

## NOTICE OF FILING

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*Sia Lagos*

Registrar

### Important Information

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**SUBMISSIONS OF MR BARTLETT ON HIS APPLICATION TO SET ASIDE  
SUBPOENA – APPLICATION FILED ON 23 APRIL 2025**

**INTRODUCTION**

1. On 17 April 2025, the Appellant filed a request for leave to issue a subpoena to produce directed to Mr Bartlett, a partner of Minter Ellison. The subpoena to produce required production of what were likely to be a large number of documents in eight categories. In consequence of the orders of the Court on 24 April 2025, all of those categories have been set aside except for category 4, and the documents ordered to be produced in that category have been time-limited to the date range of 1 August 2020 to 31 May 2021.
2. On the same day, the Appellant filed a request for leave to issue a subpoena to testify. The subpoena required Mr Bartlett to attend Court on 1 May 2025 to give evidence for the Appellant in the Appellant's interlocutory application to amend his Notice of Appeal and adduce fresh evidence in the appeal.
3. The statements accompanying the two requests explain the necessity for the subpoena in identical terms. Each statement says that the request is made, respectively to produce documents or to give evidence, only to obtain:
  - a) oral evidence to determine what occurred at a meeting on 14 March 2021; and
  - b) "The importance of testing Mr McKenzie's evidence under cross examination."
4. Mr Bartlett now moves to have the subpoena set aside.

**LEGAL PRINCIPLES**

5. The recipient of a subpoena may move to have it set aside, whether it is a subpoena to produce or a subpoena to testify, where it lacks a legitimate forensic purpose, where it is an abuse of process, or where it is oppressive.
6. Additional considerations apply to a subpoena give evidence, which involves the adducing of oral evidence rather than simply the production of documents to the court. In those circumstances, the giving of evidence by the witness may be regulated

by the Court's power to control and supervise the proceedings, case management considerations, and the requirements of section 37M of the *Federal Court Act: Comcare v John Holland Rail Pty Ltd* (No. 5) (2011) 195 FCR 43 at [18]-[20]. The court is entitled to weigh the likely importance of the forensic purpose against prejudice and case management principles (at [27]).

7. It has been said that the circumstances where an appellate court will issue a subpoena to a witness to give fresh oral evidence in the appeal will be "exceptional indeed": *Fard v Secretary, Department of Immigration and Border Protection* [2016] FCA 1224 at [6].
8. In order for the subpoena to have a legitimate forensic purpose, the documents it seeks, or the oral evidence sought to be adduced<sup>1</sup>, must have apparent relevance to the issues. The document or evidence will have apparent relevance if it "could reasonably be expected to throw light on the issues in the proceedings": *Seven Network (Operations) Ltd v Fairfax Media Publications Pty Ltd* [2023] FCAFC 185 at [39].
9. The onus of demonstrating a legitimate forensic purpose is on the Appellant: *Wong v Sklavos* [2014] FCAFC 120; (2014) 319 ALR 378 at [12].

**The subpoena lacks a legitimate forensic purpose**

10. The Appellant has not demonstrated a legitimate forensic purpose for the issue of the subpoena.
11. First, the subpoena is being used to gather evidence to mount an attack on Mr Bartlett and Mr Levitan for an alleged (and in fact baseless) breach of their professional obligations.
12. The intention to mount an attack on Mr Bartlett and Mr Levitan appears from the submissions made for the Appellant on 23 April at T41/21-45; T46/26-30; T46/38-39; T46/43-44; T47/21-34; and T47/46-T48/1-5. Those submissions indicate that the Appellant intends to use this subpoena to obtain evidence of professional impropriety by the two solicitors. That is emphatically not part of the case the Appellant sets out to make by the amended Notice of Appeal; it is wholly irrelevant.
13. Most tellingly, however, the intention is evident in the Appellant's submissions at T54/11-41. Making use of privilege, counsel for the Appellant (T54/11-41) made extravagant submissions that accused the Respondents' legal advisers of misconduct. Later, at the very end of his submissions, counsel returned to the issue at T64/38-45. He said that "as a matter of fairness" he wanted to point out that "we don't know" the position of the legal advisers. That attempt at an emollient serves only to demonstrate that those submissions should not have been made; the more so in view of the fact that the Appellant has offered no further evidence on this application in support of the proposition that any of this information was the subject of client legal privilege.

