



Précis Paper

Challenge to a Subpoena

Abstract – Barristers Andrew Fernon SC and Clifford Ireland examine the challenge to a subpoena in *Tropic Asphalts Pty Ltd v Snowy Monaro Regional Council* [2021] NSWCCA 24 (3 March 2021), where Clifford Ireland represented Snowy Monaro Council.

Discussion Includes

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Précis Paper

Challenge to a Subpoena

1. In this edition of BenchTV, Andrew Fernon SC (Barrister) and Clifford Ireland (Barrister) examine the challenge to a subpoena in *Tropic Asphalts Pty Ltd v Snowy Monaro Regional Council* [2021] NSWCCA 24 (3 March 2021).

Facts of the case

2. *Tropic Asphalts Pty Ltd v Snowy Monaro Regional Council* [2021] NSWCCA 24 (3 March 2021) was a leave to appeal application brought by the defendant in environmental criminal proceedings in the Land and Environment Court concerning the validity or otherwise of a subpoena the prosecutor had issued to a third party, Roads and Maritime Services.

The case in the Land and Environment Court

3. The case below in the Land and Environment Court was a criminal law case. It involved a prosecution for an environmental crime, being an alleged breach of a development consent. The development consent related to a mobile asphalt batching plant. One condition which was alleged to be breached was a maximum level of tonnage. Another was that there was a breach of a maximum number of truck trips per day (set at 12).
4. Prosecution proceedings commenced some years ago.
5. Snowy Monaro had issued a subpoena to Roads and Maritime Services. This came to a head in the Land and Environment Court last year in *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWLEC 136.
6. One of the key issues in dispute in the Land and Environment Court and in the Court of Criminal Appeal (CCA) was the source of the prosecutor's knowledge in relation to the existence and general content of the delivery docket type material that was sought in the subpoena.

Abuse of process

7. One of the main arguments put to challenge the subpoena was that it was an abuse of process, in two ways: one, it was not a legitimate forensic purpose to seek those documents again because the documents under the subpoena had already been sought and to a certain degree produced; and two, the fall back argument – it was alleged that because the 119J Notice was illegal then the documents obtained pursuant to it were inadmissible under the *Evidence Act 1995* (NSW) s 138.
8. Both of these arguments were rejected by Justice Moore of the Land and Environment Court. His Honour referred to *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178

CLR 477; [1993] HCA 74 where the High Court found issuing two notices in the facts of that case did not amount to an abuse of process. That view was slightly refined when it got to the Court of Appeal.

9. Justice Moore also found the 119J Notice was valid. He rejected the invalidity argument. But he also found that the Council had obtained information other than through the 119J Notice. It had obtained information from three different sources. The first was the Council itself, one of its officers had obtained information through other inquiries. Secondly, RMS had produced documents by way of an email providing information about how the alleged illegal work had been conducted. Thirdly, the Council had issued a freedom of information (GIPA) notice in which some limited form of documents had been produced.
10. His Honour found that as far as the abuse of process was concerned, it did not arise.

Scope of the subpoena

11. The main subject matter of argument in the Land and Environment Court and the Court of Appeal was whether the subpoena as a whole was recognised by an underlying legitimate forensic purpose.
12. The secondary aspect of the case involved the scope of the subpoena. The subpoena sought documents over the whole of the development period.
13. The argument for the broader scope of the subpoena was upheld by the CCA. If there were breaches shown over the whole period it would indicate that was not flash in the pan behaviour and was relevant to sentencing and state of mind. Both Justice Moore and the CCA did not find it necessary to confine the scope of the subpoena to the two particular charge dates.

On broader dispute

14. *EPA v Caltex* – familiar as the case deciding the privilege against self-incrimination does not apply to corporate entities in Australian law. One of the other questions the High Court dealt with in that case was whether documents having been obtained pursuant to a statutory notice could then be properly the subject of a notice to produce, the equivalent of a subpoena.

Key elements in CCA reasoning

15. The key element in the Court of Criminal Appeal reasoning is twofold. Firstly, in this particular case it was found that the prosecutor had knowledge of the delivery dockets and what they were likely to show prior to issuing the subpoena. The CCA was able to park the issue of the invalidity of the 119J Notice.

