in paragraph (b) or (c) of the definition of "document" in the Dictionary."

The relevant Dictionary definition provides:

> "(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
>
> or
>
> (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; ..."

The Australian Law Reform Commission has explained that this proposal was designed to extend rules relating to discovery "to include tapes, disks, microfilms and other media" so

that a party examining them may have "provided to it all information, materials and equipment needed to understand the way in which the records are kept and compiled and how any visible reproduction of the contents of the record is produced" (see, Odgers, *Uniform Evidence Law*, fourth edn, 2000 at p453).

Another species of orders to produce that might be useful can be found in Order 15, rule 11 of the *Federal Court Rules.* There, as an adjunct to the Court's powers to deal with inspection of documents after the discovery process has concluded, the Court may make an order against a party for production of documents when they are referred to in a pleading or affidavit; mentioned in the discovered list of documents; or where "it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for a belief that any document *relating to any matter in question* in the proceeding is in the possession, custody or power of a party." The document may be ordered to be produced for inspection by any party or it may ordered to be filed and served on any party (a forced inspection procedure).

Similarly, in Order 15, rule 13 of the *Federal Court Rules*, the Court may, at any stage of any proceeding order any party to produce to the Court any document in the possession, custody or power of that party "relating to any matter in question in the proceeding". On production, the Court may deal with the document in "such a manner as it thinks fit" (Order 15 rule 13(2)).

Subpoenas

It is proposed in this part of the paper to briefly provide an overview of the rules in relation to subpoenas for the production of documents. There are, of course, 2 kinds of subpoenas; a *subpoena ad testificandum* (to compel a witness to attend court and give oral evidence) and a *subpoena duces tecum* (for the production of documents to the court). They are now generally known as a subpoena to give evidence and a subpoena for production. Both kinds of subpoenas may be issued in the one combined document.

As to the main distinction between discovery and the issue of a subpoena, Justice Hill of the Federal Court stated in *Air Pacific v Transport Workers Union of Australia* (1993) 40 FCR 1 at 5 that:

> "... in truth, an order for answers to interrogatories involves potential admissions to the other parties to the proceedings and inspection, if not discovery, involves producing documents to the other parties. In contrast a subpoena is an order of the court addressed to a person requiring production of documents to the court itself, and of itself has no effect inter partes."

The issue of subpoenas in the Federal Court of Australia is governed by Order 27 of the *Federal Court Rules* titled "Subpoenas" (as well as Forms 41, 42 & 43) (See, also, Part 37 of the *Supreme Court Rules* - "Subpoenas").

As to matters of formality, the Court's power to issue subpoenas derives from Order 27 rule 2. The Court has power to issue subpoenas in the prescribed forms or "in such other form as

the Court may direct." Reasonable conduct money is required to be given (rule 3) and production of any documents caught by the subpoena may be delivered before the return date of the subpoena (rule 4). Service is usually personal service but it may be otherwise (rule 8). The Court may set a subpoena aside wholly or in part on its own motion or on the motion of an interested party (rule 9). The costs of complying with a subpoena is covered in rule 4A.

In practice, for example in Sydney, the Federal Court subpoena list is on Wednesday mornings and is heard before a Registrar. From 22 December 2000, an amended rule (rule 6) came into force whereby the party seeking to cause the issue of a subpoena first needs *leave* of the Court in order to do so (rule 6(1)). Rule 6(2) provides:

> "An application for leave under subrule (1) may be made without notice to, and decided by the Court or a Judge sitting in Chambers in the absence of, the person named in the subpoena and the other party or parties to the proceeding in which the issue of the subpoena is requested."

In practice, the party seeking leave should do so at the next appropriate Court sittings. An affidavit in support of the issue of the subpoena is required. Such an affidavit must state the reason or reasons why the particular subpoenas sought need to be issued and the draft subpoena must be attached. In other words, the affidavit needs to set out the legitimate forensic purpose, or the relevance of the proposed subpoena.

