

# SUBPOENAS IN VICTORIAN COURTS

## A FIRST POINT OF REFERENCE

Robert Heath KC, Matthew Peckham and Alyse Mobrıcı

A subpoena allows a party to secure the attendance of a person to give evidence or produce a document or thing or both. For this reason, it is recognised as one of the most important processes of the court: it is essential to the conduct of litigation that persons who know something of the matters in dispute be called to assist the court (see, for example, *Re Barnes* [1968] 1 NSWLR 697, 700-701).

### What is the applicable legal framework?

The process for issuing and responding to subpoenas is contained in *Supreme Court (General Civil Procedure) Rules 2015*, Orders 42 and 42A.

### What is a subpoena?

A subpoena is an order in writing issued by the court, at the request of a party (the **issuing party**, r 42.01), which compels a person (the **addressee**, r 42.01) in any proceeding to: (1) attend to give evidence at a hearing (Form 42A); (2) produce a document or thing (at or before a hearing) (Form 42B); or (3) both (Form 42C) (rr 42.02(1), 42.03).

Where a party who has a solicitor in the proceeding seeks to require a person not a party to produce any document to the Prothonotary before the hearing of any application or the trial, the form of subpoena is Form 42AA. The process is set out in Order 42A, with Order 42 applying so far as is practicable (r 42A.01(2)).

### What are the requirements of a subpoena?

A subpoena must state the last day on which it can be served, being five days before the earliest date on which an addressee is required to comply (unless otherwise fixed by the court) (r 42.03(8)). It must be served personally on the addressee (r 42.05(1)).

A person who has been served with a subpoena after the last date for service is not required to comply (r 42.06(2)). However, an addressee who has not been served personally but who has, by the last day for service of the subpoena, actual knowledge of the subpoena and its requirements must comply with the subpoena (r 42.06(3)).

A subpoena to a corporation should be addressed to the corporation, not to any officer. However, the corporation must comply with the subpoena by its appropriate or proper officer (r 42.03(9)).

A subpoena must indicate the time and place at which documents must be produced or sent or the time and place at which a person must appear in court (rr 42.03(4) and 42.03(5)). The issuing party

may give notice to the addressee extending the date or time for compliance (r 42.03.1).

### Setting a subpoena aside

The court may, on its own motion or on the application of a party or any person having a sufficient interest, set aside a subpoena (r 42.04(1)).

A subpoena is commonly set aside because: (1) it does not have a legitimate forensic purpose; or (2) it is oppressive or otherwise an abuse of process (see, for example, *Webb v Wheatley* [2015] VSC 153, [55]).

In considering whether a subpoena ought to be set aside, the court may also have regard to the considerations mandated by the *Civil Procedure Act 2010* (Vic), including the overarching purpose (CPA, Part 2.1) (see, for example, *Suzhou Haishun Investment Management Co Ltd v Yue'e Zhao (Ruling No 2)* [2018] VSC 144, [99]).

**Legitimate forensic purpose** Where a subpoena is sought to be set aside, the issuing party must, in response, identify expressly and precisely the legitimate forensic purpose for which the subpoena has been issued: *Cargill Australia Ltd v Viterro Malt Pty Ltd (No 19)* [2018] VSC 798, [26]-[28].

A legitimate forensic purpose will exist where, based on the circumstances of the case, the documentation sought to be produced is not only relevant to the proceeding, but will materially assist in resolving an issue in dispute: *Cargill* [28].

A “fishing expedition” (that is, a subpoena cast broadly in the hope that some of the documents returned may be relevant) is not a legitimate forensic purpose, and will not be permitted: *Suzhou*, [103].

**Oppressive or abuse of process** A subpoena may also be set aside if it is oppressive or otherwise an abuse of process. For example:

- Where the subpoena does not specify the documents with reasonable particularity such that the subpoena is, in effect, being used for the purpose of obtaining discovery (*McCull v Lehmann* [1987] VR 503, 511–513). However, using broad terms such as “relating to” in setting the scope of documents to be produced does not necessarily lead to the conclusion that the subpoena is oppressive – it will depend on the context (*Oswal v Carson* [2013] VSC 355, [60]).