16. Issuance of a subpoena was not a fishing expedition. It was a legitimate forensic purpose, facilitating a request for information that it was on the cards would assist the prosecutor in a material issue in the proceedings, namely whether there was breach of these tonnage per day limits.
17. The other important aspect of the CCA's reasoning is the rejection of the proposition that to seek the same documents on a subpoena that was sought previously by some other means, or was already in the possession of the party issuing the subpoena, was for that reason alone improper or an abuse of process.
18. There may be a number of forensic reasons for a party to seek the same documents. For example, there may be an anticipated hearsay objection to some documents that were in the possession of the party issuing the subpoena so an effort may be made to seek the documents from another source. Or copies of documents may be in the possession of the party issuing the subpoena of potentially questionable provenance so seeking the original documents from another source was legitimate forensic purpose.
19. The CCA applied the accepted understanding of legitimate forensic purpose by reference to key authorities such as *National Employers' Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372 and *R v Saleam* [1999] NSWCCA 86.

Three stages of subpoenas

20. When there's a challenge to a subpoena, the starting point is the decision of President Moffat in *National Employers' Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372 and what he referred to as the three stages of subpoenas: one, an initial challenge to the subpoena on whether it's an abuse of process; second, whether or not you grant access to a particular party; and third, when documents produced under a subpoena seek to be appended in the case. The third stage is an irrelevancy in this case. This is a challenge made to the subpoena.
21. The ultimate issue in assessing relevance is do the documents add to the evidence relevant to the issues in the case?
22. One issue of concern is whether there are two statutory notices. The High Court decision of *EPA v Caltex* said it was proper but, as Justice Macfarlan said, it provided no reasoning to it, and he therefore referred to the NSWCA decision in the same litigation.
23. The CCA rejected Justice Moore's approach that as a blanket proposition issuing two notices is not a problem, it's a legitimate thing to do.
24. It found there could be an improper purpose for two reasons: one, you are imposing a burden on a third party to produce documents twice, and the processes of the court should not be used to impose unnecessary burdens on third parties; two, there still had to be a legitimate purpose to the second round of documents.
25. One must always find a purpose before one issues a subpoena. In this case, there was a legitimate purpose which underscored the subpoena.

More likely than not concept

26. In assessing whether it's on the cards that what is being sought would add or potentially add to the relevant evidence that is before the court, the concept is not to be assessed by the test of more likely than not. The CCA said that something less than 50 per cent would be sufficient for satisfying the legitimate forensic purpose in relation to those matters.
27. The challenge to the subpoena at the end of the day was completely unsatisfactory.

Practice and procedure

28. The key argument put by the defendant in challenging the subpoena was squarely rejected. Equally, the other extreme of the proposition that it could never be inappropriate to seek other documents was also rejected. Each case is a matter of fact and degree. What was required in every case was a bona fide reason for doing so. Apparent relevance, and was it on the cards that they would help on an identified issue, had to be established on the evidence.
29. There are cautionary words from the CCA that there needed to be a high degree of caution in parties exercising their right to seek leave to appeal in relation to interlocutory matters such as the validity of subpoenas under s 5F of the *Criminal Appeal Act 1912* (NSW).
30. The process of the law requires us to follow the due process or the consequences may be inadmissibility.

BIOGRAPHY

Andrew Fernon SC

Barrister, University Chambers, Sydney

Andrew Fernon practises in the following areas of law – alternative dispute resolution, appellate, building/construction, commercial, corporations, equity, estates/probates/wills, family, insolvency, leasing, real property and trusts.

Clifford Ireland

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With over 11 years of experience at the Bar, and a total of 23 years in environmental, planning, mining and associated areas of property law, and also more generally in related areas of commercial law. Clifford Ireland has been listed as either a leading or recommended barrister in the environmental and planning area in *Doyles Guide* for the past six years. He appears regularly in the real property list and Equity Division in the Supreme Court in relation to easement and other property law disputes.

BIBLIOGRAPHY

Focus Case

Tropic Asphalts Pty Ltd v Snowy Monaro Regional Council [2021] NSWCCA 24

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_05-03-2021_insurance_banking_construction_government.pdf

Judgment Link

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCCA/2021/24.html>

Cases

Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477; [1993] HCA 74
In re the Will of Gilbert [1946] NSWStRp 24; (1946) 46 SR (NSW) 318
National Employers' Mutual General Association Ltd v Waind and Hill [1978] 1 NSWLR 372
Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd [2020] NSWLEC 136
Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd [2020] NSWCCA 74
R v Saleam [1999] NSWCCA 86

Legislation

Clean Waters Act 1970 (NSW)
Criminal Appeal Act 1912 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Evidence Act 1995 (NSW)
Government Information (Public Access) Act 2009 (Cth) (GIPA Act)