It is not legitimate to use a subpoena for the purpose of endeavouring to obtain what would be in effect a discovery of documents against a person who, being a stranger, is not liable to make discovery. A subpoena to produce documents if issued to such a person is in an objectionable form and the witness may apply to the court to have it set aside: *Commissioner for Railways v Small* (1938) S.R. (NSW) 564 at 573; *Lucas Industries Limited v Hewitt* (1978) 18 ALR 555 at 569; *Trade Practices Commission v CSR Limited* (1989) ATPR 40-970; *Trade Practices Commission v Arnotts Limited* (1989) 88 ALR 90.

Both the Supreme Court of NSW and the Federal Court have the power to issue subpoenas returnable before the hearing. So far as the Federal Court is concerned in *Hughes v. Western Australia Cricket Association (Inc.)* (1986) 66 ALR 541 Toohey J. held that Section 53 *Federal Court Act* together with Order 27 of the *Federal Court Rules*, provides, by implication, the power to order the issue of a subpoena to produce documents to someone not a party to the proceedings to produce documents to the Court on a date earlier than the date fixed for the hearing of the application. This decision was followed in *Re Federal Commissioner of Taxation; ex parte Swiss Aluminium Australia Limited* (1986) 68 ALR 587.

It should be noted that Justice Hill in *Universal Press Pty. Limited v. Provest Limited*, (1989) 87 ALR 497, noted that Justice Toohey in the *Hughes' case* also had two qualifications - the first, the subpoena should not be used to obtain discovery; the second, that the power should be exercised with economy, for it could lead, inter alia, to the fragmentation of proceedings.

Justice Hill also approved issuing subpoenas to a non- party prior to hearing, but added that the interests of justice will not usually be served if the subpoenas were returnable before the ordinary interlocutory steps have been completed, in particular, before discovery itself had been given by the parties to each other indeed before, as in the case before him, the defendant

had even filed a statement of defence in the proceedings. In *Universal Press.* his Honour set aside the subpoenas in issue on the ground that the issue at that stage of the proceedings was premature.

In *Air Pacific v Transport Workers Union of Australia* (1993) 40 FCR 1 at 4, Justice Hill held that a subpoena is properly addressed to a corporation in circumstances where the subpoena is headed the corporation "by its proper officer". In that case it was a union which was subpoenaed by a subpoena addressed to the union "by its proper officer". Justice Hill cited in support Lord Denning in *Penn-Texas Corporation v. Murat Anstalt (No.2)* (1964) 2 Q.B. 647 at 663 where he said:

> "The question arises, what is to be done when the documents are in the possession of a company? How is the court to comply production of them? One thing is quite clear. It is no good serving a subpoena duces tecum on any of the officers or servants of the company: for each of them can say that he has no authority from the company to produce them, and that would be an end of any proceedings against him: ... The only thing to do is to serve a subpoena duces tecum on the company itself, requiring it, by its proper officer to give evidence and produce the document. ...It seems to me to be the only way in which a company can be compelled to produce documents which are in its possession or custody. The command or requirement on the company is comparable to an order on a company by its proper officer, to file an affidavit of documents or to answer interrogatories. The officer answering must make inquiries of the other officers as to the documents and must then produce them on behalf of the company: ... The only limitation is that the subpoena must be issued for the purposes of the trial, and not for the purposes of discovery beforehand."

See also the decision of the Family Court of Australia in *Epstein and Epstein* (1993) 110 FLR 133; (1993) FLC 92-384 at 79,968 where Treyvaud J held that none of the companies subpoenaed to produce documents by the wife in the proceedings were required to produce the documents because the subpoenas were directed to particular officers of the respective companies and not to the respective entities themselves.

Procedure for Delivering Up Third Party Documents

In *National Employers Mutual General Association Limited v. Waind* (1978) 1 NSWLR 372 the New South Wales Court of Appeal set out the three main steps in the procedure of having a third party bring documents in court, pursuant to a subpoena.

The first step is obeying the subpoena by the witness bringing the documents to court and handing them to the judge. This step involves the determination of any objections of the witness to the subpoena, or to the production of the documents to the Court eg. improper issue or use of subpoena for the purpose of obtaining discovery.

The second step is the decision of the judge concerning the preliminary use of the documents, which includes whether or not permission should be given to a party or parties to inspect the documents.