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<sup>1</sup> *Garvey v Australian National University* [2024] FCA 140 at [15].

14. Secondly, there is ample evidence that indicates that the purpose of this subpoena, or at least its predominant purpose, is not to obtain material for use in the application to amend and to adduce fresh evidence, but to found what are in effect additional grounds to be relied on if the application is granted, namely proof of actual deployment of privileged material to the detriment of the Appellant.
15. This is apparent from Counsel's submissions to the Court on 23 April that the Appellant intends to use the occasion of calling Mr Bartlett, if permitted, to obtain evidence going beyond establishing a "real possibility", in terms of paragraph 37(b), that the Respondents made forensic decisions on the basis of the allegedly privileged information to the disadvantage of the Appellant. The transcript references are T40/16-21; T42/22-28; T47/20-34. The Appellant wishes to prove that this in fact occurred. The obvious inference is that the Appellant is seeking to obtain evidence to further amend the Notice of Appeal to make such an allegation.
16. The Appellant is not entitled to use a subpoena issued on this application as an evidence-gathering mechanism for his appeal.
17. Thirdly, the Appellant is required to identify the basis for his legitimate forensic purpose in a manner that is "reasonably precise and tolerably clear": *Thomas v SMP (international) Pty Ltd (No 2)* [2010] NSWSC 870 at [19].<sup>2</sup> For the reasons referred to at paragraphs 11 and 14 above, he has not done so.
18. The lack of clarity in the identification of the legitimate forensic purpose is compounded by the statement in support of the Appellant's request for the subpoena to issue. As noted in paragraph 3 above, the request referred to two matters:
  - a) The supposed necessity for oral evidence to determine what occurred at a meeting on 14 March 2021; and
  - b) "The importance of testing Mr McKenzie's evidence under cross examination".
19. The purposes for which the Appellant seeks to call Mr Bartlett go well beyond the reasons provided for the request. Some of those purposes – which are in any event illegitimate -- may be identified, but they are not for Mr Bartlett to guess at; the onus is on the Appellant to demonstrate them clearly, and to demonstrate that they are legitimate purposes.
20. Fourthly, the proposition, set out in paragraph 35 of the proposed amended Notice of Appeal, that the Second Respondent engaged in what is said to be "wilful misconduct" by "improperly and unlawfully obtaining and retaining information concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant" finds no basis in the evidence on the application.
21. The information and documents relied on as being privileged are as follows:

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<sup>2</sup> Referred to with approval in *Roberts-Smith v Fairfax Media Publications Pty Ltd (No. 16)* [2021] FCA 584 [31]

- a) The statement at page 209 of NM-1 that Ms Roberts had knowledge that the Appellant met with Person 29 and Monica Allen in December 2019 to pass to that person documents to help him prepare for his IGADF interview.
  - b) The references at page 211 of NM-1 to Monica Allen;
  - c) The references to the burying of USB sticks in the garden;
  - d) The reference at page 215 of NM-1 indicating that the Second Respondent had knowledge of an email sent by Mark O'Brien to the Appellant concerning Mick Keely. The evidence is clear from NM-1 page 200 that Mr McKenzie did not have the email or access to it at all.
  - e) The audio recording, which refers not to the Appellant's "strategy" generally, but to Person 17.
22. In his submissions on the application, the Appellant refers only to the Mark O'Brien email as demonstrating that the Second Respondent had access to his privileged information.
23. The proposition that any of this information was the subject of privilege at the time it was acquired by the Second Respondent is not established. There is no basis in the evidence to think that, even if the information in (d) above was protected by client legal privilege at some time, the privilege subsisted in the information at the time that information was acquired by the Second Respondent.
24. The Appellant attempts, unsuccessfully, to make up for the weakness of his case in this regard by asserting, in effect, that this material was self-evidently privileged. This appears from the Appellant's submissions on the Application, paragraph 3.19 ("it was inescapably a privileged communication"); the submissions at the hearing on 23 April 2025 at T42/22-28; and the submission referred to above at paragraph 13. These assertions are unsupported by the evidence. As already noted, the Appellant has offered no further evidence on this application in support of the proposition that any of this information was the subject of client legal privilege.
25. There is no evidence that the Second Respondent engaged in wilful misconduct by using any of the allegedly privileged information.
26. Further, none of the evidence pointed to by the Appellant comes close to establishing the proposition that there was a "real possibility" that the Respondents made forensic decisions based on this material, which advantaged them and disadvantaged the Appellant. There is no evidence of deployment of any of this material by the Respondents.
27. The absence of evidence on these issues reinforces the inference that one of the purposes for which the subpoena was procured was to attempt, by calling Mr Bartlett to give evidence, to establish a case of actual use of privileged material. That is not part of the case pleaded in the proposed amended Notice of Appeal, and it is not a legitimate purpose for the issue of the subpoena.

