SUBPOENA STAMINA

4 things you need to know.

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WHAT TO DO IF YOU GET A SUBPOENA

Received a subpoena and not sure what you have to do next? Can you ignore it? Can you claim the cost of answering it?

In this e-book we provide a four part series on responding to subpoenas, including:

- Producing documents in answer to a subpoena
- Protecting sensitive information
  - Making a claim for legal privilege.
  - Protecting commercially sensitive information through confidentiality regimes.
  - Protection of information under standard court practice.
- What your rights are after you've produced documents

What is a subpoena?

A subpoena is an order made by a court at the request of a party to a court case that requires the recipient to either produce documents, attend court to give evidence, or both.

The most common subpoena is for the production of documents.

A subpoena for the production of documents will specify:

- The categories of documents sought.
- The date by which the subpoena had to be served on you.
- The date by which the documents have to be produced.
- The date on which the proceedings are listed in the court so that the court can check whether documents have been produced and make orders for access to the documents by the parties.

As a subpoena is a court order, failing to respond to a subpoena without lawful excuse is a contempt of court. There may be civil or criminal penalties.

> If a subpoena is served after the date for service specified in the subpoena, you are not obliged to comply with it.

Formalities

A subpoena must be served by giving it to an individual, or delivering it to the registered office of a company (including by post).

If a subpoena is served after the date for service specified in the subpoena, you are not obliged to comply with it.

You are also not obliged to comply with a subpoena unless conduct money (usually about $30) is paid or offered. Conduct money is to cover the cost of getting the documents to the court by post. It is not intended to reimburse the cost of finding and collating the documents or getting legal advice. The right to those expenses is discussed in Part 4 of this series.

What you have to do

On receipt of a subpoena you should identify and collate any documents you have that fall within the listed categories.

Tip - separate the documents into bundles that correspond with the categories.

Complete the declaration on the back of the subpoena to confirm that you require the return of the documents, or that the documents can be destroyed.

Tip - unless specifically requested, copies of documents will be sufficient.

There are two ways to get the documents to the court:

- Attend court on the date specified on the subpoena with the documents (along with a copy of the subpoena) or
- Deliver or send the documents (along with a copy of the subpoena) to the court registry addressed to the registrar, so that the documents are received at least two clear days before the day the subpoena is listed before the court.

Note that:

- If you do not have any documents in the categories described in the subpoena, you can simply write and tell the court.
- You do not need to create documents to answer the subpoena.
- If you hold electronic documents you can either produce copies on a USB device or similar, or print them.