The third step is the admission of the document in whole or in part; or the use of it in the

process of it being put before the Court by cross examination or otherwise.

Degree of "Control" of Documents Required

This question was examined in detail by the High Court in *Rochfort v. Trade Practices Commission* (1982) 153 CLR 134. In that case the court considered the case of what is the degree of possession, custody or control of documents required to sustain an application in order to produce them under a subpoena. In that case, Mason J. (with whom Wilson J. agreed) said at 143-146:

> "A party to litigation can compel a stranger to produce documents by serving on him a subpoena duces tecum. Once served with the subpoena and provided with the proper conduct money, he must obey it and bring to court the documents described in the subpoena if he has them to the Court, unless he can establish some good reason why they should not be produced. A person called on by a subpoena duces tecum may be asked, without being sworn, whether he has brought the documents, and if so, whether he produces them. If he objects to produce them, he should state the grounds of his objection on oath so that the court may determine their sufficiency: see generally *Commissioner for Railways v. Small* (1938) 38 S.R. (NSW) 564 at pp.573-574, per Jordan C.J.
>
> Neither the Federal Court rules nor the form of the subpoena issued by the court explicitly limit the obligation to produce documents owed by a person served with a subpoena to documents which he holds. The subpoena, which has the effect of a court order, requires the person to whom it is addressed to produce the documents which it describes. It assumes that he has the ability or capacity to produce them. At times this idea has been expressed by saying that the person served is bound to produce any document which is in his possession, custody or control. But these statements should not be allowed to obscure the true effect of the subpoena - it binds a person who can produce the documents to do so.
>
> A special problem has arisen with respect to documents held by an employee in the course of his employment. In *Amey v. Long* (1808) 9 East 473; 103 E.R. 653, Lord Ellenborough C.J., speaking for the court, said (9 East at p. 482; 103 E.R. at p.657) that the sheriff's bailiff when served with a subpoena was bound to produce a warrant which he had 'an immediate physical ability' to produce. However, subsequently in *Crowther v. Appleby* (1873) L.R. 9 C.P. 23 it was decided that an employee was not bound to produce a document which he held for his employer when the latter had forbidden its production. And later Eccles held that an employee was not bound to produce a document in response to an order made under the *Foreign Tribunals Evidence Act* 1856 (U.K.) when he had no authority from his employer so to do. The fact that Eccles related to an order made under a statute does not distinguish the case from production under a subpoena. The reasoning of the majority applies with equal force to production pursuant to a subpoena. That certainly has been the view taken by Lord Denning M.R. in *Penn-Texas Corporation v. Murat Anstalt (No.2)* (1964) 2 Q.B. 647 at pp. 661-664.
>
> It is commonly said that the reason underlying the *Eccles* principle is that the

employee's 'possession' is not his, but that of his master: *Earl of Falmouth v. Moss* (1822) 11 Price 455; 147 E.R. 530. This reason is sometimes coupled with another - that the employee, in the absence of the employer's consent, lacks authority to bring the documents and produce them to the court (see, for example, the comments in *Eccles* of Vaughan Williams L.J. at 145 and Buckley L.J. at pp. 147-148). The correctness of this view was challenged by Kennedy L.J. (dissenting) in Eccles at pp.151-152. Like the majority, he though that a person could be required to produce only such documents as were in his possession, custody or control. However, he considered that the authority of a number of employees amounted to a large degree of control and discretion to act independently, in which even they were at liberty to act, without express orders from their employer. They could then be regarded as having possession, custody or control of documents which they held for their employer and were bound to produce the documents, unless instructed by the employer not to do so.

To my mind the absence of authority from the employer to bring the documents to court and to produce them is not a material circumstance when the court's order requires them to brought and produced. Kennedy L.J. noted (at p. 151) that the employee who has the employer's document in court without his authority to produce it may nevertheless be ordered to produce it and for this purpose he will be considered to have possession, custody or control of it. Kennedy L.J. was discussing the common law rule which is not replaced in New South Wales by s.12 of the *Evidence Act 1898* (NSW). The point is that the common law rule and the statute make compellable the production of a document which is physically held by a person in court. It can scarcely be doubted that the court can order the production of a document held by an employee in court, notwithstanding that he has no authority from his employer to do so or that he has been instructed not to do so.