**Robert Heath KC**  
T: 61 3 9225 6726  
heath@vicbar.com.au

**Matthew Peckham**  
T: (03) 9225 7961  
M: 0425 790 816  
matthew.peckham@vicbar.com.au

**Alyse Mobrıcı**  
T: 03 9225 7777  
M: 0402 078 224  
alyse.mobrıcı@vicbar.com.au

- Where the subpoena is excessively onerous or requires the addressee to undertake a search of an excessively large number of documents ([Commissioner for Railways v Small \(1938\) 38 SR \(NSW\) 564](#) applied in, for example, [Crown Joinery v Lyleho \[2007\] VSC 214, \[34\]](#)).

### Complying with the subpoena

Compliance with a subpoena to attend to give evidence will require the person specified to attend court at the date, time and place specified.

The addressee of a subpoena to produce must produce documents that are in his or her possession, power or control, but is not obliged to take steps to bring documents that do not fall within these concepts into his or her power or control (*Dorojay Pty Ltd v Aristocrat Leisure Ltd* (2006) 230 ALR 549).

There are two ways to comply with a subpoena to produce: (1) by attending at the date, time and place specified for production and producing the subpoena and the document or thing to the Court (r 42.06(4)(a)); or (2) by delivering the subpoena and the document or thing to be produced to the prothonotary at the address specified in the subpoena, so they are received not less than two clear business days before the date that has been specified for production (r 42.06(4)(b)).

If the documents are to be produced in court, the court may give directions about their inspection, copying and disposal (r 42.08). If the documents are to be produced to the prothonotary, the prothonotary may permit the parties to inspect those documents unless the addressee, a party or a person having sufficient interest gives notice of an objection (r 42.09(4)).

A failure to comply with a subpoena without lawful excuse is a contempt of court (r 42.12(1)).

### Objection to inspection or production

Where documents are to be produced in court, objections may be made at the time of production.

Where documents are produced to the registry, objections must be made in writing and must indicate the grounds for the objection (r 42.09(6)). Because the documents have already been produced, the objection will be to allowing any inspection of those documents, rather than objecting to the documents being produced. The registry will then refer the objection to the court for hearing and determination (r 42.09(7)).

Objecting to inspection or production is not the same as applying to strike out the subpoena because it still requires that the subpoena be complied with.

Objections to production or inspection are most commonly made on the basis that certain documents are protected by privilege. Although confidentiality is not typically a basis for objection, a court may also be willing to limit the inspection of certain confidential or sensitive documents.

Any objection should ordinarily be supported by evidence on affidavit and the documents produced under objection should be clearly marked or identified.

Similar to the *Harman* undertaking, an issuing party who inspects documents produced on subpoena is under an obligation not to use the documents for any purpose not connected with the litigation without an order of the court authorising such use ([Campaign Master \(UK\) Ltd v Forty Two International Pty Ltd \(No 4\) \(2010\) 269 ALR 76](#)).

### Conduct money and other compensation

Conduct money is a sum of money or its equivalent (such as pre-paid travel) sufficient to meet the reasonable expenses of the addressee of attending (and returning from) court as required by the subpoena (r 42.01).

A person is not required to comply with a subpoena to attend court to give evidence unless they have been provided with conduct money by a reasonable time before the day on which attendance is required (r 42.06(1)).

The court may order a party who issues a subpoena to pay the amount of any reasonable loss or expense incurred in complying with the subpoena (r 42.11(1)). These costs may be fixed by the court or assessed in accordance with the court's usual procedure (r 42.11(2)).

A person who successfully resists a subpoena, or incurs costs in complying with it, is entitled to have their costs and expenses reimbursed, typically on an indemnity basis ([ASADA & AFL v 34 Players \(No 2\) \[2015\] VSC 14](#)).

Reasonable costs and expenses may include costs associated with: ([Hera Project Pty Ltd v Bisognin \(No 4\) \[2017\] VSC 270](#))

- advice as to whether the subpoena is valid and whether the addressee should comply with it;
- communications with the issuing party with a view to narrowing or clarifying the scope of the documents to be produced;
- advice regarding issues of privilege or confidentiality; and/or
- attendances in court on the return of the subpoena and any hearings to determine objections.

June 2023