The Subpoena and the Computer: A modern day tale of interrogation and oppression

Max Duthie, Freehills

Max Duthie is a solicitor in Freehills' Melbourne office. He has many years experience advising clients in the UK and Australia on dispute resolution and litigation issues. He trained at leading City of London firm, Slaughter and May, and has particular experience in sports law issues. Max used to play professional rugby union in the UK and France.

No one likes to receive a subpoena. If you get one, you know it is going to cost you time and money. It will almost inevitably involve you conducting lengthy searches for documents and having to disclose what might be commercially sensitive material.

These days it might also require you to reproduce, compile or rearrange information that is stored on your organisation's computers. But is this legitimate? Should a stranger to litigation be forced to interrogate his computer databases in order to respond to a subpoena? What if that involves reprogramming or requires other forms of assistance from an IT expert? Justice Heerey's recent Federal Court decision in *Jacomb*[1] shows that this will not always be legitimate and might now make such subpoenas more susceptible to challenge.

Subpoenas: A question of competing interests

With any subpoena,[2] the courts have to perform a balancing act. On the one hand, having available all relevant evidence (including that held by third parties) serves the administration of justice. But, on the other hand, the privacy of third party bystanders has to be respected; such people ought not be excessively burdened in having to produce documents to the court in cases that do not concern them. Broadly speaking, the courts have resolved this difficulty by ruling that a subpoenaed third party will not have to comply with a subpoena if he can show that the documents being sought are privileged, the documents are not relevant to the issues in the case,[3] the documents are sought in bad faith or for some spurious purpose, or the subpoena is oppressive.[4]

Oppression

Questions of privilege, relevance and bad faith are relatively straightforward. It is oppression that causes litigants and third parties the most difficulty. Essentially, a subpoena will be oppressive if it puts an unreasonable burden on its recipient. But the boundaries of oppression are not fixed, and the courts will consider the circumstances of each case, including the resources of the subpoena recipient and the likely impact of the documents on the issues in dispute. Examples of oppressive subpoenas include the following.

- A subpoena that is too widely drafted. A subpoena must specify with reasonable particularity the documents that are being sought. Imagine a case that concerned, say, the retail sale of certain goods. If one side issued a subpoena[5] requesting the production by a third party of 'all documents relating to the sale of goods', then in most circumstances such a subpoena would be too wide. It does not specify the type of sales (eg retail); nor the type of goods; it is not limited to sales by or to the subpoena recipient; and it could feasibly catch a very broad range of document types (eg till receipts, order forms, warehouse documents, shipping documents, sales forecasts, sales reports, profit and loss reports, management accounts, audited accounts, and even press reports). As such, it would probably be oppressive.
- A subpoena that will put the recipient to disproportionate expense and effort. The courts will weigh up the time, costs and inconvenience to be incurred by the subpoena recipient, as against the likely benefit to be achieved by the parties (and the administration of justice) from production of the documents.

  So, if a subpoena recipient, say, has to make extensive searches of an excessively large number of documents, with limited staff for carrying out such a task, and the documents being sought are unlikely to have a material impact on the case, then the subpoena will ordinarily be oppressive.
- A subpoena that forces the recipient to form a judgment as to whether documents are relevant to issues in the case. The courts have made it clear that, unlike when a party to a case has to give discovery, a third party subpoena recipient should not have to turn his mind to issues in the case in this way.[6]
- A subpoena that seeks, say, production of all documents 'relating to the applicant's allegation that a contract was entered into between the parties' would probably be oppressive.
- A subpoena that amounts to a 'fishing' expedition. Where the purpose of a subpoena is not to seek evidence to support the case but rather to see whether or not there is a case at all, it will ordinarily be set aside.

The creation of documents?

The term 'subpoena for production' is a little ambiguous. It is an order that the recipient produce, in the sense of deliver to the court, certain documents that are already in existence (and that are in the recipient's possession). In this context at least, 'produce' does not mean 'create'. And so, if the recipient has no document fitting the description in the subpoena, he is not obliged to create one. This is reasonably straightforward when it comes to hardcopy documents: if a subpoena orders the recipient to produce, say, a list of all his clients, and he has no such list, he simply produces nothing. The recipient might have that information other than in a document

(ie in his memory), but he is not required to record it in writing, and then produce that record.

Computer-stored records

But subpoenas do not just deal with hardcopy documents. The relevant definitions of 'document' are very wide and effectively cover any record of information, including electronic records, such as those stored on a computer.[7] So a subpoena recipient cannot escape having to produce a record of information merely because he does not have that record in written hardcopy form: if the record is stored on, say, a server computer, or on a disk drive of a personal computer, and it is not oppressive for the recipient to access it, then he will ordinarily have to produce it to the court.[8]

However, answering the question 'do I have a document that meets the description in the subpoena?' is not always that simple when considering computer records and electronic databases. If a subpoena orders production of a list of all clients, then even if the recipient's computer has no such list stored electronically (eg as a stand-alone Word or Excel document), it might be that the name of each of the recipient's clients is stored on that computer somewhere (eg some will be on invoices, some on letters and faxes, etc). And then some interesting questions arise:

- if the actual computer is the only document that meets the description in the subpoena, then must the recipient produce the entire computer?
- if, rather, the appropriate response would be to collect the names of the clients from the different parts of the computer, would this compilation work involve the creation of a new document?
- and, in any event, would the time, effort and cost involved in producing the entire computer, or compiling information from some of its parts, make the subpoena oppressive?

