SUBPOENA LAW AND PRACTICE IN AUSTRALIA

BY GERARD B CARTER

FOREWORD

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Every Australian lawyer knows how important subpoenas are. It is hard to conceive of the conduct of litigation without benefit of this vital procedural device. It is curious, therefore that, until now, there has not been a general Australian text collecting the law as it has developed in this country, concerning the availability, issue and enforcement of subpoenas. Now, Mr Carter, whose indefatigable energies have produced books, mainly (although not only) in specialised areas of legal practice, has produced a book on a topic of importance to every lawyer who has acquaintance with litigation.

My own first experience with subpoenas began not long before I met Mr Carter whilst we were both University students. The best part of my life as an articled clerk lay in sitting behind the leading barristers of the time as they fought out the dramas of the cases involving my master solicitor's clients. That was the exciting upside of my life. But the downside was preparing subpoenas with those curious Latin tags "*ad testificandum*" and "*duces tecum*". Once prepared, it was my duty, at least in the cases in the Supreme Court to take the subpoenas up to the

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Prothonotary's gloomy office, found at the head of the spiral staircase in the old Court building in Sydney. There I joined a seemingly endless queue waiting for the precious document to receive a great stamp of the Court commanding the intended recipient, in the name of the Sovereign, to attend court for oral examination or to produce specified documents and in default to suffer dire consequences.

Little did I know then of the body of history and law that lay behind my dutiful acts. *Small's case* (see (1938) 38 SR (NSW) 564 (FC), 573)) and its quaint injunction against "fishing" were frequently referred to by my master solicitor: warning me to be very precise in the subpoenas I drew. Only later did some of the legal intricacies mentioned in this book impinge upon my consciousness. In the New South Wales Court of Appeal, I had occasion to search them out in cases, some of which are mentioned by Mr Carter.

Suitably enough, the author begins his text with a reference to *Small*. But it is important to know the history of how the subpoena came about as an adaptation of the Lord Chancellor's jurisdiction in England. It took a few centuries for it to be adopted in the common law courts. Now, there is no doubt about its importance and utility. The legal controversies concern the circumstances in which subpoenas may be issued; the conduct required to effect binding service; the limits on the requirement to attend and produce documents; the procedures for objecting to and setting aside subpoenas; and the enforcement of a subpoena where its requirements are overlooked or defied.

The abiding importance of subpoenas to any legal system was brought home to me in my work for the United Nations in Cambodia. In that country, with its valiant attempts to restore legal institutions after the Khmer Rouge destroyed them following year zero, problems have arisen in the enforcement of court process. Although Cambodia is now, once again, a

unitary Kingdom and not a federal state, a difficulty has arisen in securing the attendance of persons before court outside the province in which the trial court sits. Especially in the case of powerful people, such as a military officer who has fled out of a province to escape redress for alleged acts of oppression, it has often proved impossible to enforce an effective process to command the subject to return to face court proceedings. In part, this is the consequence of the rudimentary stage yet reached in the re-establishment of legal institutions. In part, it is the result of the limitation in the power of officials to operate outside their own province, there to enforce the orders of the court. In part, it is simply the result of inexperience with court process after decades of war, genocide, revolution and invasion. The society of Cambodia today is thus not very dissimilar from England after the War of the Roses. Cambodia has to learn the requirements for the establishment of an effective judicial system. Without the subpoena, the rule of law gives way to the rule of power. The ordinary citizen, and even the courts, cannot command the powerful to submit to curial jurisdiction over disputed matters. In a report to the General Assembly of the United Nations I called specific attention to the need for the writ of subpoena. Its utility, taken for granted by Australian lawyers, is blindingly obvious in a society that does not have the facility available.

This is therefore a useful book which gathers together a mass of information about the Australian law and practice of subpoenas. It will be helpful to have so much relevant material collected in the one text for the very importance of subpoenas to the conduct of litigation gives rise to many urgent disputes over their application. Of course, the first rule governing any practitioner in this area is to study the statute or the rules of the particular court out of which the subpoena is to be issued. But beyond that, there is much law in this country and in other countries of the common law

concerning subpoenas. Mr Carter has done a service by collecting that material. I commend him for doing so.

Michael Kirby

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Canberra
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