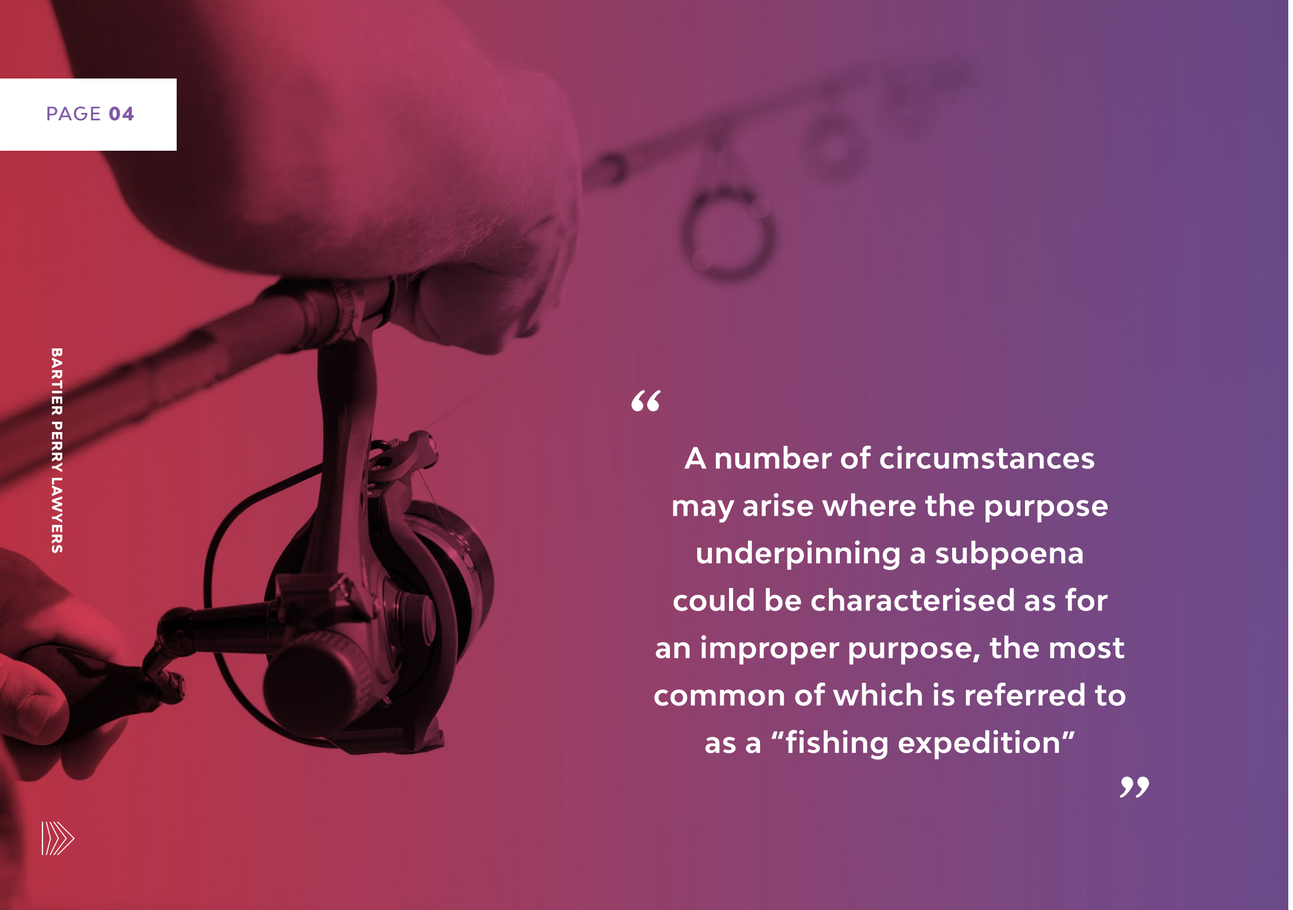
Court attendance

If you have not sent documents to the court registry, you will need to attend court to formally produce them.

Unless there has been a claim of privilege or commercial sensitivity made over the documents (see Part 3 of this series), it is likely that the court will make a "general access order" granting all of the parties to the litigation the right to examine the documents.

Conclusion of proceedings

At the conclusion of the litigation the court will either return the documents to you or destroy them.



> “A number of circumstances may arise where the purpose underpinning a subpoena could be characterised as for an improper purpose, the most common of which is referred to as a “fishing expedition”

SETTING ASIDE A SUBPOENA: OPPRESSION AND FISHING EXPEDITIONS

In our first instalment of how to deal with a subpoena, we looked at the simple machinery behind subpoenas, and how you should respond to one should you have the joy of “being served”.

You will recall that a subpoena is a court order compelling production of documents, attendance at court to give evidence, or both. As such, strict compliance with the terms of the subpoena is necessary.

However, the court rules at both state and federal levels provide that a party with a “sufficient interest” may make an application to fully or partly set aside a subpoena.

The case law relating to subpoenas has lead to an emergence of two bases upon which you can apply to set aside or vary a subpoena:

- Where the subpoena has been issued for an improper purpose; or
- Where compliance with the subpoena would be oppressive to the receiving party.

Improper purpose

A number of circumstances may arise where the purpose underpinning a subpoena could be characterised as for an improper purpose, the most common of which is referred to as a “fishing expedition”.

For example, a subpoena might seek production of documents that go beyond the scope of the issues raised in the proceedings, and so it may be argued that those documents should not be produced because they are not relevant.

Similarly, a subpoena will also be characterized as a “fishing expedition” if there is no apparent basis for supposing that any documents caught by the subpoena could assist or weaken the case of any of the parties.

Courts have regularly stated that parties to litigation should not use a subpoena as a substitute for discovery from a non-party. Discovery is the general process by which parties to litigation obtain documents from each other party. A subpoena that is not precise about the documents to be produced, or which requires the recipient to make a judgment as to which documents relate to the issues between the parties, is liable to be set aside.

Oppression

The other ground to set aside or vary a subpoena is where compliance with the subpoena would be so burdensome on its recipient as to be oppressive.

Assessing the question of oppressiveness is one that involves balancing the burden placed on the recipient and the public interest that documents relevant to the issues in dispute should be freely available to the parties.