There is, accordingly, every reason for thinking that the court can compel a person to produce documents which he is physically able to produce. But there are factors which need to be taken into account before deciding that the court will insist on production by an employee of his employer's documents.

The obligation to produce documents pursuant to a subpoena duces tecum is a qualification upon, or an intrusion into, the citizen's right to keep his documents to himself: *Penn-Texas (No.2)* (at p.667). In the absence of some compelling reason it is right that the owner of the documents should decide in the first instance whether any of them are caught by the subpoena and that he should bear the responsibility for not producing such of them as are ultimately held to be covered by the subpoena. To acknowledge that the employee's possession is sufficient in itself to sustain an obligation to produce, without reference to his employer, would be to disregard the employer's rights with respect to his documents. What is more it would deprive him of the privilege of objecting to produce a document on the ground that it has a tendency to incriminate him. The privilege against self-incrimination is that of the witness who is called to produce. He cannot claim the privilege on the ground that the document tends to incriminate another *R. v. Kinglake* (1870) 11 Cox C.C. 499 at p.501; *R. v. Adey* (1831) 1 M. & R. 94; 174 E.R. 32; *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* (1978) A.C. 547 at pp. 637-638.

> Recognition of these interests of the employer suggests that in general it is he, not his employee, who should be required to produce the documents. Of course the protection of the employer's interests must give way to the public interest in the efficient administration of justice in case of collision between the two. So, if it is overseas, incapacity or his whereabouts being unknown, the court will insist on production of the documents by his employee or agent who holds them. In these circumstances, the prompt dispatch of court business must prevail over the protection of the employer's interests.
>
> And there are other situations, quite apart from that of the unincorporated association to be discussed later, where the employee has express or implied authority to deal with the employer's documents, viz. the circumstances contemplated by Kennedy L.J. in which it is proper for the court to overrule an objection to produce made on the ground that the employee merely holds the document for his employer. However, these exceptions or qualification should not obscure the general rule that a party should subpoena the documents of an employer from the employer himself, not from his employee."

Privilege

A court will not compel the production in evidence of documents the publication of which would be injurious to the public interest - *Griffin v. South Australia* (1925) 36 CLR 378 at 398.

Of course documents do not have to be disclosed to the issuing party which are subject to claim for legal professional privilege: *Grant v Downs* (1976) 125 CLR 674, and *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49. However, the privilege may be abrogated by statute either expressly or by necessary implication from the statute *(see, eg: Corporate Affairs Commission of NSW v. Yuill* (1991) 172 CLR 319 - which has now been overturned by *Daniels*' *Case*- see below)).

However, it is important to bear in mind that a subpoena is a direction of **the Court** and if there is to be any dispute as to privilege, the Court may inspect the documents and determine that issue for itself. There must be reasonable grounds for the privilege which may be able to be found in the circumstances of the case, or in matters put forward by the parties subpoenaed: *Air Pacific v Transport Workers Union of Australia* (1993) 40 FCR 1 at 5. It will sometimes, then, be appropriate in the context of a claim for privilege being made in respect of documents produced to Court that the Court not set aside the subpoena but order that access to the documents either be denied or be permitted only on a restricted basis, such as access or access qualified or limited in some manner being granted only to legal advisers of the moving party.

As to corporations, the ability to claim for privilege in respect of documents covered by a subpoena or a notice to produce which is based on privilege on the grounds of exposure to a penalty was taken away in an authoritative decision of the Full Federal Court (sitting with 5 judges) in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96. This decision makes it very clear that privilege against self exposure to a penalty is no longer available to a corporation. That case concerned several notices to produce which were served

on the respondent company during the course of a prosecution under the *Trade Practices Act 1974* (Cth) being conducted by the Trade Practices Commission. The Trade Practices Commission served the notices pursuant to Order 33 rule 12 of the *Federal Court Rules*.