To illustrate this in more detail, let's go back to the hypothetical dispute involving the retail sale of certain goods. What if a party to the dispute wanted to see how many of the particular goods a third party sold in a specified period? It could issue a subpoena seeking production of:

> 'a document that shows the number of retail sales of [product X] made by [company Y] in the period 1 January 2004 to 31 January 2004 inclusive'.

Assume that the third party has no such document in hardcopy form, but that every retail sale it makes is recorded onto its computer database. Depending on the particular software and hardware it uses to record this information, one ought ordinarily be able to say that it has a document that contains the information sought, that is, either the computer on which the data is stored (which would also contain thousands or millions of other pieces of information) or perhaps even an electronically stored spreadsheet that just captures the retail sales. If there is such a spreadsheet in existence, that will be the relevant document and the only challenge will then be how to produce it to the court in response to the subpoena (eg by printing off a hardcopy of it or burning a copy onto a CD-ROM).

But what if the information is not conveniently recorded in a single spreadsheet? Would the third party have to produce the entire computer, or go to the trouble of compiling the data from different parts of the computer? And what if the issuing party sought different information? What if it wanted to know, say, the average number of the products sold per day in the specified period? If the computer does not store such average information, but has all of the underlying data to allow averages to be calculated, then in truth the third party does not have a document meeting the description in the subpoena. And the third party will argue that it has no obligation to create a new document that does contain the desired information. In addition, depending on the specific circumstances, the third party might also argue that even if it was required to create a new document containing the average figures, the time, effort and costs involved would be unreasonably burdensome and therefore oppressive.

The situation might be even more complicated. The subpoena might seek a document containing information that is stored not on one of the third party's computers but collectively across a number of computers. Or it might seek a document that is effectively a new arrangement or depiction of existing information (eg a graph). Or a document containing information that is stored on the third party's computers but in such a way that its retrieval would require the computers to be reprogrammed.

Until relatively recently, there has been little in the way of judicial or statutory guidance as to how such issues are to be resolved. For example, when The Australian Gas Light Company brought proceedings last year against the Australian Competition and Consumer Commission (ACCC) in the Federal Court in Melbourne, the ACCC issued a number of subpoenas against third parties in the electricity industry, seeking computer-stored information about the generation and sale of electricity in Australia. A number of subpoena recipients questioned the extent of their obligations to interrogate one or more of their electronic databases and on 8 October 2003 Justice French noted that he was surprised to find little in the Federal Court Practice Notes or previous authority to assist him on this issue.[9] Ironically, only the day before, his Federal Court colleague, Justice Heerey, had given judgment on essentially the same issues in *Jacomb* .

Jacomb v Australian Municipal Administrative Clerical & Services Union

The substantive claim in Jacomb concerned the respondent union's rule that a minimum number of its office-holders had to be female, and particularly whether or not that rule amounted to sex discrimination under equal opportunity legislation.[10] The applicant issued a subpoena against the respondent union (so this was a case where the subpoena recipient was a party, not a stranger to the litigation). Among other things, the subpoena ordered the union to produce a list of certain union members, a list which was also to reveal specified details about each of those members (eg job title, employer and employment status). The list was to be accurate as at a specified date (more than two years prior to the issue of the subpoena).

No such list existed, although it appears from the judgment that the respondent union might have been capable of creating such a list from information in its computerised records, albeit at considerable cost and only with the help of external IT consultants. Justice Heerey identified as a 'point of principle' the question: can a subpoena recipient be obliged to generate a document that does not exist?

In a short judgment, Justice Heerey accepted the submissions of the respondent union's counsel that 'information which has to be created by the application of computer expertise, possibly at considerable expense from outside consultants' is not 'a document' (as relevantly defined). As a result, a subpoena recipient cannot be obliged to create a new document containing that information. Justice Heerey drew the distinction between having to create a new document in this way, and simply printing out in hardcopy form information that is stored on a computer in electronic form.

So what does this mean for subpoena recipients? Justice Heerey's judgment will certainly be a useful tool to be deployed when resisting subpoenas. If a subpoena recipient can show that the subpoena requires the production of a document that does not exist, or put another way, if it requires the recipient to process or calculate new information (or a new arrangement of existing information), especially where this takes time and effort, then this might mean that the recipient can have the subpoena set aside.