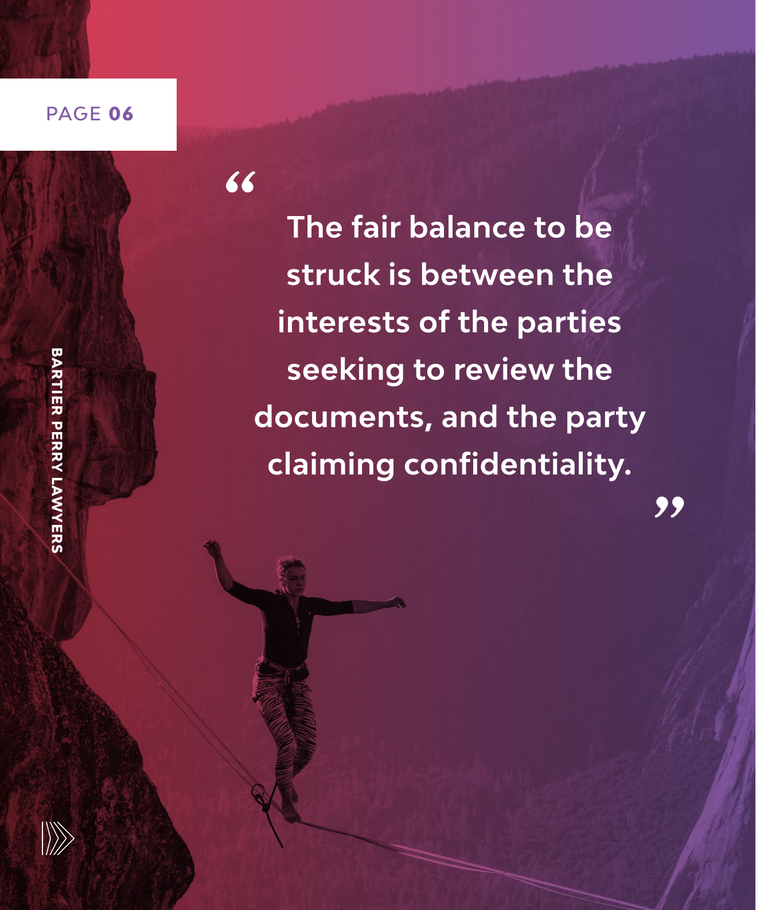
The types of factors relevant to these considerations include the volume and breadth of material that is required to be produced, the relevance they have to the proceedings, and the costs and time that would be expended in complying with the subpoena.

For example, in the digital age it is not uncommon for an enormous amount of electronic material to fall within the scope of a subpoena. At times, it can be a long and costly exercise to identify and retrieve this data. As such, if compliance with a subpoena will be unduly onerous and expensive, there may be grounds to set aside the subpoena, or at least to limit the scope of the subpoena.

What if my information is private?

If an application to set aside a subpoena is unsuccessful, then you will need to produce the documents sought.

If you have concerns as to disclosing privileged or commercially sensitive information contained within the documents, read on for options available to a subpoena recipient to protect that information.



> “The fair balance to be struck is between the interests of the parties seeking to review the documents, and the party claiming confidentiality.”

PRIVILEGE AND CONFIDENTIALITY
SUBPOENAS AND SENSITIVE INFORMATION

Do you know what options you have available to you in preparing documents to be produced in court? Especially if these documents are of a sensitive nature or record communications between you and your lawyers?

So far, we have examined the effect of subpoenas, and the grounds upon which you might ask the court to set one aside.

This instalment deals with the two options available to you if you wish to protect any sensitive information, including documents recording communications between you and your lawyers, and information containing commercially sensitive information.

You should follow a broad process in preparing documents for court as follows:

- Documents answering the categories sought in the subpoena should be collated by you;
- Any documents that contain communications with your lawyers, or recording commercially sensitive information, should be separated out from all the other documents into their respective bundles;
- You should end up with three bundles: (1) for general access following production; (2) marked “Subject to legal professional privilege”; and (3) marked “Subject to confidentiality”; and
- You can then seal each bundle in an envelope or in some other way and produce to the court.

It is safer to separate the documents attracting legal professional privilege from those that are commercially sensitive, as the issues that arise for each claim to protect that information are different.

Legal professional privilege

Once the bundle of documents marked “Subject to legal professional privilege” are lodged with the court, they cannot be inspected by any other party until the court otherwise orders.

You should note however, if the court is pressed by one of the parties to the dispute, the onus is on you, as the party claiming privilege, to satisfy the court that access to the produced documents should be denied.