The Full Federal Court held that the privileges against self incrimination and self exposure to a penalty are both reflections of the one fundamental principle and it is therefore wrong to regard the two grounds or aspects of privilege as depending upon unrelated or different considerations. Now that the common law of Australia has been declared by the High Court not to extend to corporations a privilege against self incrimination in *Environment Protection Authority v Caltex Refining Co Pty Limited* (1993) 178 CLR 477, the common law of Australia does not extend to companies any privilege against self exposure to a civil penalty either.

Legal professional privilege was considered by the High Court of Australia again recently in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 (7 November 2002). The Court there (per Gleeson CJ, Gaudron, Gummow & Hayne JJ) stated (at [9]-[11]):

> "It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. It may here be noted that the "dominant purpose" test for legal professional privilege was recently adopted by this Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* in place of the "sole purpose" test which had been applied following the decision in *Grant v Downs*.
>
> Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings. Rather and in the absence of provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the [Trade Practices] Act provides. Thus, for example, it was held in *Baker v Campbell*, that documents to which legal professional privilege attaches could not be seized pursuant to a search warrant issued under s 10 of the *Crimes Act* 1914 (Cth).
>
> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect."

As to legal professional privilege (or "client legal privilege" as it is referred to in the

Evidence Act at eg: s 119 & 122) it is important to recall the well known passage from the judgment of Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-6 concerning the circumstances in which legal professional privilege can arise (recently again referred to in *Commonwealth of Australia v Dutton* (2000) 102 FCR 168 at 178-9 and in *Dick Smith Electronics Pty Ltd v Westpac Banking Corp* [2002] FCA 1040 at [27] (Beaumont J)):

> Legal professional privilege extends to various classes of documents including the following:
>
> (a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them. See *Wheeler v. Le Marchant* (1881) 17 Ch D 675; *Smith v. Daniell* (1874) LR 18 Eq 649; *Bullivant v. Attorney-General for Victoria* [1901] AC 196; *Jones v. Great Central Railway Co.* [1910] AC 4, and *O'Rourke v. Darbishire* [1920] AC 581.
>
> (b) Any document prepared with a view to its being used as a communication of this class, although not in fact so used. See *Southwark Water Co. v. Quick* (1878) 3 QBD 315.
>
> (c) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance. See *Hughes v. Biddulph* (1827) 4 Russ 190; 38 ER 777.
>
> (d) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf. See *Woolley v. North London Railway Co.* (1869) LR 4 CP 602, at p 604; *Greenough v. Gaskell* (1833) 1 My & K 98, at p 102; 39 ER 618, at p 620; *Corporation of Bristol v. Cox* (1884) 26 Ch D 678, at pp 681-682; *Woolley v. Pole* (1863) 14 CBNS 538; 143 ER 556; *Seabrook v. British Transport Commission* [1959] 1 WLR 509; *Grant v. Downs* (1976) 135 CLR 674, and Bray, *Principles and Practice of Discovery* (1885) pp. 388-389.
>
> (e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence. See *Wheeler v. Le Marchant* (1881) 17 Ch D 675; *Laurenson v. Wellington*

City Corporation [1927] NZLR 510, and *O'Sullivan v. Morton* [1911] VLR 70.

(f) Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action. See *Wheeler v. Le Marchant* (1881) 17 Ch D 675; *Cork v. Union Steamship Co.* (1904) 23 NZULR 933, and *In Re Holloway* (1887) 12 PD 167.

(g) Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent. See *Kennedy v. Lyell* (1883) 23 Ch D 387 and *Lyell v. Kennedy (No. 2)* (1883) 9 AC 81.

A further useful summary of many of the cases relating to privilege is set out in *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240 at (Sundberg, Merkel and Kenny JJ) where the Court said:

> “The following propositions, amongst others, can be distilled from the cases we have examined:
>
> - Privilege attaches to communications, and not to facts which a lawyer observes while acting in the course of a retainer.
> - Privilege does not attach to everything a client says to the lawyer, but only to communications made by the client for the purpose of obtaining the lawyer’s professional assistance. It will not attach to "mere collateral facts". The address and identity of a client will usually be "collateral facts".
> - Privilege attaches to communications only if they are confidential. In almost all cases the client’s name and address will not have been communicated confidentially.
> - Instructions to a lawyer to do a particular thing, for example to prepare a legal document such as a will, are generally not privileged, because instructions to do something do not necessarily amount to a request for advice.
> - As a general rule, the identity of a client will not be privileged, as the privilege belongs to the client, and the retainer between the lawyer and the client must be demonstrated in order to establish the privilege. This requires disclosure of the client’s identity.