28. In those circumstances, the issue of the subpoena to Mr Bartlett is “essentially speculative in nature”: *Cosco Holdings Pty Ltd v Commissioner for Taxation* (1997) 37 ATR 432; [1997] FCA 1504 at 13; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 588 at [17]; *Comcare v John Holland Rail (Pty) Ltd (No 5)* (2011) 195 FCR 43 at [32]-[35].
29. Lastly, the Appellant may advance the proposition that the subpoena has a legitimate forensic purpose, in that calling Mr Bartlett may elicit evidence that he somehow told the Second Respondent that the material, or some of it, was privileged and should not be used. That is purely speculative. There are no reasonable grounds in the evidence relied on by the Appellant to think that such evidence is available: *Comcare* at [50], [51] and [57].
30. In any event, even if such evidence existed, it is frankly fanciful to think that that evidence would support the proposition that the privileged material was deployed, to the disadvantage of the Appellant or otherwise.

#### **Abuse of process**

31. The attempt by the Appellant to use this subpoena for the purposes set out above at paragraphs 11, 14, 17 and 20 constitutes an abuse of process. The subpoena should be set aside on that basis.
32. Even if the court were to discern a legitimate forensic purpose for the issue of this subpoena, an abuse can be constituted by a predominant purpose, and the sole purpose test does not apply: *Campaign Master (UK) Ltd v 42 International Pty Ltd (No 4)* [2010] FCA 398 at [44].

#### **Additional matters**

33. As noted above, the Appellant requested the issue of two subpoenas on 17 April: a subpoena to produce documents, and a subpoena to give evidence. In the seventh paragraph of the request for the subpoena to give evidence, the Appellant said that “it is not practicable to obtain the relevant information by other means (e.g. document production or interrogatories), given the importance of testing Mr McKenzie’s evidence under cross examination.” This is in circumstances where a subpoena to Mr Bartlett to produce documents had already been applied for by the Appellant. It was potentially misleading to say that it was “not practicable to obtain the relevant information by other means (e.g. document production)”. The reverse was obviously true. The fact that a request was made for a subpoena to produce documents casts doubt on any suggestion that there is a necessity for Mr Bartlett to give oral evidence, because there was no other practical means of requiring production of the requested information.

34. Further, the suggestion that it is “not practicable” to obtain the information by other means – at the same time as requesting the court to deploy those other means to obtain the information – suggest that the purpose for the issue of this subpoena was to embark on an enquiry to obtain evidence for use in the appeal rather than evidence for use in this application.
35. As Bromberg J said in *Comcare* at [27], the Court is entitled to put in the balance the likely importance of the forensic purpose against issues of prejudice and case management principles. The Court would also have regard to s. 37M of the *Federal Court Act* in these circumstances.
36. This is a subpoena:
- a) For which no proper forensic purpose has been demonstrated;
  - b) Which constitutes an abuse of process;
  - c) The stated purposes for which could in any event have been achieved by a properly drafted subpoena to produce documents; and
  - d) The necessity for which, given the exceptional circumstances, the Appellant has entirely failed to demonstrate.
37. Mr Bartlett invites the Court to set the subpoena aside.

Chambers, 25 April 2025

A handwritten signature in black ink, appearing to read 'Blackburn', with a stylized flourish at the end.

TOM BLACKBURN