But subpoena recipients should not get carried away with the decision in Jacomb. It is not a comprehensive statement of how subpoenas may be used to collect evidence from third party-held computers. It really only deals with two extremes: one, the subpoena that seeks computer-stored information that can simply be printed off (the recipient must comply with such a subpoena); and two, the subpoena that seeks a document containing information that has to be created using external computer expertise and at considerable expense (the recipient need not comply with such a subpoena).[11]

Subpoenas that fall somewhere between the two extremes are not dealt with. It remains unclear whether a recipient must comply with a subpoena that seeks a document containing information that does not exist but that could be created without substantive expertise or expense (eg if it were straightforward to calculate averages or aggregates of figures that are held on the recipient's computer).[12] Or a subpoena that seeks a document containing information that is stored across a number of computers. Or one that seeks information that does exist but the retrieval of which would require the computer to be reprogrammed.

The remaining uncertainty would be alleviated by a practice direction or equivalent. Something that sets out, to the extent it is possible, how the courts will deal with subpoenas that require the recipients to extract data from one or more computers, particularly where that data does not currently exist in the form in which it is sought.

Finally, subpoena recipients should also be aware that a successful challenge to a subpoena might not prove to be the end of the matter for them. There is more than one way to skin a cat. If a subpoena fails, the determined litigant might be able to find other procedures for collecting documentary evidence from third parties. For example, by way of a third party discovery order,[13] a subpoena ordering production of a document containing all underlying data (from which the subpoena issuer could create the document it ultimately desires), a subpoena ordering the recipient to attend and give oral evidence (which might cover some of the information not covered in the subpoena to produce), or an order under the courts' wide general powers.[14]

---

1 Jacomb v Australian Municipal Administrative Clerical & Services Union BC200306083; [2003] FCA 1143.

2 The focus of this article is on subpoenas for production (traditionally 'subpoena duces tecum'), rather than subpoenas to give oral evidence.

3 See the comments of Justice Cantor in R v Barton [1981] 2 NSWLR 414 at 419.

4 A subpoena recipient will also be excused from complying with the subpoena if he was not given sufficient conduct money (to cover the expenses of attending at court with the documents) or if the service of the subpoena was defective in certain ways (eg under the amendments to the Federal Court Rules introduced on 1 March 2004, if the subpoena was served after the last date for service specified on the subpoena).

5 This is shorthand. Technically, it is the court that issues or seals a subpoena at the request of one of the litigants.

6 See, for example, the comments of Chief Justice Jordan in Commissioner for Railways v Small (1938) 38 SR (NSW) 564 at 573, and those of Justice Moffitt in Waind v Hill and National Employers' Mutual General Association Ltd [1978] 1 NSWLR 372 at 382.

7 See, for example, the definitions of 'document' in: the interpretation section of the Federal Court Rules (Order 1, rule 4) the Dictionary section of the Evidence Act 1995 (Cth) (which is incorporated by reference into the Federal Court Rules) section 38 of the Interpretation of Legislation Act 1984 (Vic) (which is incorporated by reference into the Victorian Supreme Court Rules) section 25 of the Acts Interpretation Act 1901 (Cth) (to which Justice Heerey refers in Jacomb).

8 In such circumstances, as a practical matter, the recipient might negotiate with the party issuing the subpoena as to how the information ought to be produced (for example, by copying the information from the server to a CD-ROM, rather than delivering the entire server to the court).

9 See The Australian Gas Light Company v Australian Competition and Consumer Commission and Others, No V880 of 2003, transcript of hearing dated 8 October 2003. The author acted for one of the subpoena recipients in this matter.

10 More specifically, the Human Rights and Equal Opportunity Commission Act 1986 (Cth).

11 In addition, Justice Heerey's judgment is not drafted (one assumes deliberately so) as an unequivocal statement of the law in this evolving area. Rather than stating the position firmly, Justice Heerey merely tells us that he thinks the submissions of the respondent union's counsel are correct. He later states that he does not think the creation of a document falls 'within the terms of the rules... [or is] in accordance with the principles underlying the regime of subpoenas' and that he thinks the legal obligations on the subpoena recipient are such as he states. This might be no more than His Honour's self-effacing style, but it might also indicate an underlying reluctance to be overly prescriptive in this developing area of procedural law.

12 Rather than setting apart the rather fundamental question of whether a subpoena recipient can be required to create a document, the judgment blends this with the issue of oppression.

13 For example, under Order 15A, rule 8 of the Federal Court Rules or Order 32, rule 7 of the Victorian Supreme Court Rules. See also Derby & Co Ltd and Others v Weldon and Others (No 9) [1991] 2 All ER 901 and Sony Music Entertainment (Australia) Limited v University of Tasmania (2003) 198 ALR 367, which deal with, among other things, the procedures the court may order the parties to follow when electronically stored documents are produced on discovery.

14 For example, under section 23 of the Federal Court of Australia Act 1976 (Cth).