- Disclosure of the client's identity is necessary before the privilege can arise even if the client's name was given in confidence, and it was a condition of the lawyer's retainer that the client's identity be kept confidential. The client cannot by contract extend the area of privilege.

- Some of the cases support an exception to this general rule when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication. This will be the case when the client's identity is so intertwined with the confidential communication that to disclose the identity would be to disclose the communication."

Costs of Complying with A Subpoena

Order 27 rule 4A of the *Federal Court Rules* (and Part 37 rule 9 *Supreme Court Rules* (NSW)) provides a mechanism whereby a person who is named in a subpoena who is not a party to proceedings and where that person incurs substantial expense or loss in complying with the subpoena, the court or a judge may order the party who requested the issue of a subpoena pay that person (in addition to any conduct money amount which the person served with the subpoenas is entitled to be paid pursuant to Order 27 Rule 3) an amount to compensate him or her for such expense or loss as is reasonable incurred or lost by that person in compliance with the subpoena.

The conduct money commonly offered at the time of service of the subpoena is around $20-$30. Costs in substantially excess of this can be claimed pursuant to Order 27 rule 4A(1) of the *Federal Court Rules* which provides:

> **Costs of Complying with Subpoena**
>
> 4A(1) Where a person named in a subpoena is not a party to the proceeding and he incurs *substantial expense* or loss in complying with the subpoena the Court or a Judge may order that the party who requested the issue of the subpoena pay to that person, in addition to any amount which the person served with the subpoena is entitled to be paid pursuant to Order 27 rule 3 or the Second Schedule, an amount *to compensate him for such expense or loss as is reasonably incurred or lost* by that person *in complying* with the subpoena." (my emphasis)

In addition to this head of recoverable costs, one may further seeks costs on any notice of motion filed in order to claim or maintain a claim previously made for privilege. As set out above, Order 27 rule 9 provides for the Court or any sufficiently interested person to apply by motion to set aside the subpoena in whole or in part. Costs of any such motion should follow the event.

As to recoverable costs of complying with the subpoena, those costs include the cost for time occupied in searching out and collating documents to be produced. Also included is the cost

of legal advice reasonably incurred in obtaining advice in relation to confidentiality and privilege issues concerning the subpoenaed documents: *Fuelexpress Ltd v LM Ericsson Pty Ltd* (1987) 75 ALR 284. It is appropriate for these costs to be assessed on a solicitor-client basis: *Kumagai Australia Finance v Avarton Ltd,* unreported, Supreme Court (NSW), 7 June 1991, Bryson J (where it was said at page 1 that the applications made pursuant to Part 37 rule 9 "in principle ... cannot be resisted") (See also: *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 77 (Levine J)).

The Court must not consider the position of the subpoena applicant as a legally aided person when considering the issue of costs. Section 42 of the *Legal Aid Commission Act 1979* (NSW) provides:

> "A court or tribunal which may order the payment of costs in proceedings before it shall, where a legally assisted person is a party to any such proceedings, make an order as to costs in respect of the legally assisted person as if he were not a legally assisted person."

In *Fuelexpress v. L.M. Ericson Pty. Limited* (1987) 75 ALR 284 an order was made to the respondent, who had issued a subpoena to the third party, to pay to the third party an amount sufficient to compensate it for the expense or loss which it had reasonably incurred or lost in complying with the subpoena and that the amount should be fixed by the court's taxing officer. In that case it is interesting to note that Mr. Justice Lockhart held that, in principle, the claim made by the third party for the costs of obtaining legal advice on the subpoena was not impermissible. It was held in that case that the legal costs and expenses incurred in and about compliance with the subpoena, including the costs of the motion, and in and about the preparation of the bill for taxation attending to the taxation should be assessed on solicitor and client basis (see also: *Chapman v Luminis Pty Ltd (No 3)* (2000) 104 FCR 368 (von Doussa J)).