In essence, there are two types of legal professional privilege, being documents recording confidential information between a lawyer and a client, or the contents of that communication, created for the dominant purpose of providing:

- Legal advice to the client (Advice Privilege); and
- Professional legal services relating to litigation (Litigation Privilege).

If you have documents that fall within either of those categories, you should consult a lawyer for advice on how best to show the court that the documents attract legal professional privilege, and so access to them should be denied.

Commercially sensitive

If you are producing commercially sensitive information, you should be aware that the rules are not as clear, nor as favourable to you. However, courts may be inclined to protect your rights in respect of commercially sensitive information in some circumstances.

The fair balance to be struck is between the interests of the parties seeking to review the documents, and the party claiming confidentiality. Such considerations are especially relevant if you, as the subpoenaed party, are a trade rival to one of the parties to the litigation.

Increasingly, courts have been inclined to limit access to such documents to the legal advisers of the litigants, subject to those individuals providing a confidentiality undertaking not to disclose such information to clients or any other person.

Again, if you are producing information that is commercially sensitive, you should seek legal advice in order to best protect your information.

Summary

That concludes our examination of the issues of privilege and confidentiality in documents subject to subpoena. Remember, you need to separate the documents requested into their respective categories. If in any doubt, contact your legal adviser.

> “In a race to the finish line, in this fourth and final instalment on subpoenas, we look at how documents produced under subpoena can be admitted as evidence, and the rights of persons who produce those documents.”

PART / 04

WHAT HAPPENS AFTER YOU’VE PRODUCED?

IMPLIED UNDERTAKINGS AND SUBPOENAS

Once you have produced documents to a court under a subpoena, you might wonder what happens to those documents and how they might be used against you (especially in circumstances where you’re not a party to the proceedings).

So far, we have looked at what a subpoena is, how to comply with one served on you, and how to protect sensitive and privileged documents.

In this fourth and final instalment of our series on subpoenas, we look at how documents produced under subpoena can be admitted as evidence, and the rights of persons who produce those documents.

Production and Entry into Evidence

When you produce documents to a court under a subpoena, those documents do not automatically become admitted into evidence in the proceedings.

On the return date of a subpoena (which is noted on the subpoena form), there is a hearing at the Court where parties to the proceedings and third parties who are producing documents can ask the Court to make orders as to who can access the documents and at what time.

For example, a party may be given access to the documents prior to another one, so that it can review the documents first and remove any legally privileged documents before the other side reviews them.

It is quite common for parties to a proceeding not to attend the return of subpoena if documents have been produced and the proposed access order (which is noted on the subpoena form) does not prejudice their case. If the parties do not object to the access order, the Court simply makes the order in accordance with the terms of the subpoena.

Once access orders have been made, the parties will then have the ability to review the documents produced. If a document produced is relevant to one party’s claim or defence, they will then need to put that document into evidence in the proceedings.

This can be done by:

- attaching the documents which they wish to rely on to witness statements or affidavits; or
- tendering a copy of the documents to the Judge during the final hearing generally on the basis that they are a business record.

The “Implied Undertaking”

When you produce documents to a court, as a general rule, a party who has sought production of those documents can only make use of them for the purpose of the legal proceedings already on foot (and not for any other reason).

This is sometimes referred to as an “implied undertaking” – that is, the person who receives the documents is said to have impliedly provided an undertaking that they will not use documents which the Court has compelled production of, in other proceedings or for any other purpose.

In effect this means that the produced documents:
- cannot be used in other proceedings (even if the substance of the proceedings are similar);
- cannot be “leaked” to the media; and
- cannot be accessed by the general public so that new proceedings can be brought against the producing party.

When the rule doesn't apply

However, in some circumstances, a court may grant a party leave to use the documents produced for another purpose. To obtain leave of the court, a party will need to ask the Court to relieve them of their undertaking or obtain the consent of the producing party to use the documents in the way they propose.

The main reason parties generally seek the court's indulgence is so that they can add new causes of action against an existing party or alternatively add a new party to the proceedings. When determining such an application, the Court is mindful of avoiding duplication of proceedings and costs incurred by the parties. The court is also mindful of not causing injustice to the producing party or other parties to the proceedings.

In summary

Even after production of documents to court under subpoena, there remains good reasons to be vigilant in respect of the use to which those documents are put by parties who may seek access to them.

If you have been served with a subpoena, contact our team of experienced lawyers who can help you comply with it and protect any confidential or legally privileged information.

GET IN TOUCH

Contact our smart and friendly team today who will take the time to understand your needs.

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