In *Chase Manhattan Overseas Corp v Chase Corp Limited* (1985) 9 FCR 129, at 147-148, Justice Wilcox ordered that the respondents pay the costs of a third-party subpoena issued at their request notwithstanding that the respondents won the case. The respondents, having subpoenaed the documents, had not pursued the matter by way of seeking access to or tender of the documents. Justice Wilcox said that there was no useful purpose in the issue of the subpoena and the respondents must pay the costs, not the applicants.

As a practical matter, if the compliance with a subpoena will be very time-consuming for your client, you should seek immediately to obtain an undertaking from the party issuing the subpoena to pay your client's reasonable expenses at a predetermined and agreed rate. If no undertaking is given, then, certainly at the Federal Court, you should inform the issuing party in writing that you will apply to the court for orders at the appropriate time for costs of complying.

Grounds for Setting Aside Subpoena

It is proposed to set out briefly some of the more commonly used grounds for setting aside a subpoena. The relevant rule is Order 27 rule 9 of the *Federal Court Rules* (Part 39 Rule 7 *Supreme Court Rules* (NSW)). Reference should also be made to the article by Mr. P. Wood,

"Challenging Subpoenas Duces Tecum - Is There a Third Party View"? (1983-85) 10 Sydney Law Review 379).

1 Abuse of process

The issuing of a subpoena may constitute an abuse of process where it has not been served bona fide for the purpose of obtaining relevant evidence (no legitimate forensic purpose); *Botany Bay Instrumentation & Control Pty. Limited v. Stewart* (1984) 3 NSWLR 98 and *Saleam v R* (1989) 16 NSWLR 14 (Hunt, Carruthers and Grove JJ), or where a subpoena is oppressive; *National Employers Mutual General Association Limited v. Waind & Hill* (1978) 1 NSWLR 377; where it is being used as a substitute for discovery against a party or is an attempt to obtain discovery from a stranger to the litigation; *Commissioner for Railways v. Small* (1938) 38 SR(NSW) 564; or where there is an alternative statutory procedure to compel the attendance of witnesses for the production of documents; *R. v. Hurle-Hobb* (1945) KB 165; or where the subpoena is served upon defendants in proceedings for recovery of a penalty; *Trade Practices Commission v. T.N.T. Management Pty. Limited* (1984) 53 ALR 214 but not in relation to company defendants, see *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96

2 Oppressive and Fishing Expedition

It is clear that the most common ground for attempting to set aside a subpoena is that it is too wide. A subpoena may not be used as a substitute for discovery. Therefore if a subpoena is addressed to a person who is not a party and it is not sufficiently precise, if it requires that person to make a judgment as to which of his documents relate to issues between the parties it is liable to be set aside as oppressive; *National Employers Mutual General Association Limited v. Waind & Hill* (1978) 1 NSWLR 377 (and on appeal (1979) 24 ALR 86); *Southern Pacific Hotel Services Inc. v. Southern Pacific Hotel Corporation Limited* (1984) 1 NSWLR 710; *Commissioner of Railways v. Small* (1938) 38 SR 564. There is an excellent discussion by Mr. Justice Waddell in *Spencer Motors Pty. Limited v. LNC Industries Limited* (1982) 2 NSWLR 921 where his Honour examined the law as to oppressive subpoenas.

A subpoena may also be set aside if even though it does not constitute an improper attempt to obtain discovery it imposes an unduly onerous obligation upon a person to collect and produce documents which can have little or no relevance to the proceedings; *Commissioner of Railways v. Small*.

Where documents are produced by a third person in response to a subpoena issued by a party the opposing party has not right to object to the court making the documents available for inspection except, of course, where a claim for privilege validly made in respect of them; *Southern Pacific Hotel Services Inc. v. Southern Pacific Hotel Corporation Limited* (1984) 1 NSWLR 710. It should be remembered that there is no requirement that the documents which it is sought to inspect should be intended to be tendered in evidence nor even that they would be admissible; *National Employers*

Mutual General Association Limited v. Waind & Hill.

It needs to be remembered that a subpoena is not necessarily improper because it uses the expressions such as "referring to" or "relating to" in attempting to describe the documents whose production is required; *Southern Pacific Hotel Services Inc. v. Southern Hotel Corporation Limited.*

If a judge rules against an applicant to set aside a subpoena, the Court will not delay the hearing of the main proceedings by entertaining an appeal. Nevertheless, where an application to set aside a subpoena is refused the applicant, even if he or she is not a party to the proceedings, may, by leave, appeal against the refusal; *Senior v. Holdsworth; ex parte Independent Television News Limited* (1976) 1 QB 23 at 32.

One decision of general importance on the question of relevance and oppression is the Family Court of Australia case of *Epstein and Epstein* in (1993) FLC 92-384 at 79,968, Treyvaud J. Another useful decision in this area is *New South Wales Crime Commission v Hawes* (1994) 74 A Crim R 199 where James J in the Supreme Court of New South Wales declared that the subpoena there issued at the request of the defendant was properly characterised as a fishing expedition as there was no evidence that there could be documents caught by the subpoena which could assist the defendant's case or weaken the plaintiff's case (applied in *Chapman v Luminis Pty Ltd* [2001] FCA 1580 (Nicholson J)).

Inspection of Subpoenaed Documents

In *National Employers Mutual General Association v. Waind & Hill* the Court of Appeal stressed that documents produced in answer to a subpoena are produced to the court not to the parties. It will be for the court to determine whether, when and under what circumstances the documents may be made available to the parties. Usually, unless there is some objection to the disclosure raised by the person who has produced the documents, parties will be granted leave to inspect the documents which have been produced to the court. However, leave may be granted at any time. Once leave is granted it will continue until that order is altered. There can of course be qualifications depending upon the nature of the documents produced and in cases of confidentiality leave to inspect might be limited to the parties legal advisers and independent experts; *Kimberley Mineral Holdings (In Liquidation) v. McEwan* (1980) 1 NSWLR 210.

PRACTICAL MATTERS

Justice Hill provided some useful advice at the closing of his judgment in *Air Pacific v Transport Workers Union of Australia* (1993) 40 FCR 1 at 8 where he said:

> "I should say that the parties and the community would be better served if the legal advisers could, where a subpoena is said to be too wide, confer between themselves before agitating the matter in Court, as experience suggests that agreement can readily be reached as to satisfactory compliance without the need for the time of the court to be taken up and additional costs to be incurred."

Further, note Justice Young's comments in *Field v Inglis*, unreported, 8 February 1994,

SCNSW, Equity Division, in determining an application seeking to set aside a notice to produce which had been served on a party in proceedings under the *Family Provision Act 1982* (NSW). The notice to produce was intended to elicit the degree of wealth of the defendant. Justice Young held that in the circumstances of the proceedings, the degree of wealth of a beneficiary/defendant is irrelevant. He added:

> "It is a little unsatisfactory having to make a determination of this sort of matter on an interlocutory basis because sometimes the full facts and circumstances do not come to light until the final hearing. However, it is also in the interests of everybody to keep costs and expenses to a minimum in litigation and to get the real questions between the parties on for trial as soon as possible."

The process of discovery, notices to produce and subpoenas for production of documents can bring out the worst in some clients and practitioners. Mistrust can be sometimes manifest and, it is said, how can one ever really know that the opposing client is undertaking reasonable or full searches? Correspondence between practitioners can occasionally become heated in these areas (or even mildly hysterical - see *Bryer Merchandisers Pty Ltd v Nike Australia Pty Ltd* [2002] FCA 880 at [11] (Whitlam J).

Practitioners should welcome the new rules and bear in mind that there is considerable merit in working up a case to the fullest extent at the earliest available opportunity. Refining issues and negotiating on the proper scope of discovery and on documents needed by notice or subpoena can only aid the proper and efficient administration of civil justice.

Thank You